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**STATUTES OF A GENERAL NATURE PASSED AT THE SESSIONS OF 1911 AND
1913, WITH ANNOTATIONS COVERING THE DECISIONS REPORTED IN
WASHINGTON REPORTS, VOLUMES 53 TO 72, INCLUSIVE**

BY

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**VOLUME III
SUPPLEMENT**

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CONSTITUTION OF THE STATE OF WASHINGTON.

ARTICLE I.

§ 3.

See notes to Const., art. 1, § 21. See notes to §§ 2283, 6604-1.

Ordinances conferring the exclusive right to collect garbage and refuse upon a city department are within the police power in that they tend directly to promote the public health: *Smith v. Spokane*, 55 Wash. 219, 19 Ann. Cas. 1220, 104 Pac. 249.

As to power of municipality to confer exclusive right or create a monopoly for the removal of garbage, see notes in 97 Am. St. Rep. 688; 21 L. R. A., N. S., 830.

Ordinances of a city of the first class creating a crematory department for the collection and disposition of refuse and garbage, and making it unlawful for any person other than authorized employees of the department to engage in hauling in the city any such refuse, except manure, are not unconstitutional as preventing one formerly in that business from engaging in a lawful occupation: *Smith v. Spokane*, 55 Wash. 219, 19 Ann. Cas. 1220, 104 Pac. 249.

As to the constitutionality of ordinances providing for the removal of garbage, see notes in 2 Ann. Cas. 496; 4 Ann. Cas. 281; 19 Ann. Cas. 1221.

An ordinance prohibiting solicitation by hack-drivers in railroad stations when used by passengers entering or leaving the same is not an unreasonable restriction upon the right of private contract, especially where the passengers have opportunity on the trains and at an office in the building to fulfill their wants without solicitation: *Seattle v. Hurst*, 50 Wash. 424, 18 L. R. A., N. S., 169, 97 Pac. 454.

As to the exclusion of hackmen from railroad depots, see note in 39 L. R. A., N. S., 126.

By "due process" and "the law of the land" is meant that life, liberty and property are to be held under the protection of the general rules that govern society: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

As to what is "due process," see notes in 24 Am. Dec. 538; 20 Am. St. Rep. 554.

Property is not taken without due process of law by the act of 1907, page 582, which provides for the construction of the Lake Washington canal at the expense of property benefited, after an assessment with a hearing before a board empowered to equalize the assessment and right of

appeal to the courts: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 4.

See notes to § 4826.

§ 8.

See notes to § 6288.

§ 9.

A plea of former jeopardy is properly overruled, where it is based on the fact that at a former trial a jury was discharged on the statement of the foreman that the jurors could not agree upon the question of the sanity of the prisoner at the time of the commission of the offense, unless the court would instruct them as to whether the prisoner would be imprisoned for life or might be subsequently released, since the necessity for such a discharge is a matter within the sound discretion of the trial court, and no abuse of discretion appears where the jury had already deliberated forty-three hours: *State v. Barnes*, 54 Wash. 493, 23 L. R. A., N. S., 932, 103 Pac. 792.

A plea of former jeopardy is properly sustained where the accused had been placed on trial before a court of competent jurisdiction on a sufficient indictment before a jury empaneled and sworn, when the charge was dismissed on motion of the state without his consent or any sufficient reason: *State v. Kinghorn*, 56 Wash. 131, 27 L. R. A., N. S., 136, 105 Pac. 234.

As to when jeopardy attaches, see notes in 1 L. R. A. 451; 4 L. R. A. 543; as to jeopardy in case of dismissal of jury, see notes in 1 L. R. A. 452; 44 L. R. A. 694; 27 L. R. A., N. S., 127.

§ 12.

See notes to §§ 5187, 6604-1, 7065, 7498, 8626.

An act authorizing the sale of certain school lands for cemetery purposes is not unconstitutional as granting special privileges to any citizen or class of citizens, in violation of constitution, article 1, section 12: *Day v. Richardson*, 54 Wash. 288, 103 Pac. 8.

A city ordinance providing a license tax upon the sale of goods of any kind by means of any automatic device violates the constitutional prohibition against granting to any citizens special privileges and immunities which upon the same terms do not equally belong to all citi-

zens, since it discriminates against a simple mode of doing business which is conceded to be lawful and fair, and in no way involves the police power: *Seattle v. Dencker*, 58 Wash. 501, 137 Am. St. Rep. 1076, 28 L. R. A., N. S., 446, 108 Pac. 1086.

As to constitutional limitations on the power to impose license taxes, see note in 129 Am. St. Rep. 249.

An act authorizing a county to levy assessments upon lands benefited by a ship canal does not violate this section, since a county is a municipal corporation: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

An anti-treating ordinance prohibiting the sale of intoxicating liquors in licensed saloons to be drunk on the premises by any other person than the one buying the same does not violate the provisions of the federal and state constitutions securing to the citizen his property and the equal protection of the laws, from the fact that only the act of selling liquor and not the purchase thereof is punishable: *Tacoma v. Keisel*, 68 Wash. 685, 40 L. R. A., N. S., 757, 124 Pac. 137.

An ordinance requiring a city license to issue trading stamps used in selling goods is not unconstitutional as depriving one of property without due process, or impairing the obligation of contracts, or ultra vires, or in restraint of trade, or void as against public policy, or for any other reason: *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, 122 Pac. 1060.

As to constitutionality of statutes regulating or forbidding the use of trading stamps, see notes in 1 Ann. Cas. 48; 12 Ann. Cas. 528; 30 L. R. A., N. S., 957.

As to the right to impose a license tax on the business, see note in 2 L. R. A., N. S., 592.

§ 14.

See notes to § 2287.

§ 16.

See notes to § 7768.

A city may, by virtue of the police power, fill in low lands, that are a menace to health, without rendering compensation for damages claimed to private property filled in; and whether the facts warrant the exercise of the police power is a judicial question to be determined by the courts: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

An order of the railroad commission compelling a railroad company to construct and operate a spur track from its main line to a private sawmill, without compensation, is a taking of private property without due process of law, in contravention of the fourteenth amendment to the federal constitution: *Northern Pac. R. Co. v. Railroad Commission*, 58 Wash. 360, 28 L. R. A., N. S., 1021, 108 Pac. 938.

Where a plat of city tide lands and harbor area showed the dedication of a street as a "city slip," giving the public as much right to use the same as property owners, the construction by the city of a gridiron wharf for public use in that portion of the street extending across the harbor area is not a taking or damaging of private property of abutters who had previously leased from the state the harbor area abutting on such portion of the street, for the purpose of maintaining docks and wharves in aid of commerce and navigation; any inconvenience suffered in the use of improvements thereon being *damnum absque injuria*: *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 117 Pac. 232.

The building and operation of a steam railroad in a street under a city franchise is a damage to abutting property, within constitution, article 1, section 16, providing that no private property shall be taken or damaged for public or private purposes without just compensation: *Keil v. Grays Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113.

As to what are additional servitudes in public streets, see note in 106 Am. St. Rep. 232.

Damages to abutting property by reason of the construction of a steam railroad in a city street must be confined to such physical injury as will depreciate its value at the time of the taking; danger from fire being only an element in so far as it depreciates value: *Keil v. Grays Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113.

As to the meaning of the word "damaged" in the constitutional guaranty that property shall not be damaged for public use without compensation, see note in 109 Am. St. Rep. 904.

Noises, and the jarring of buildings and the casting of smoke and cinders on adjacent property necessarily incident to the operation of a spur track on a railroad company's land, and the alley abutting thereon under license from the city is *damnum absque injuria*, and not a taking or damaging of the adjacent property: *DeKay v. North Yakima & Valley R. Co.*, 71 Wash. 648, 129 Pac. 574.

As to noise and smoke as elements of damages in eminent domain, see notes in 36 L. R. A., N. S., 780; 40 L. R. A., N. S., 48.

§ 17.

See notes to §§ 1053, 2850, 6046.

§ 21.

See notes to §§ 94, 316, 6604-1.

The "due process clause" of the constitution taken in connection with article 1, section 21, providing that the right to

trial by jury shall remain inviolate, means that there can be no due process depriving one of life or liberty upon a criminal charge without a trial by jury as the right existed in the territory at the time of the adoption of the constitution, upon all questions of fact, and this includes the substantive fact of the sanity of the accused at the time of the act charged; hence Rem. & Bal. Code, section 2259, providing that insanity shall be no defense to crime, and that no evidence thereof shall be admitted, is void: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

The plaintiff is not entitled to a jury trial on issues raised by a complaint in an action to recover damages for breach of a contract, where a defendant, admitting the contract, denied the breach and filed a cross-complaint alleging plaintiff's breach and praying the foreclosure of a trust deed given by plaintiff as security for his performance, since the answer and cross-complaint converted the case into an equitable action: *Nolan v. Pacific Warehouse Co.*, 67 Wash. 173, 121 Pac. 451.

As to the conditions and restrictions which the legislature may impose on the right of trial by jury, see note in 98 Am. St. Rep. 538.

§ 22.

See notes to §§ 2215, 2091, 2309.

A venire to summon a jury in a police court "from the body of your city" violates constitution, article 1, section 22, guaranteeing the right of trial by an impartial jury of the county; and since Rem. & Bal. Code, sections 665, 679, and 1762, empowers police officers of a city to serve all processes from the police court in any part of the county, such a venire is not authorized by Id., section 69, conferring on a court all the means necessary to carry into effect jurisdiction conferred

upon it: *State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384.

§ 23.

An ordinance providing a reasonable frequency of street-car service does not impair the obligation of a franchise reserving the right to require the cars to make sufficient trips, or of a franchise prescribing a minimum service of two round trips a day: *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661.

As to the power of municipalities to regulate street-car companies and traffic for the protection of the public, see note in 104 Am. St. Rep. 636.

An act changing the method of selecting jurors in criminal cases is not an ex post facto law, as it affects only the remedy or method of procedure: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

Where municipal indebtedness was incurred at a time when the law required all moneys received from licenses, fines, etc., to be paid into the general fund, and available to meet the indebtedness, it would be an impairment of the obligation of the contract to divert such revenue into a current expense fund, without making any provision for revenue to pay the past indebtedness: *State ex rel. Polson v. Hardcastle*, 68 Wash. 548, 124 Pac. 110.

A city's wrongful diversion to the current expense fund of revenue belonging to the indebtedness fund cannot be justified on the ground of necessity and that all funds diverted were needed to meet disbursements and save the existence of the city, where it appears that the city for years failed to make the maximum tax levies authorized by law to be made for either of such funds: *State ex rel. Polson v. Hardcastle*, 68 Wash. 548, 124 Pac. 110.

§ 33. RECALL OF ELECTIVE OFFICERS.—Every elective public officer in the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

§ 34. SAME.—The legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided, That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of law-making nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent. [L. '11, p. 504, § 1.]

ARTICLE II.

§ 1. LEGISLATIVE POWERS, WHERE VESTED.—The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure as proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two prefer-

ences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted. Six per centum, but in no case more than thirty thousand, of the legal voters shall be required to sign and make a valid referendum petition.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections or parts of any act, law or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular elections, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: Provided, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the state of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. The whole number of electors who voted for governor at the regular gubernatorial election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter

of the state shall receive the publication at least fifty days before the election at which they are to be voted upon. [L. '11, p. 136, § 1.]

The courts are not concerned with the wisdom of an act, and cannot declare it unconstitutional merely because it is unwise, the policy of a law being for the legislative branch of the government: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

§ 8.

This section, providing that each house of the legislature shall be the final judge of the election of its members, does not prevent a judicial contest over the nomination of candidates: *State ex rel. McAvoy v. Gilliam*, 60 Wash. 420, 111 Pac. 401.

§ 26.

No cause of action is created or liability imposed upon the state by this section, providing that the legislature shall direct by law in what manner and in what courts suits may be brought against the state, nor by Rem. & Bal. Code, section 886, providing that any person having a claim against the state shall have the right to begin an action against the state in the superior court of Thurston county: *Riddoch v. State*, 68 Wash. 329, 42 L. R. A., N. S., 251, 123 Pac. 450.

§ 28.

See notes to § 7670-1.

§ 33.

The removal of disabilities of aliens as to the acquisition of property in the several states is a proper subject of treaty between the United States and foreign countries: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

A treaty providing that the subjects of the contracting parties "in the respective states" may freely dispose of their

property, means that the subject may freely dispose of his property within the country of his citizenship, "respective" meaning "pertaining or relating severally to each of those under consideration": *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

The treaty between Norway and Sweden and the United States, providing that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament or otherwise and that their heirs in whatever place they shall reside shall receive the succession, etc., entitles aliens residing in Sweden to take property devised to them by a naturalized citizen of the United States, especially in view of the rule of liberal construction applicable to treaty rights: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

A treaty securing to aliens the right to succeed to "goods and effects" embraces real property: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

The treaty between Norway and Sweden and the United States, securing to alien "heirs" the right to "receive the succession" to property, covers the right of succession by testament as well as by operation of law: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

As to the right of aliens to inherit realty as affected by treaty, see notes in Ann. Cas. 1912A, 1100; 33 L. R. A., N. S., 632.

§ 35.

See notes to § 7670-2.

§ 37.

See notes to §§ 1133, 7670-2.

ARTICLE III.

§ 12.

The governor's powers in the exercise of the veto being limited by the constitutional restrictions upon legislative powers, he cannot veto all the affirmative legislation in an act and approve a section repealing all inconsistent laws, where the repeal was dependent upon the affirmative legislation, and was not included in the title of the act except as connected with the vetoed affirmative sections: *Spo-*

kane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76, 109 Pac. 316.

§ 13.

Under this section an appointment to fill a vacancy in the office of secretary of state is for the balance of the term for which his predecessor was elected, or until the next general election for state officers, fixed by the constitution at every fourth year: *State ex rel. Fish v. Howell*, 59 Wash. 492, 110 Pac. 386.

ARTICLE IV.

§ 2.

See notes to § 8.

§ 4.

See notes to § 1027.

An appeal in an action to recover \$30 damages, as the value of a steer killed on an unfenced logging railroad, raising the question whether the defendant was a railroad, within the act of 1903, does not involve the "validity of a statute," within this section: *Sherman v. Eastern & Western Lumber Co.*, 56 Wash. 69, 105 Pac. 166.

In an action by the surety on a bond to indemnify materialmen and laborers upon public work, brought to establish the amount of its liability on various claims filed, in which judgment was given to the claimants upon their respective cross-complaints, no appeal lies in the case of any cross-complainant in whose favor judgment was given for less than the sum of \$200, that being the jurisdictional amount on appeal to the supreme court in case of judgment for the recovery of money only: *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

The state insurance commissioner is a state officer, within the meaning of this section, conferring original jurisdiction upon the supreme court in mandamus to "all state officers," the same not being limited to the heads of executive departments recognized *eo nomine* as state officers in constitution, article 3: *State ex rel. North Coast Fire Ins. Co. v. Schively*, 68 Wash. 148, 122 Pac. 1020.

The supreme court has no original jurisdiction to grant a writ of prohibition to prevent a receiver's sale of property pursuant to an order of the superior court, upon the claim that the relator is the owner of the property, in the absence of any attempt by the relator to exhaust his remedies in the court below: *State ex rel. Hoppe v. Superior Court*, 68 Wash. 500, 123 Pac. 786.

As to when the writ of prohibition lies, see the note in 111 Am. St. Rep. 929.

The original amount in controversy, within the jurisdiction of the supreme court, includes interest, when recoverable, on the principal sum demanded to the time of the commencement of the action, and not to the date of judgment: *Ingham v. Harper & Son*, 71 Wash. 286, 128 Pac. 675.

The jurisdiction on appeal, as depending on the amount in controversy, is determined by the allegations of the complaint, not by the demand for judgment: *Ingham v. Harper & Son*, 71 Wash. 286, 128 Pac. 675.

Upon an appeal by plaintiff from a judgment of dismissal, carrying with it dismissal of a counterclaim acquiesced in by defendant, the amount sued for is the amount in controversy, regardless of the counterclaim; and if less than \$200, the appeal will be dismissed: *Gorham-Revere Rubber Co. v. Broadway Automobile Co.*, 71 Wash. 578, 129 Pac. 89.

Under this section the supreme court has no jurisdiction of an appeal in an action to recover demurrage charges in the sum of \$105, in which the defendant claimed to be entitled to the charge and filed a counterclaim in the same sum; the original amount in controversy being the amount claimed by either party, and not the sum of the two claims: *Northern Pac. R. Co. v. Shoemaker*, 69 Wash. 140, 124 Pac. 385.

The supreme court has no jurisdiction of an appeal in an action to restrain the enforcement of a judgment of the superior court in a civil action at law for the recovery of money in which the original amount in controversy was less than the jurisdictional limit of the supreme court; and the supreme court may look to the complaint in the injunction suit to determine that the character of the action was one to indirectly secure a review of a judgment of which the supreme court has no appellate jurisdiction: *Leites v. Peterson*, 68 Wash. 474, 123 Pac. 773.

§ 5.

This section provides for but one court in a county and is violated by Laws of 1909, page 82, providing that the county commissioners may divide a county into independent judicial districts, each of which is a judicial unit, with its own seal, officers, records, and with jurisdictions restricted to the limits of the district, from which jurors are drawn and changes of venue granted or received, and a distinctive style of actions and proceedings is employed, and providing that in criminal actions, each district shall be considered as a separate constitutional county: *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464.

Under this section a judge elected for the term of four years is ineligible as a candidate for governor during such period, although his term as judge would expire before the term of governor commences, "eligible" meaning competent to be chosen, and having reference to the time the choice is made, without reference to the time when the term begins: *State ex rel. Reynolds v. Howell*, 70 Wash. 467, 126 Pac. 954.

§ 6.

See notes to Const., art. 4, § 10.

This section is sufficiently broad to embrace general chancery jurisdiction to appoint guardians of the local estate of non-resident insane persons: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

Laws of 1909, page 82, providing that the county commissioner may divide a county into judicial districts, each of which is constituted a separate and distinct constitutional county contravenes this section: *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464.

After appearance before a judge and presentation of a motion, it cannot be objected that the judge heard the motion "in chambers" instead of in open court in the courthouse, this section providing that the courts shall always be open: *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

§ 10.

An act conferring upon justices of the peace jurisdiction to impose a fine not exceeding \$300 for violation of a city ordinance against the lessor of a gambling house, when the state law on the same subject limited the superior courts to a fine of \$100 does not trench upon the jurisdiction of the superior courts in violation of this section, in view of constitution, article 4, section 6, conferring jurisdiction upon justices in all cases of misdemeanors not otherwise provided by law: *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

§ 20.

The superior court does not lose jurisdiction by failing to decide a cause within ninety days from the time it is submitted, as required by the constitution: *Olympic Oil Co. v. Kane*, 56 Wash. 199, 105 Pac. 477.

ARTICLE V.

§ 3.

This section providing that all officers shall be subject to removal for misconduct in office, has no application to a removal

by the recall provided for in the city charter, and the advisability of such recall is a political and not a legal question: *Hilzinger v. Gillman*, 56 Wash. 228, 21 Ann. Cas. 305, 105 Pac. 471.

ARTICLE VI.

§ 3.

See notes to § 4755.

§ 6.

While the right to vote is a constitutional right, under this section it is subject to regulation by the legislature in any reason-

able way not prohibited: *State ex rel. Shepard v. Superior Court*, 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233.

As to the power of the legislature to regulate the right to vote, see notes in 97 Am. Dec. 263; 91 Am. St. Rep. 682; 7 Ann. Cas. 665.

ARTICLE VII.

§ 2.

See notes to §§ 6604-1, 9134.

This section is violated by the assessment of bank stock at sixty per cent of its value, when all other personal property is intentionally, and in pursuance of a fixed and definite policy, assessed at less than forty per cent of its value; and being arbitrary and a constructive fraud upon the rights of the property holder discriminated against, equity will grant relief: *Spokane & Eastern*

Trust Co. v. Spokane County, 70 Wash. 48, 126 Pac. 54.

§ 8.

The limitations of this section upon the power of cities, towns, and villages, to make local improvements has no application to counties: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 9.

See notes to § 7768.

ARTICLE VIII.

§ 5.

The constitutional prohibition against a city's loaning its credit to another corporation does not apply to the loan of funds to facilitate a bond issue for the payment

of the indebtedness of annexed territory: *Fisher v. Seattle*, 55 Wash. 396, 104 Pac. 655.

The state can lend its aid to enterprises undertaken by the federal government:

Bilger v. State, 63 Wash. 457. Federal constitution, article 1, section 10, does not restrict the power of the state to aid in enterprises undertaken by the federal government: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 6.

Where a city is indebted in excess of its constitutional limit, the excess only requires ratification; and funding bonds for a portion of the debt are valid without ratification, if the portion funded was within the constitutional limit: *Fisher v. Seattle*, 55 Wash. 396, 104 Pac. 655.

This section providing for the biennial election of county officers, and article 11, section 5, providing that no county officer shall hold office for more than two terms in succession, does not prevent the legislature from making the term of office two years and "until his successor is elected and qualified"; nor does it prevent a second term incumbent from holding over for two years more, on the refusal of his successor to qualify: *State ex rel. Vanderveer v. Gormley*, 53 Wash. 543, 102 Pac. 435.

Under this section a city cannot submit to the voters a bond issue to raise money for several distinct purposes, in no way related to each other, in such a way that the voters must vote for or against all the propositions; "assent" meaning that the voters shall freely express their approval of each of the various objects sought: *Blaine v. Seattle*, 62 Wash. 445, Ann. Cas. 1912D, 315, 114 Pac. 164.

The constitutional provision that no county, town, school district, or other municipal corporation shall become indebted to an amount exceeding a certain per centum of its taxable property, fixes a separate limitation for each corporation named which is not affected by the indebtedness of the different municipalities having jurisdiction over the territory on which it is superimposed, if the legislature did not abuse its power by providing for the creation of a municipal corporation for the sole purpose of avoiding the constitutional limitation of indebtedness: *Paine v. Port of Seattle*, 70 Wash. 294, 127 Pac. 580.

As to the creation of municipal indebtedness in excess of the constitutional limit, see notes in 44 Am. St. Rep. 229; Ann. Cas. 1913B, 1177; 37 L. R. A., N. S., 1058.

§ 7.

The borrowing of money for the purpose of acquiring sites for docks, wharves, and other public structures is a municipal purpose as well as a public purpose, and is not a loaning of municipal credit to an individual, within the meaning of the constitution, notwithstanding they were to be leased for a limited time to private persons; and the private uses of the lessee would not affect the validity of the bonds issued to acquire or construct them, if they were not acquired or constructed for the sole purpose of leasing, and the power was reserved to regulate wharfage charges: *Paine v. Port of Seattle*, 70 Wash. 294, 127 Pac. 580.

ARTICLE XI.

§ 3.

Laws of 1909, page 82, providing that the county commissioners, "whenever they determine it to be for the best interests of the people," may divide a county into judicial districts each of which is constituted a "separate and distinct constitutional county" for the purposes of the act, contravenes constitution, article 11, section 3, which provides that a new county shall not be formed containing less than two thou-

sand inhabitants: *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464.

§ 5.

See notes to Const., art. 8, § 6. See notes to §§ 4065, 7788.

Commissioners to equalize a county assessment for the construction of a ship canal are not county officers, within this section: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 7. TERMS OF OFFICE LIMITED TO TWO TERMS.—No county treasurer shall be eligible to hold his office more than two terms in succession. [L. '11, p. 63, § 1.]

§ 8.

See notes to § 4031.

§ 10.

See notes to §§ 7494, 7498, 7670-1.

An act authorizing a county to levy a special assessment for benefits accruing

from a public improvement is not the imposition of a tax upon the county by the state, prohibited by this section: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

This and the next section are to be construed as a reservation of a general legislative power in the state; so that a franchise granted by a city to a telegraph

company under authority of a special city charter is subject to such reservation, and may be controlled or modified by subsequent acts of the legislature: State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861.

This section providing that a city charter "may" be amended by proposals therefor submitted to the electors at "any general election," does not exclude other methods; hence, under the constitutional authority to cities of the first class to

adopt special charters not "inconsistent" with the constitution and laws, a city may provide for proposed amendments to its special charter to be submitted to the electors at a special election: State ex rel. Hindley v. Superior Court, 70 Wash. 352, 126 Pac. 920.

§ 12.

See notes to § 8356.

ARTICLE XII.

§ 3.

See notes to § 3175a.

§ 12.

See notes to § 8626.

ARTICLE XV.

§ 1.

The provision in this section, that the harbor area shall never be sold or granted but shall be reserved for "landings, wharves, streets and other conveniences of navigation and commerce," has reference to commerce both by land and water, as "navigation" is not used in a restrictive sense; hence, under article 15, section 2, authorizing the leasing for terms not exceeding thirty years, of the right to build on the harbor area "wharves, docks, and other structures," the state may lease the right to build a railroad on the harbor area, "other structures" in section 2 being equivalent to "other conveniences" of commerce in section 1: State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co., 54 Wash. 530, 103 Pac. 809.

City streets may be extended in any direction over the harbor area to deep water at the outer harbor line, under this

section and article 15, section 3, granting to cities the right to extend their streets "over intervening tide lands to and across the area reserved as herein provided": Chlopeck Fish Co. v. Seattle, 64 Wash. 315, 117 Pac. 232.

§ 3.

See notes to Const., art. 15, § 1.

Where, pursuant to constitution, article 15, section 1, harbor lines are established in front of a city the corporate limits of which only extend to the line of ordinary high tide, the city has power to extend its streets over intervening tide lands to and across the reserved area, as expressly authorized by this section: Tacoma v. Titlow, 53 Wash. 217, 101 Pac. 827.

As to right to extend highway into navigable water, see note in 15 L. R. A., N. S., 1170.

ARTICLE XVII.

§ 1.

Under this section the state owns the beds and shores of all navigable waters up to the line of ordinary high tide: Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

As to the title to land under navigable water, see notes in 53 Am. St. Rep. 289; 1 L. R. A., N. S., 762.

In ejectment for upland bordering on a navigable stream, the plaintiff cannot recover damages for the use of land below mean high tide: Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833.

As to what property or invasion of possession ejectment is maintainable, see note in 116 Am. St. Rep. 568.

The title to shore lands being in the United States, and in the state after the adoption of the constitution, an upland owner, by dedicating a plat covering shore lands on a navigable lake, acquires no title thereto, and none can pass from him by deed or execution sale: Gifford v. Horton, 54 Wash. 595, 103 Pac. 988.

As the state reserved the title in fee to the beds and shores of navigable waters, up to the line of mean high tide, a conveyance of the same by the state to a boom company for booming purposes, grants the exclusive use thereof, except a free passageway between the boom and one of its shores for water craft "for the ordinary purposes of navigation": Lown-

dale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833.

A state deed of oyster lands, granting exclusive possession and preventing strangers from passing over the same by boat, is not a substantial impairment of the interests of the public in navigable waters or an interference with the federal right to regulate commerce: Palmer v. Peterson, 56 Wash. 74, 105 Pac. 179.

Under this section, the owner of upland under patents from the federal government has no riparian or littoral rights as against the state, which holds the title of the beds and shores in fee free from encumbrances or easements of any kind: Bilger v. State, 63 Wash. 457, 116 Pac. 19.

In view of this section, asserting title in the state to the beds and shores of all navigable waters, including the line of high water in navigable lakes, the riparian owner on a navigable lake has no common-law right as such owner to the waters of the lake for the purposes of irrigation superior to the right of appropriation possessed by owners of land not bordering upon the lake under the laws of the state relating to the appropriation of water for irrigation; and it is immaterial that such riparian rights are based upon titles from the general government prior to the adoption of the state constitution: State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 745.

Since the state owns the beds and shores of navigable waters, under this

section, and is prohibited from giving any rights to private persons in waters beyond harbor lines established pursuant to article 15, section 1, the state may establish pier head lines beyond the harbor lines, whenever it pleases; and hence a lessee of the state of abutting tide lands cannot show the establishment or change of pier head lines at locations advantageous to his leasehold for the purpose of enhancing the value thereof, in an action to recover for damages thereto: Wilson v. Oregon-Washington R. & Nav. Co., 71 Wash. 102, 127 Pac. 847.

Where a pier for a railroad bridge across navigable water was placed on harbor area which the railroad company had leased from the state, any damage it might do to an adjoining owner by causing the water to shoal in front of such owner is *damnum absque injuria*, since it was caused by the lawful use of the railroad company's property: Wilson v. Oregon-Washington R. & Nav. Co., 71 Wash. 102, 127 Pac. 847.

As to the relative rights of the public and riparian owners in and to navigable waters and the land thereunder, see notes in 19 Am. St. Rep. 226; 126 Am. St. Rep. 710.

As to rights of state to grant tide lands, see note in 22 L. R. A., N. S., 337.

As to right of way on shore, see note in 4 L. R. A., N. S., 872.

§ 2.

See notes to § 6750.

ARTICLE XXI.

§ 1.

See notes to § 926.

(NOTE—Insert this leaf in your 1913 Supplement to Remington and Ballinger's Washington Code following page 11.)

CONSTITUTIONAL AMENDMENTS.

AMENDMENT 5.

Article six (VI) was amended by striking from said article all of sections one (1) and two (2) and inserting in lieu thereof the following, to be known as section one (1):

Section 1. All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language, Provided That Indians not taxed shall never be allowed the elective franchise. And further provided, That this amendment shall not affect the rights of franchise of any person who is now a qualified elector of this state. The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provision of this section. There shall be no denial of the elective franchise at any election on account of sex. [L. 1909, p. 26, § 1.]

Approved November, 1910.

AMENDMENT 6.

Article III, section 10. In case of the removal, resignation, death or disability of the Governor, the duties of the office shall devolve upon the Lieutenant-Governor; and in case of a vacancy in both the offices of Governor and Lieutenant-Governor, the duties of the Governor shall devolve upon the Secretary of State. In addition to the line of succession to the office and duties of Governor as hereinabove indicated, if the necessity shall arise, in order to fill the vacancy in the office of Governor, the following state officers shall succeed to the duties of Governor, and in the order named, viz: Treasurer, Auditor, Attorney General, Superintendent of Public Instruction and Commissioner of Public Lands. In case of the death, disability, failure or refusal of the person regularly elected to the office of Governor to qualify at the time provided by law, the duties of the office shall devolve upon the person regularly elected to and qualified for the office of Lieutenant-Governor who shall act as Governor until the disability be removed, or a Governor be elected; and in case of the death, disability, failure or refusal of both the Governor and the Lieutenant-Governor elect to qualify, the duties of the Governor shall devolve upon the Secretary of State; and in addition to the line of succession to the office and duties of Governor as hereinabove indicated, if there shall be the failure or refusal of any officer named above to qualify, and if the necessity shall arise by reason thereof, then in that event in order to fill the vacancy in the office of Governor, the following state officers shall succeed to the duties of Governor in

the order named, viz: Treasurer, Auditor, Attorney General, Superintendent of Public Instruction and Commissioner of Public Lands. Any person succeeding to the office of Governor as in this section provided, shall perform the duties of such office only until the disability be removed, or a Governor be elected and qualified; and if a vacancy occur more than thirty days before the next general election occurring within two years after the commencement of the term, a person shall be elected at such election to fill the office of Governor for the remainder of the unexpired term. [L. 1909, p. 642, § 1.]

Approved November, 1910.

ERRATUM.

At page 9 (3 Rem. & Bal. Code), omit amendment to article XI, section 7, which failed of approval.

CODES OF PROCEDURE

OF THE

STATE OF WASHINGTON.

§ 1.

The supreme court has original jurisdiction to issue a writ of mandamus to the secretary of state to compel him to certify to a nomination, the jurisdiction extending to state officers who are proceeding contrary to law, although the issues involve only the private rights of individuals contesting for the office: *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211.

As to what duties mandamus lies to compel performance, see notes in 125 Am. St. Rep. 492; 89 Am. Dec. 728.

As to mandamus against public officers, see note in 98 Am. St. Rep. 863.

An act "to regulate the practice and procedure in civil action" embraces but one object, within organic act, section 6: *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116.

§ 8.

Under constitution, article 4, section 2, providing for five judges of the supreme court "a majority of whom shall be necessary to form a quorum," and which further provides that the legislature may increase the number of judges, "and may provide for separate departments," it was competent for the legislature, by this act, to increase the number to nine judges, and provide for two departments of the court, consisting of five judges each, three of whom shall constitute a quorum for the transaction of business in a department; and a litigant is not entitled, as a matter of right, to a rehearing by the full court sitting en banc, authorized by section 4 of the act: *State ex rel. Vanderveer v. Gormley*, 53 Wash. 543, 102 Pac. 435.

§ 15.

Where the parties to an action stipulated that it be dismissed upon the conveyance to trustees of part of the property in dispute, the trustees to pay plaintiff's attorneys, on their contingent fees, whatever sum might be allowed or determined in their favor, the court has no jurisdiction in the pending case to determine the amount of the fees without service of process or further pleadings, by reason of the fact that the trustees joined in the stipulation and were present or represented at the hearings, where they did not appear and consent thereto, but objected to the jurisdiction of the court; and prohibition lies to prevent

proceedings in the action to determine the amount and enforce payment of the attorney's fees: *State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905.

The decision of a court that it has jurisdiction to determine the contingent fees of plaintiff's attorneys is not conclusive, where it was based on statements made to the court and a stipulation for dismissal of the action, and the record shows that the court had no jurisdiction over the parties objecting thereto: *State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905.

It is discretionary for the courts of this state to refuse, on the doctrine of comity, to assume jurisdiction of an action between nonresidents, upon a contract made and to be performed in the state of their residence, where the action involves only the title to real property in such state, especially where a similar action had been commenced and was voluntarily dismissed in such state, and there would be no way of enforcing a judgment in this state, no damages or alternative judgment being asked: *Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 545, 117 Pac. 491.

A foreign corporation would have no more right than any other party to maintain such an action by reason of its having filed articles in this state and complied with our laws: *Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 545, 117 Pac. 491.

As to what are local and what transitory actions, see note in 22 Am. St. Rep. 22.

As to the jurisdiction of a court to entertain a case involving real estate or title thereto, situate in another state or country, see notes in 5 Ann. Cas. 533; 3 Ann. Cas. 344; 23 L. R. A., N. S., 1135; 29 L. R. A., N. S., 625.

The state courts have jurisdiction of an action brought by a shipper to recover for unjust discrimination by a common carrier engaged in interstate commerce, in violation of the act of Congress regulating interstate commerce, in view of section 22 of the act (U. S. Comp. Laws 1901, p. 3170) providing that nothing in the act shall abridge existing common-law remedies, since the right existed at common law: *Lilly Co. v. Northern Pac. R. Co.*, 64 Wash. 589, 117 Pac. 401.

§ 22.

The dismissal of an action for the cancellation of a note and mortgage does not affect an intervener's right as holder to foreclose under this section, authorizing an intervener to demand relief adversely to the parties, and section 303, requiring the court to determine the rights of the intervener at the same time the action is decided: *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

As to the law of intervention, see note in 123 Am. St. Rep. 280.

§ 28.

See notes to § 130.

There being but one superior court in a county, it is not error to refuse to transfer a cause for trial from one department to another in which preliminary orders had been made, as the court has jurisdiction: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

§ 36.

It is discretionary with the trial court to require the observance of a local rule of

court requiring motions to be accompanied by an affidavit that the attorney believed the motion to be meritorious: *Sylvester v. Olsen*, 63 Wash. 285, 115 Pac. 175.

§ 39.

A judgment is not void because not rendered within ninety days after the trial, nor does that of itself constitute reversible error: *Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271.

§ 41.

Under this section a judge of the superior court cannot properly hear a motion for a new trial outside of the county wherein the cause is pending, except by consent of the parties: *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

§ 42.

See notes to § 130.

Under this section, a judge having heard a cause out of his district may decide and rule thereon in any other county in the state: *Rice v. Ahlman*, 70 Wash. 6, 126 Pac. 64.

§ 42-1. Official Court Reporter—Appointment—Term.

It shall be the duty of each superior court judge in counties or judicial districts in the state of Washington having a population of over thirty thousand inhabitants to appoint a stenographer to be attached to the court holden by him, (except, for the sake of economy, where in counties or judicial districts having more than one judge there is not sufficient trial work to require the services of two or more official reporters, the judges of such courts may, provided their trial dockets can be satisfactorily arranged so as not to delay the trials of cases, appoint one official reporter jointly to act as official reporter for their respective courts), who shall have had at least three years' experience as a skilled, practical court reporter, or who upon examination shall be able to report and transcribe accurately one hundred fifty words per minute of the judge's charge or one hundred seventy-five words of testimony for five consecutive minutes; said test of efficiency, in the event of inability to meet the qualifications as to length of time of experience, to be given by a committee of three of the attorneys of the county or district in which the said stenographer is seeking to act as official reporter, and such stenographer shall thereupon become an officer of the court and shall be designated and known as the official reporter for the court or district for which he is appointed. Each official reporter so appointed shall hold office during the term of office of the judge appointing him, but may be removed for incompetency, misconduct or neglect of duty, and before entering upon the discharge of his duties shall take an oath to perform faithfully the duties of his office, and file a bond in the sum of two thousand dollars (\$2,000) for the faithful discharge of his duties. No person shall be appointed to the office of official reporter who is not a citizen of and a duly qualified elector in the state of Washington. [L. '13, p. 386, § 1.]

§ 42-2. Duties of Reporter.

It shall be the duty of each official reporter appointed under this act to attend every term of the superior court in the county or judicial district for which he is appointed, at such times as the judge presiding may direct; and upon the trial of any cause in any court, if either party to the suit or action, or his attorney, request the services of the official reporter, the presiding judge shall grant such request, or upon his own motion such presiding judge may order a full report of the testimony, exceptions taken, and all other oral proceedings; in which case the official reporter shall cause accurate shorthand notes of the oral testimony, exceptions taken, and other oral proceedings had, to be taken, except when the judge and attorneys dispense with his services with respect to any portion of the proceedings therein, which notes shall be filed in the office of the clerk of the superior court where such trial is had. [L. '13, p. 387, § 2.]

§ 42-3. Compensation of Reporter.

Each official reporter so appointed shall be paid a compensation at the rate of ten dollars (\$10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court, which compensation shall be paid out of the county treasury where such court is held, as other expenses of the court are paid; and the sworn statement of the official reporter as to the number of days' attendance upon the court, when certified as correct by the judge presiding, shall be a sufficient voucher to the county auditor, upon which he shall draw his warrant upon the treasurer of the county in favor of the official reporter. [L. '13, p. 387, § 3.]

§ 42-4. Additional Fees to be Paid Reporter.

In each civil action hereafter commenced the sum of one dollar (\$1) shall be paid by the plaintiff at the time of the filing of the complaint to the clerk of the court, and at the time of the appearance of the defendant, or any defendant appearing separately, there shall be paid in to the clerk of the court one dollar (\$1), and these sums so paid shall be taxed as costs in the case, and collected from the unsuccessful party in said action, and shall be known as stenographers' costs, and shall be paid by the clerk of said court into the county treasury of the county in which said action is commenced. [L. '13, p. 387, § 4.]

§ 42-5. Transcript of Notes—Fees.

When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into longhand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and

in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: Provided, That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in this opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section 42-3. [L. '13, p. 388, § 5.]

§ 42-6. Transcript Accorded Verity.

The report of the official reporter, when transcribed and certified as being a correct transcript of the stenographic notes of the testimony, or other oral proceedings had in the matter, shall be prima facie a correct statement of such testimony or other oral proceedings had, and the same may thereafter, in any civil cause, be read in evidence as competent testimony, when satisfactory proof is offered to the judge presiding that the witness originally giving such testimony is then dead or without the jurisdiction of the court, subject, however, to all objections the same as though such witness were present and giving such testimony in person. [L. '13, p. 389, § 6.]

§ 42-7. Subsequent Transcript.

When the official reporter who has taken notes in any cause, shall thereafter cease to be such official reporter, any transcript thereafter made by him therefrom, or made by any competent person under the direction of the court, and duly certified to by the person making the same, under oath, as a full, true and correct transcript of said notes, the same shall have full force and effect the same as though certified by an official reporter of said court. [L. '13, p. 389, § 7.]

§ 42-8. Reporter Pro Tem.

In the event of the absence or inability of the official reporter to act, the presiding judge may appoint a competent stenographer to act pro tem, who shall perform the same duties as the official reporter, and whose report when certified to, shall have the same legal effect as the certified report of the official reporter. The reporter pro tem shall possess the qualifications and take the oath prescribed for the official reporter, and shall file a like bond, and shall receive the same compensation. [L. '13, p. 389, § 8.]

§ 42-9. Court Amanuensis.

In all counties or judicial districts, except counties of the first class, such official reporter shall act as amanuensis to the court where he is appointed, and the court may allow him per diem therefor, as provided in this act: Provided, That in no event shall the per diem for such work exceed ten days in any one calendar month. [L. '13, p. 389, § 9.]

§ 42-10. Court Files Accessible to Reporters.

Official reporters or reporters pro tem may, without order of court, upon giving a proper receipt therefor, procure at all reasonable hours from the office of the clerk of the court, any files or exhibits necessary for use in the preparation of statements of fact or transcribing portions of testimony or proceedings in any cause reported by them. [L. '13, p. 389, § 10.]

§ 42-11. Office Expenses.

Necessary supplies for reporting and for the preparation of transcripts in criminal cases shall be furnished by the county. Typewriters and all other supplies in all other cases shall be furnished by the stenographers. In counties where arrangements can be made therefor, suitable office room shall be furnished the official reporter. [L. '13, p. 390, § 11.]

§ 42-12. Substituted Reporters.

At the request of either party to an action an official reporter from the same or any other district in the state may be substituted for the official reporter of the court in which the action is being tried for the purpose of reporting the trial of said action: Provided, That the party or parties to the action requesting such substitution pay or secure to be paid to the clerk of the court the necessary traveling and hotel expenses of the official reporters so substituted as aforesaid. [L. '13, p. 390, § 12.]

§ 42-13. Application of Act.

This act shall not apply to any county having a population of two hundred thousand, or over. [L. '13, p. 390, § 13.]

§ 46.

Under this section, a justice of the peace is not limited to a fine of \$100 in cases coming under city ordinances, especially in view of the fact that the act of 1901 simply amended Ballinger's Code, section 4683, by omitting therefrom an express limitation to that effect: *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

The amendment of Ballinger's Code, section 4683, which conferred upon justices of the peace jurisdiction in all crim-

inal causes arising under any city or town ordinance, by this section, does not deprive justices in towns of the fourth class of jurisdiction in causes arising under a town ordinance, in view of the intent of the amending act to merely enlarge the jurisdiction, and of section 7735½, providing that the violation of any ordinance of a town of the fourth class shall be a misdemeanor: *State ex rel. Hall v. Wicker*, 60 Wash. 238, 110 Pac. 992.

§ 61-1. Holiday Follows Sunday.

Whenever any legal holiday, other than Sunday, shall fall upon any Sunday, the day next following such date shall become and be held as a legal holiday. [L. '11, p. 9, § 1.]

§ 63-1. Columbus Day.

The 12th day of October of each year is hereby declared to be a legal holiday to be known as "Columbus Day." [L. '11, p. 390, § 1.]

§ 69.

See notes to § 4829.

Under this section, the court has power to appoint a commissioner to act for an irrigation district, where the district was mandamused to sell bonds and it appeared that the president of the board of directors was insane and the board was without a

quorum: *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

§ 94.

Repealed. See § 94-1 et seq.

Constitution, article 1, section 21, providing that the right to trial by jury, "shall

remain inviolate," is not violated by this section, since the constitutional guaranty and all the essential incidents of trial by jury are preserved: *State v. McDowell*, 61 Wash. 398, 112 Pac. 521.

Under this section an elector and taxpayer of the state of Washington is a qualified juror, and a juror need not be a taxpayer within the county in which he is called: *State v. Jahns*, 61 Wash. 636, 112 Pac. 747; *Lasityr v. Olympia*, 61 Wash. 651, Ann. Cas. 1912C, 782, 112 Pac. 752.

As to the conditions and restrictions which the legislature may impose upon the right of trial by jury, see note in 98 Am. St. Rep. 538.

Constitution, article 1, section 22, guaranteeing to accused the right to a trial before "a jury of the county," is not violated by this section which provides that the county shall be divided into jury districts, and that an equal number of the jurors shall be drawn from each district for service in any month: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

§ 94-1. Qualification of Jurors.

No person shall be competent to serve as a juror in the superior courts of the state of Washington unless he be (1) an elector and taxpayer of the state, (2) a resident of the county in which he is called for service for more than one year preceding such time, (3) over twenty-one years of age, (4) in full possession of his faculties and of sound mind, (5) able to read and write the English language. [L. '11, p. 314, § 1.]

§ 94-2. Persons Exempt.

Officers of the United States and of the state, attorneys at law, school teachers, practicing physicians, licensed embalmers, active members of the fire and police departments of any municipality, women, and all persons over sixty years of age, shall not be compelled to serve as jurors; and in preparing jury lists, the names of such persons, other than women and persons over sixty years of age, shall, if it be known that they are entitled to be excused from jury service, be omitted from the jury list: Provided, however, That the right of any such person to be excused from jury service shall not be cause for challenge as to his competency if he desires to serve: Provided further, That any woman desiring to be excused from jury service may claim exemption by signing a written or printed notice thereof and returning same to the sheriff before the date for appearance, and if exemption is claimed by reason of sex, no fee shall be allowed for her appearance. And it shall be the duty of the person serving any summons for jury service to inform the person served of this provision. [L. '11, p. 314, § 2.]

§ 94-3. Jury List—Yearly Revision.

Upon the taking effect of this act, the judge or judges of the superior court of each county in this state shall divide the county into not less than three nor more than six jury districts, following the lines of voting precincts and arranging the districts in such manner that the population in each district shall be as nearly equal as may be, and the fixing of the boundaries of the district shall be evidenced by an order made by the court and entered upon its records. During the month of July of each year the county clerk of each county in the state shall make up a jury list containing the names of all the qualified jurors in the county, so far as he may be able to ascertain the same from the latest tax-rolls and poll-books of the county or from any other official sources of information and shall ascertain so far as possible the voting precinct and place of residence of each juror and if these cannot be ascertained, the school district in which he lives. He shall provide boxes sufficient in number to correspond with the number of jury districts fixed by the court,

and numbered to correspond therewith, and having written the names of the jurors in each district upon slips of paper, which shall be similar in size, quality of paper, and writing, and shall deposit such slips in the jury-box of the proper district. The jury list shall be revised from year to year, new lists being made up each year, adding thereto the names of new residents, and omitting therefrom the names of persons who may have removed from the county, or who may have served as jurors within five years theretofore (unless they shall be necessary to make up a sufficient list) and the names of the new list shall be deposited in the box for service for that year, as hereinbefore provided. [L. '11, p. 314, § 3.]

§ 94-4. Jury Terms—Jury, How Drawn.

Jury terms shall commence on the first Monday of each month, and shall end on the Saturday preceding the first Monday of each month, unless the day of commencing or ending said term be changed by order of the judge or judges of the superior court; but it shall not be necessary to call a jury for any term in any county unless the judge or judges of the superior court of that county shall consider that there is sufficient business to be submitted to a jury to require that one be called. When the judge or judges of the superior court of any county shall deem that the public business requires a jury term to be held, he or they shall require the county clerk to draw a jury to serve for the ensuing term, and the county clerk, on the second Saturday of the calendar month preceding the month in which the jury is to be called to serve, shall be blindfolded, and in the presence of the judge or judges or of a court commissioner of the superior court, shall draw from the jury-boxes such number of names as the judge or judges may have ordered to be summoned as jurors for the ensuing term. The names shall be drawn in equal numbers from each jury-box, and before the drawing is made the boxes shall be shaken up so that the slips bearing the names thereon may be thoroughly mixed, and the drawing of the slips shall depend purely upon chance. [L. '11, p. 315, § 4.]

§ 94-5. Grand Jurors—How Drawn.

Whenever the judge or judges of the superior court of any county in the state shall desire to summon a grand jury, the names of persons to serve as grand jurors shall be drawn from the jury list, as hereinbefore provided: Provided, however, That the names of the persons who shall serve as grand jurors shall not be stricken from the jury list, and such service shall not excuse them from service upon petit juries, as though they had not been summoned upon the grand jury. [L. '11, p. 316, § 5.]

§ 94-6. Additional Names—Open Venire.

If for any reason the jurors drawn for service upon a petit jury for any term shall not be sufficient to dispose of the pending jury business, or where no jury is in regular attendance and the business of the court may require the attendance of a jury before a regular term, the judge or judges of the superior court may draw from the jury list such additional names as they may consider necessary, and the persons whose names are so drawn shall thereupon be summoned to serve as jurors forthwith. The judge or judges drawing such additional names, may, in his or their discretion, order and

direct that, of such additional jurors, only those living nearest to the county seat or most conveniently reached and found shall be at first summoned by the sheriff, and at any time when a sufficiency of such persons has been summoned and produced in court, such judge or judges may, in his or their discretion, order and direct the sheriff not to summon the remainder of the additional jurors so drawn. By stipulation or agreement made in open court as a part of the record, the parties to any action may agree that an open venire may be issued to make up a jury in that action, and upon order of the court approving such stipulation and directing the number of jurors to be drawn, the clerk shall issue an open venire, and the sheriff shall fill the same by summoning from the bystanders, or elsewhere, a sufficient number of persons to fill the open venire. [L. '11, p. 316, § 6.]

§ 94-7. Excused from Service.

A person summoned as a juror may be excused from acting as such on account of any of the reasons stated in section 94-2 hereof; when his own health requires, on account of death in his family, or of illness in his family of such character that he is required to be in attendance thereupon, or when his business interests would be seriously prejudiced by such service. No person, however, shall be excused from service as a juror on account of business reasons unless his service is such as would lead to the waste or destruction of his property; and unless it shall appear that after having been summoned as a juror he had made every reasonable effort to permit of his serving as a juror without causing waste or destruction of his property. When excused for any of the foregoing reasons, or for any reason deemed sufficient by the court, the name of the juror so excused shall remain upon the jury list from which jurors are drawn, and his name returned to the jury box from which it was drawn. Any person applying to be excused from jury service for any of the causes herein specified, may be placed upon oath or affirmation to testify truly in all respects as to the cause for such excuse, and that he will answer truly any question put to him by the judge with respect thereto. [L. '11, p. 317, § 7.]

§ 94-8. Separation of Jury.

In no action or proceeding whatever, except felony cases shall the jury sworn to try the issues therein be kept together and in the custody of the officers of the court, save during the actual progress of the trial, until the case shall have been finally submitted to them for their decision. Whenever the jury are kept together in the custody of the officers when the trial is not in progress, they shall be supplied with meals at regular hours, and with comfortable sleeping and toilet accommodations. [L. '11, p. 317, § 8.]

§ 98.

Repealed. See § 94-1 et seq.

§ 99.

Repealed. See § 94-1 et seq.

§§ 101-104.

Repealed. See § 94-1 et seq.

§ 103.

Where, in drawing a jury, the usual practice is followed, the ballots are taken from the box by chance, and an impartial jury results, error cannot be predicated on the manner in which the clerk conducted the drawing when selecting the jury, the statute not being clear as to the exact method of drawing: *Mercereau v. Maughlin Mill Co.*, 53 Wash. 475, 102 Pac. 232.

Statutory provisions for the drawing of a panel are mainly directory, and failure to precisely conform thereto will not warrant a reversal of a conviction, where none of the jurors were incompetent or improperly drawn, no prejudice against the defendant was shown or any of his rights injuriously affected, and he declined to use an additional challenge accorded him: *State v. Barnes*, 54 Wash. 493, 20 L. R. A., N. S., 932, 103 Pac. 792.

Jurors selected in May, 1909, to serve during the next month, under the law in force at the time of their selection, may serve during such June term, although by the act of 1909, taking effect June 8th, the former laws were repealed and a new method provided for selecting jurors for each ensuing month, leaving no law in force for the selection of jurors in June, 1909, in view of the constitutional authority of the superior courts and their common-law power to provide juries: *Cathey v. Seattle Elec. Co.*, 58 Wash. 176, 108 Pac. 443.

The requirement that a jury be drawn for "the ensuing month," is not so material as to invalidate a panel part of whom were drawn for the month of December, but not summoned until January, because

there was no jury business for the month of December, in view of section 2140, providing that challenges to the panel shall only be allowed for a material departure from the prescribed forms: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

§ 104.

This section has no application to the portions of the preceding section requiring monthly jury terms and fixing the time for the commencement of the term on the first Monday of the ensuing month; hence it is within the discretion of the court to summon a grand jury to serve on the twenty-second of the same month: *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131.

Laws of 1905, page 270, section 4, requiring the drawing of a grand jury to serve during the ensuing three months, is impliedly repealed by Laws of 1909, page 133, a complete act purporting to cover the whole subject of selecting and summoning grand and petit jurors: *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131.

§ 109.

Repealed. See § 94-1 et seq.

§ 116. General Powers and Duties of Prosecuting Attorneys.

The prosecuting attorney of each county shall have authority and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the county and all school districts in the county in which he is a prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county or such school district is a party. [L. '11, p. 375, § 1.]

§ 123. Examinations—Qualifications.

Examinations for admission to the bar shall be held at the state capitol on the first Thursday and Friday after the second Monday in January, May and October, of each year, and shall be both oral and written as to the applicant's knowledge of law, general learning, fitness and qualifications. Nor shall any such applicant be examined unless he shall have filed with the clerk of the supreme court, two months before such examination, a statement in which the time he commenced the study of law is set forth: Provided, The time he applies for admission is at least two years after the time named in such statement. Every applicant shall also present an affidavit by some member of the bar of the supreme court, or a certificate from the dean or head of some law school of approved standing, to the effect that such applicant has regularly and attentively studied law under the direction of the affiant or dean or head of such law school as the case may be, for a period of two years: Provided, That thirty-five full weeks of study in a law school in any one year shall be equivalent to a year's study. [L. '11, p. 158, § 1.]

§ 124. Rules—Examining Board—Appointment—Compensation.

The supreme court shall make such other rules as may be necessary for the admission of applicants to practice law, and for the purpose of conducting

the examination of applicants, shall appoint a board consisting of three lawyers, who shall severally hold their office for a term of three years unless sooner removed by the court: Provided, however, That the first appointments after the taking effect of this act shall be one member to be appointed for one year, one for two years and one for three years, and thereafter each member shall be appointed for a term of three years, except to fill a vacancy not caused by the expiration of a term. No person shall be eligible as a member of such board unless he shall have been a member in good standing of the bar of the supreme court of this state for not less than five years immediately preceding his appointment, and no person shall be eligible to succeed himself on such board. Each member of said board shall be allowed ten dollars (\$10.00) per day for each day actually spent in the performance of his duties, and five cents per mile for each mile actually and necessarily traveled in going to and returning from attendance on the court to conduct such examinations. The person having the shortest term to serve on said board shall be chairman thereof, and the clerk of the supreme court shall act as secretary thereof and shall keep the records, files and correspondence of the board. The board of examiners shall meet not later than two days before an examination is to be held to prepare the questions to be answered in writing by the applicants, which questions when prepared shall be kept in a sealed envelope or package and free from inspection in the office of the clerk of the supreme court until required for such examination, and, after the completion of such examination, said questions shall be made public. [L. '11, p. 158, § 2.]

§ 125. Oath.

Every person before being admitted to practice law in this state shall take and subscribe the following oath:

I do solemnly swear:

(1) I will support the constitution of the United States and the constitution and laws of the state of Washington;

(2) I will maintain the respect due to courts of justice and judicial officers;

(3) I will not counsel or maintain any suit or proceedings which shall appear to me to be illegal and unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

(4) I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by an artifice or false statement of facts or law;

(5) I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

(6) I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or reputation of a fellow attorney, party or witness, unless required by the justice of the cause with which I am charged;

(7) I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God. [L. '11, p. 159, § 3.]

§ 129.

An attorney holding stock in a corporation as a trustee for his client and to in-

demnify him upon his indorsement of a note, is guilty of a conversion thereof, where he transferred part of his stock to

a business associate, called a meeting of the stockholders, ousted his client from office, organized a new corporation, and transferred to it all the assets of the old corporation by voting the stock, his acts being construed most strongly against him, and the burden being upon him to show that his dealings were free from all reasonable grounds of suspicion: *Hertick v. Smith*, 67 Wash. 664, 122 Pac. 363.

As to what conversion of personal property is sufficient to maintain an action of trover, see note in 24 Am. St. Rep. 795.

Where an action to quiet title was compromised by an agreement recognizing the plaintiffs' title, and defendants authorized their attorney to carry out the contract, the attorney had authority to consent to a decree confirming the plaintiffs' title on their performance of the contract: *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

§ 130.

An oral "street" agreement of an attorney to file a supersedeas bond on appeal in a cause, whereby the adverse party was led to delay the issuance of execution until the time therefor had expired, is void, under this section: *Eisenberg v. Nichols*, 57 Wash. 560, 107 Pac. 371.

As to the implied authority of an attorney in conducting litigation, see note in 132 Am. St. Rep. 148.

As to the extent to which a client may control a cause, see note in 93 Am. St. Rep. 169.

As to contracts between attorney and client, see note in 83 Am. St. Rep. 158.

Where the receiver and several stockholders of a corporation intervened in an action against the corporation, a stipulation of the receiver in the nature of a compromise, authorized by the court, binds the stockholders as the receiver represents the stockholders as well as the corporation; and an appeal by the stockholders will not be considered: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to intervention by receivers and persons interested in the receivership, see note in 123 Am. St. Rep. 303.

Under this section and sections 28 and 42 the parties to an action in D. county may stipulate that a motion to vacate the judgment may be heard at the county seat of S. county, before the superior judge of W. county, and upon entry of an order accordingly and transfer of the papers, such trial judge has jurisdiction to hear and decide the motion, the parties having appeared by counsel and argued the same; and his order is res judicata: *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

An attorney was authorized to represent a wife in the settlement of condemnation proceedings against community property,

where it appears that both husband and wife were parties and served with process, that he was employed by the husband, as he presumed, to represent both, and the husband was authorized by the wife to employ counsel in the case and he understood the attorney was to represent her: *Pearl Oyster Co. v. Seattle & Montana R. Co.*, 53 Wash. 101, 101 Pac. 503.

Parties may stipulate to dismiss an appeal without consent of counsel: *Hump-tulips Driving Co. v. Cross*, 65 Wash. 636, 37 L. R. A., N. S., 226, 118 Pac. 827.

An attorney of record may enter a voluntary dismissal of the action, which is binding upon the client: *Furman v. Bon Marche*, 71 Wash. 238, 128 Pac. 210.

CONSTRUCTION AND OPERATION OF STIPULATIONS: See 4 Remington's Digest, "Stipulations," § 2; *First Nat. Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038; *State ex rel. Great Northern R. Co. v. Superior Court*, 60 Wash. 187, 110 Pac. 808; *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

A stipulation that the date of the "definite location" of the Northern Pacific Railroad Company was in 1884 implies a compliance with all the conditions precedent to a valid definite location, and dispenses with proof (1) that the company located the line, (2) gave notice to the land department, and (3) that the selection was approved: *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.

In a stipulation relating to the Northern Pacific right of way, the use of the word "railway" for "railroad" is immaterial, where it was stipulated that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company: *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.

§ 136.

An action pending in some court in this state is necessary to secure to an attorney a lien under this section: *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 31 L. R. A., N. S., 1215, 110 Pac. 989.

As to liens of attorneys, see notes in 51 Am. St. Rep. 251, 9 Ann. Cas. 625.

In an action to recover for legal services rendered in the defense of an action assailing the title of the defendants, and of their grantee in a warranty deed made by the defendants, in which there was an issue as to whether the defendants had employed the plaintiff to defend the action on behalf of such grantee, it is erroneous and misleading to instruct the jury that a general warranty deed runs with the land and binds the grantor to defend his title or estate, when the defendants were defending their title, as such defense would inure to the benefit of the grantee and they were under no obligation to employ counsel for the grantee:

Kiefer v. Lara, 56 Wash. 43, 104 Pac. 1102.

An attorney's lien on a judgment cannot attach upon the oral announcement of the decision at the conclusion of the trial, but a written judgment must be formally entered under this section: **Cline Piano Co. v. Sherwood**, 57 Wash. 239, 106 Pac. 742.

An attorney prosecuting an action for personal injuries in the courts of British Columbia under the workmen's compensation act, which precludes the attorney from taking any part of the recovery as a fee except such as is awarded by the arbitrator, cannot, after accepting the arbitrator's award, claim any other interest in, or lien upon, the recovery: **Plummer v. Great Northern R. Co.**, 60 Wash. 214, 31 L. R. A., N. S., 1215, 110 Pac. 989.

A settlement of a pending action by the parties will not be set aside because it defeats an attorney's lien for services, where the evidence does not warrant a finding of collusion and fraud on the part of the parties, taking into consideration a counterclaim set up in good faith and the fact that the law favors settlements: **Cline Piano Co. v. Sherwood**, 57 Wash. 239, 106 Pac. 742.

As to settlement of litigation by a client, whereby the lien of his attorney is defeated, see note in 93 Am. St. Rep. 175.

Under this section, giving attorneys a lien for their services upon the judgment "from the time of filing notice of such lien," the claim for lien must be filed prior to assignment of the judgment in order to take precedence over the assignment: **Humptulips Driving Co. v. Cross**, 65 Wash. 636, 37 L. R. A., N. S., 226, 118 Pac. 827.

As to sufficiency of notice by attorney to judgment debtor of former's lien on judgment, see note in 12 Ann. Cas. 343.

§ 139.

The commission of the crimes of barratry or perjury is ground for the disbarment of an attorney: **State ex rel. Mackintosh v. Rossman**, 53 Wash. 1, 17 Ann. Cas. 625, 21 L. R. A., N. S., 821, 101 Pac. 357.

An attorney is guilty of an act of moral turpitude, within this section, authorizing his disbarment, where, acting as a notary public, he at divers times falsely certified, in his jurat and certificate to affidavits to be used in claims for pensions, that the witnesses appeared before him and were sworn and acknowledged the execution of the papers: **In re Hopkins**, 54 Wash. 569, 103 Pac. 805.

§ 140.

A proceeding to disbar an attorney at law, under this and the next section, is in the nature of a civil action, in which a trial

by jury is not required: **State ex rel. Mackintosh v. Rossman**, 53 Wash. 1, 17 Ann. Cas. 625, 21 L. R. A., N. S., 821, 101 Pac. 357.

As to disbarment of attorneys, causes and proceedings therefor, see notes in 95 Am. Dec. 333; 45 Am. St. Rep. 71; 114 Am. St. Rep. 839; 5 Ann. Cas. 990; 15 Am. St. Rep. 419.

As to reinstatement of disbarred attorney, see note in Ann. Cas. 1912A, 813.

§ 144.

A settled construction of statutes respecting practice will not be departed from unless the gravest necessity exists therefor: **Hallidie Co. v. Washington Brick, Lime & Mfg. Co.**, 70 Wash. 80, 126 Pac. 96.

A statute will be upheld so far as it is legal, if the illegal part can be separated from the legal: **Gantenbein v. Pasco**, 71 Wash. 635, 129 Pac. 374.

The motive of the legislature, or the passing of an act "by stealth," cannot be inquired into by the courts in order to affect the validity of the law: **Ettor v. Tacoma**, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

Equitable construction of statute, while tolerated in remedial statutes with great caution, should not be extended to regulations of public policy, and if the language is plain and free from ambiguity, inconvenience in its enforcement can have no weight in its construction: **Walker v. Spokane**, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

An act entitled an act "granting additional power" is not to be construed as granting any additional power where its provisions do not do so: **State ex rel. Schade Brewing Co. v. Superior Court**, 62 Wash. 96, 113 Pac. 576.

HISTORY AND PASSAGE OF ACT.—

The history of the passage of an act may be resorted to in determining the legislative intent in the use of the words "last general election": **State ex rel. Griffin v. Superior Court**, 70 Wash. 545, 127 Pac. 120.

Where an act contains no ambiguity, latent or patent, a mistake in the act as passed and approved by the governor cannot be shown by extrinsic evidence relating to the history of its passage and proposed amendments, agreed to in committee, but not reported through the mistake of a committee clerk: **State ex rel. Aetna Life Ins. Co. v. Schively**, 68 Wash. 503, 123 Pac. 784.

EXECUTIVE CONSTRUCTION.—The construction placed upon a statute by the executive department does not control the courts when it deprives a citizen of valuable rights accorded him by the law: **State ex rel. Pindall v. Ross**, 55 Wash. 242, 104 Pac. 216.

As to effect given by courts to contemporaneous practical construction of unam-

biguous statute, see note in 10 Ann. Cas. 51.

The construction of a statute of doubtful meaning by the highest law officer of the executive department, while not binding on the courts, is entitled to considerable weight: *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901.

A statute providing that the court "may" award damages for a civil contempt in addition to punishment, being remedial in its nature, will be construed to mean "shall," where the aggrieved party asks for and is willing to take the same in such proceeding in lieu of an ordinary action: *State ex rel. Nicomen*

Boom Co. v. North Shore Boom & Driv- ing Co., 55 Wash. 1, 103 Pac. 426.

As to when "may" in a statute is mandatory, see note in 5 L. R. A., N. S., 340.

§ 150.

A notice of application for the appointment of a guardian of an insane defendant, served February 20th, to be heard March 2d, is served not less than ten days before the time of hearing, within the rule that the first day be excluded and the last be included in the computation: *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285.

As to computation of time, see note in 78 Am. St. Rep. 872.

§ 152-1. Adoption of Remington & Ballinger's Code.

The compilation of the Session Laws of the state of Washington, arranged and compiled by Richard A. Ballinger and Arthur Remington, and known as Remington & Ballinger's Annotated Codes and Statutes of Washington, is hereby adopted as an official compilation of existing statutes of the state up to and including the year 1909. [L. '11, p. 8, § 1.]

§ 152-2. Citation and Reference.

It shall be proper for the legislature, in amending or repealing existing statutes, and for the courts in referring to existing statutes, to refer to or cite Remington & Ballinger's Annotated Codes and Statutes of Washington containing such law. [L. '11, p. 8, § 2.]

§ 152-3. Adoption of Pierce Code.

The compilation of the session laws of the state of Washington, arranged and compiled by Frank Pierce and known as "Pierce's Washington Code," is hereby adopted as an official compilation of existing statutes of the state up to and including the year 1911. [L. '13, p. 276, § 1.]

§ 152-4. Citation and Reference.

It shall be proper for the legislature, in amending or repealing existing statutes, and for the courts in referring to existing statutes, to refer to or cite Pierce's Washington Code containing such law. [L. '13, p. 277, § 2.]

§ 153.

A cause of action for damages is stated, and it is error to sustain a demurrer, where the complaint alleged the transfer of property of the value of \$2,700 to trustees for the purpose of sale, \$1,300 of debts to be paid out of the proceeds, and that the trustees fraudulently conspired with another and privately sold the property for \$900, since no necessity for an accounting of the trust appears; or if shown by answer, the case can be tried either in equity or at law, the defendants not being confined to the issues tendered: *Brys v. Pratt*, 55 Wash. 122, 104 Pac. 169.

An action against a building association to recover damages for fraud in the issuance of its contracts, although framed as

sounding in law, is one of equitable cognizance, where its essence was to relieve against a forfeiture of contracts and to recover money paid thereunder, on the ground of fraud in the inception of the contracts and in their performance: *Con- away v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

§ 155.

The legislature has power by a retroactive law to take away the natural right of a municipal corporation to plead the statute of limitations against a moral claim which in good conscience it ought to pay; and the same does not violate the due process clause of the constitution: *State ex rel. McCul- lough v. Seattle*, 60 Wash. 241, 110 Pac. 1008.

The legislature has the power, even after the statute of limitations has run, to take away from a city the right to plead the statute in respect to adverse possession of a city street, as the matter is one of public concern only, and not a property right of the city: *State v. Seattle*, 57 Wash. 602, 27 L. R. A., N. S., 1188, 107 Pac. 827.

As to retrospective operation of statute of limitations, see notes in 111 Am. St. Rep. 455; Ann. Cas. 1912A, 1041.

A contract for annual installments of interest is merged in the judgment thereon, and the statute of limitations running against the judgment bars any recovery for annual interest on the contract or judgment: *Crowder v. Morphy*, 61 Wash. 626, 112 Pac. 742.

As to effect of bar of statute of limitations, see note in 95 Am. St. Rep. 656; as to effect of limitation of action on judgment, see note in 133 Am. St. Rep. 60.

Where a debtor turned over a note in payment of his own debt, at the same time guaranteeing the note, the guaranty is not a promise to pay the debt of another which would be barred when the statute of limitations had run against the note; but it is a promise to pay his own debt, creating a liability during the period of limitations following its written acknowledgment: *Ekre v. Cain*, 66 Wash. 659, 120 Pac. 523.

An attorney who contracted with plaintiff and one C. to perfect the title to certain tide lands for a one-fourth interest therein, the title to be taken in the name of C. as trustee, does not become a cotrustee with C. and C.'s successors, where the lands were sold and defendants failed to account to plaintiff for her part of the proceeds; hence an action against the attorney and C.'s successors, to recover plaintiff's share of the proceeds, is not an action to declare a trust, as far as the attorney is concerned, but as to him is an action at law for damages, to which the statute of limitations applies, where it is not alleged that the attorney received the title or any part of the proceeds which could be impressed with a trust, his codefendant being trustee for both parties: *Hotchkin v. McNaught-Colins Improvement Co.*, 67 Wash. 206, 121 Pac. 455.

WHEN CAUSE ACCRUES.—The statute of limitations applicable to an action on the official bond of a county officer, for various defalcations and misappropriations of funds which were not known to the county during his term of office, does not begin to run as against the county until the expiration of the term of office for which the bond was given: *Skagit County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197.

As to the acts for which sureties on an official bond are liable, see note in 91 Am. St. Rep. 497.

An action for a mandamus to compel an irrigation district to sell bonds to pay a judgment does not arise until the judgment is obtained and the refusal of the district to satisfy the same: *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

Vendors who had given a bond for a deed and had received the full purchase price are not trustees of the legal title for the vendee so as to arrest the running of the statute of limitations, where the vendee never took possession of the property; and any action by heirs of the vendee for relief, upon the grantors' conveyance to third persons, is subject to the statute of limitations, which begins to run when the right accrues, although the heirs allege that they were without notice of their rights: *Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492.

An action for damages by periodic flooding by a dam accrues at the time the injury is done, and not at the time the dam was built: *Brisky v. Leavenworth Logging, Boom & Water Co.*, 68 Wash. 386, 123 Pac. 519.

As to limitation actions for flooding land, see notes in 20 Am. St. Rep. 176; 20 L. R. A., N. S., 894; 25 L. R. A., N. S., 645.

As to operation of statute of limitations where a cause of action for nominal damages ripens into a right to actual damages, see note in 126 Am. St. Rep. 944.

§ 156.

See notes to § 786.

An action for the partition of real property and an accounting brought by children not named in their mother's will (which devised the property to her husband) is barred by the statute of limitations when not commenced until more than ten years after the husband deeded the lands and surrendered possession to the defendants: *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340.

Adverse possession of land for more than ten years under the mistaken belief that the fence inclosing the land was on the true boundary line, with claim of ownership during such period, ripens into title by adverse possession: *Wissinger v. Reed*, 69 Wash. 684, 125 Pac. 1030.

As to adverse possession in case of mistake as to boundaries, see notes in 24 Am. St. Rep. 388; Ann. Cas. 1912A, 450.

Actual possession under an administrator's deed for twenty-seven years is sufficient to bar an action by heirs to quiet title, brought when the youngest heir was thirty-eight years of age, and regardless of the validity of the deed, as the deed,

if void, was color of title: *Miller and Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462.

As to what constitutes color of title, see note in 88 Am. St. Rep. 701; as to the necessity of color of title, see note in 15 L. R. A., N. S., 1178.

PROPERTY SUBJECT TO PRESCRIPTION—PUBLIC PROPERTY: See 4 Remington's Digest, "Adverse Possession," § 3; *State v. Seattle*, 57 Wash. 602, 27 L. R. A., N. S., 1188, 107 Pac. 827.

As to adverse possession of public property, see notes in 76 Am. St. Rep. 479; 87 Am. St. Rep. 775.

ADVERSE CHARACTER OF USE.—Permissive use for twenty years of a private way across plaintiff's land to a county road does not establish an easement, where there was another practical route, plaintiff's predecessors having sold to defendant's predecessors a strip of land for the express purpose of giving access to the county road: *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446.

As to creation of easement by prescription, see note in 10 L. R. A. 484.

As to creation of highway by prescription, see note in 57 Am. St. Rep. 744.

Open, notorious, continuous and adverse use by the public of a strip of land thirty feet wide, generally known and used as a thoroughfare, negatives permissive use, and constitutes the same a street by prescription independently of dedication: *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

To acquire an easement for a private way by prescription, the travel must be over a uniform route, continuous, and adverse to the owner of the land, at a time when he could object; use of uninclosed lands, which were later fenced, leaving gates or bars as a neighborly accommodation, is not sufficient, showing merely a permissive use: *Schulenbarger v. Johnstone*, 64 Wash. 202, 35 L. R. A., N. S., 941, 116 Pac. 843.

The occasional hauling of wood for domestic use from a tract of six hundred and forty acres of land, wholly unoccupied and unimproved, is not such an act of adverse possession as to indicate a claim of title: *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749.

The state is not estopped to assert title to the bed of a navigable lake by the fact that it has permitted improvements thereon by one in possession and stood by while the same was conveyed and taxes were paid for many years: *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278.

As to estoppel of state or municipality to assert title to land, see note in 87 Am. St. Rep. 779.

Title by adverse possession may be acquired of lands inclosed and improved under a mistake as to the true boundary

line of the lot covered in the deed, and successive periods of occupation may be tacked, although the deeds purported to convey only the lot conveyed in the first deed, where there was privity, and the successive occupants were not aware of the mistake and there was nothing on the ground to indicate the same: *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768.

Title by adverse possession of a tract of land for the statutory period is not affected by the fact of an involuntary interruption of possession by the public authorities in laying out a county road across one end of the tract, after which fences were changed, leaving part of the property outside of the inclosure, when their title would have been complete but for such interruption: *Kirchhoffer v. Harris*, 68 Wash. 316, 123 Pac. 455.

The taking out of delinquency tax certificates upon taxes assessed against an unknown owner is not the recognition of a superior title, and will not affect title by adverse possession under claim of right and title for the statutory period: *Silverstone v. Hanley*, 55 Wash. 458, 104 Pac. 767.

ABANDONMENT.—See 4 Remington's Digest, "Adverse Possession," § 20; *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 107 Pac. 187.

Abandonment of an easement is not shown by the fact that the rails of a logging road were taken up and the right of way not used for ten years, where there was no provision that the land should revert by nonuser, the rails were taken up for temporary use pending litigation of the title to the timber lands served by the road, and the financial depressions of 1893 compelled further suspension of operations for several years, it being testified that there was no intention to abandon the road: *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 107 Pac. 187.

Mere nonuser for ten years of a right of way granted for a logging road will not defeat the right, or amount to abandonment of the easement, where no time was stipulated for the use and no provision was made in the grant for restoration of the land on failure to use the same: *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 107 Pac. 187.

As to gain or loss of title by abandonment, see note in 135 Am. St. Rep. 889.

As to effect of nonuser of an easement, see notes in 1 L. R. A. 214; 5 L. R. A. 652; 18 L. R. A. 535.

CLAIM OR COLOR OF TITLE.—Occupancy of a twelve-dollar shack for nearly twenty years on a railroad company's premises by an old employee, who had no deed and had paid no taxes, appears to have been merely permissive as a squatter; and in ejectment it is not an

abuse of discretion to refuse to vacate a default judgment on such a showing: *Northern Pac. R. Co. v. Devine*, 53 Wash. 241, 101 Pac. 841.

Title by adverse possession is shown where it appears that the purchaser inclosed the land by a fence upon the supposed line in 1895, at once starting a clearing, set out an orchard in 1896 and cared for the trees ever since, and maintained the fence and used the land for ten years continuously, at all times claiming to own it: *Davies v. Wickstrom*, 56 Wash. 154, 134 Am. St. Rep. 1100, 105 Pac. 454.

The purchaser of lots, who by mistake takes possession of the wrong property, incloses the same with a fence and erects a house thereon and otherwise improves the property, and maintains possession for over ten years under a claim of right, based under the mistaken idea that he has the correct property, acquires title by adverse possession, although he did not intend to occupy any other land than that described in his deed: *McCormick v. Sorenson*, 58 Wash. 107, 137 Am. St. Rep. 1047, 107 Pac. 1055.

That frame buildings extended three and one-half inches over onto the adjoining lot of another does not show an adverse claim to the land occupied, where it appears that the exact location of the line was not known when the lot was first acquired, and on replacing part of the buildings along the line, a survey was made and a brick building was erected on that part of the true line, and the agent of the owner agreed to remove the other buildings: *Milbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053.

A tax title purchaser who has paid all the taxes since foreclosure may maintain an action to quiet title within ten years from the date of foreclosure: *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927.

Whether the inclosing of land of another under a mistake as to the true boundary line constitutes adverse possession is a question of fact, depending upon intent and disseizin of the owner at the time: *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073.

The evidence sufficiently shows an adverse holding constituting title after the lapse of ten years, where the purchaser of lots took possession and fenced the land according to the lines established on the ground, and built a house thereon and occupied or rented it and paid taxes for fourteen years, believing that he had purchased the identical land, and without any notice of a mistake in the survey in locating the lines, which was not discovered until after the period of limitation had run: *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073.

After a title ripens by adverse possession, evidence to sustain an estoppel

must be clear and convincing; and it is not enough that one in adverse possession for fourteen years moved his house across the line of a new survey, as he claimed, to get it on higher ground, where he still claimed the title in good faith, attempted to pay taxes upon the whole tract, and instituted a suit to quiet title and to restrain the erection of a building shortly after construction was commenced: *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073.

The evidence is sufficient to establish title by adverse possession where grantors, before selling part of their lands, had a survey made to mark the boundaries which by mistake was so run as to include part of the lands sold, erected fences on the line marked by the survey, made valuable improvements to the line, maintaining open and notorious possession for twenty-five years of portions of the land included in their deed, under the mistaken belief that the survey marked the true line; and it is an immaterial circumstance that, for a time, they looked after the lands not included in their inclosure, and acted as agents of the grantees as to the lands not claimed by them: *Kirchhoffer v. Harris*, 68 Wash. 316, 123 Pac. 455.

Testimony of a witness that one S. was in possession of real estate in 1900, but that witness did not know of his own knowledge anything about the possession prior to 1902, is insufficient to show actual, open, and continuous possession under a claim of right for ten years prior to April 22, 1900; as the same does not show possession for the required time, and is not reasonably direct and certain as to all the requisite elements: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

§ 157.

Where a lease for a term of years, with right of re-entry for nonpayment of ground rents, stipulated that the lessors should at the end of the term, pay two-thirds of the value of a building erected by the lessees, and the lease was terminated before the expiration of the term by the nonpayment of rent and re-entry, an action by lessees for compensation for the building under the terms of the lease is barred by the lapse of six years after the re-entry: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

Where the rights of the parties are fixed by a written contract requiring a grantee to reconvey a one-half interest to the grantor on the payment of specified sums, the grantor's right of action on the contract accrues when the grantee gives a written notice abrogating the contract for the default of the grantor, and is barred six years thereafter: *Gasaway v. Ballin*, 57 Wash. 355, 106 Pac. 905.

An action for rent is within this section, subdivision 3, providing a limita-

tion of six years for rents and profits for the use and occupation of real estate: *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

§ 159.

See notes to § 165.

An action for alienation of affections of a husband is not commenced within three years from the time of the accrual of the action, and is therefore barred, where the plaintiff separated from her husband more than three years before the action was commenced, and anything said or done by the defendants to alienate the husband's affections occurred prior to that time: *Mullins v. Mullins*, 66 Wash. 351, 119 Pac. 830.

As to limitation of action by wife for alienation of husband's affection, see note in Ann. Cas. 1912C, 1183.

FRAUD.—Subdivision 4 of this section applies to actions on the official bond of a county officer for embezzlement of funds, under a strict construction of said section: *Skagit County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197.

An action to set aside a fraudulent judgment of foreclosure is not deemed to have accrued until the discovery of the facts constituting the fraud; and the mortgagor, although extremely dilatory and in default for years, is not barred where he commenced an action to vacate the decree within a few months after discovery of the judgment: *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7.

In an action for relief on the ground of fraud, it is incumbent on the plaintiffs to show that the fraud was not discovered within three years next prior to the commencement of the action: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

An action by a trustee in bankruptcy to recover the sum paid to the bankrupt's president on a sale of its capital stock, thereby diminishing the capital stock of the corporation, is one for relief upon the ground of fraud, and is not barred until the lapse of three years after the cause of action accrues, as provided in this section, subdivision 4, in view of sections 3697 and 3704-3706, making it unlawful to make a dividend or reduce the capital stock of a corporation except in the manner provided: *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539.

Notice of entry of a fraudulent judgment is not imputed to a mortgagor who was in default for several years, especially where he met the mortgagee after the foreclosure, which was not disclosed, although the mortgage indebtedness was the subject of conversation between them: *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7.

As to operation of statute of limitations in case of concealed fraud, see notes in 6

L. R. A. 799; 7 L. R. A. 826; 8 L. R. A. 687; 25 L. R. A. 566.

§ 162.

The proviso to this section, that the act shall not apply to certain actions if commenced within one year "after the passage of the act," has reference to the time when the act received the final sanction necessary to constitute it a law, and not to the time when the law went into effect, ninety days after the adjournment of the legislature, since there is no reason to give any technical or other than the ordinary meaning to the words: *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780.

An action to quiet title to land sold for taxes, attacking the validity of the tax foreclosure, is within this section: *Anderson v. Spokane, Portland & Seattle R. Co.*, 57 Wash. 439, 107 Pac. 183.

A tax deed based upon a void judgment is within the protection of the statute of limitations requiring actions to cancel a tax deed to be commenced within three years after the date of the deed: *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850.

An action to cancel a tax deed, commenced within the time limited by this section, is not barred by laches where there was nothing in the record upon which to predicate laches: *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122.

The three years statute of limitations for actions to set aside a tax deed does not apply as to one acquiring the tax title pursuant to a conspiracy with a mortgagee of the premises, for the purpose of preventing a redemption from the mortgage, since such conspirator would hold the lands in trust for the mortgagor, and as security for the money paid for taxes: *Maher v. Patter*, 60 Wash. 443, 111 Pac. 453.

An action to set aside a tax judgment title on the ground that the tax foreclosure judgment was fraudulently obtained and entered without jurisdiction, and that plaintiff did not know of the fraud until shortly before the commencement of the action, is barred, if it is not commenced within three years from the date of the deed, by this section: *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522.

Where prior to the passage of this section, the shortest period of limitation for the commencement of an action to set aside a tax deed and recover lands sold for taxes was seven years, actions on all deeds issued prior to the passage of the act are barred unless commenced within one year after passage of the act: *Hoko River Boom Co. v. Fairservice*, 69 Wash. 357, 125 Pac. 145.

An action to cancel a tax deed is barred within three years by this section, although the tax judgment on which it was based was void for want of jurisdiction:

Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082; Fish v. Fear, 64 Wash. 414, 116 Pac. 1083.

A nonresident who failed to pay taxes for six years is not estopped by laches from bringing action to set aside a void tax foreclosure, where there were no material changes in the value of the property, and she did not know until about a year prior to action, of the attempted foreclosure or possession by the defendant: Hembree v. McFarland, 55 Wash. 605, 104 Pac. 837.

§ 165.

See notes to § 159.

An action by tenants of a building for damages resulting from tunneling under the property is not an action of trespass, within the three year statute of limitations, section 159, where the damages were largely consequential for injury to business and loss of profits, and by reason of cutting off access, and must be commenced within two years within the provisions of this section, for actions not otherwise provided for: Welch v. Seattle & Montana R. Co., 56 Wash. 97, 26 L. R. A., N. S., 1047, 105 Pac. 166.

§ 166.

An account is a mutual, open account against which the statute of limitations does not run, where at no time six months intervened between any two payments; and it is immaterial that the books showing the charges were kept by one of the parties, where they were not his books, but were kept as general manager of a corporation, and the officers had access to the same: Blom v. Blom Codfish Co., 71 Wash. 41, 127 Pac. 596.

§ 167.

An action is barred by the statute of limitations, where the complaint was duly served but was not filed, so as to commence the action within the time limited, under this section, providing that the action is not commenced so as to toll the statute, until the complaint is filed: Petree v. Washington Water Power Co., 64 Wash. 636, 117 Pac. 475.

Under this section, and section 220, where service of a summons is made within twenty-five days after the complaint is filed, the action is deemed commenced from the time of the filing of the complaint, and this applies to actions by private parties: Blinn v. Grindle, 71 Wash. 120, 127 Pac. 840.

§ 168.

The statute of limitations is not tolled by absence of the debtor from the state, where his business kept him out of the state only part of the time, and at all times he

maintained a home in this state at which his wife and children resided, and where service of process could have been made under section 226, regardless of any distinction between domicile and residence: Crowder v. Morphy, 61 Wash. 626, 112 Pac. 742.

As to exemption in statute of limitation as to time defendant is absent from state as applicable to nonresidence at time of accrual of action, see notes in Ann. Cas. 1912D, 467; 34 L. R. A., N. S., 436.

The rule that statutes of limitations do not run in favor of a foreign corporation, because it is "out of the state" and so within the exception of this section, has no application to the contract of limitation in an indemnity bond which disclosed the foreign sovereignty of the company and names no exceptions: Ilse v. Aetna Indemnity Co., 69 Wash. 484, 125 Pac. 780.

§ 169.

Where a minor, before majority, gave a deed of his interest in an estate, and, after becoming of age, failed to promptly repudiate the deed, and only commenced action within three days of the year limited therefor to set aside the probate proceedings, which had been a matter of record for fifteen years, he is guilty of laches barring a recovery, regardless of the statute of limitations: Kline v. Galland, 53 Wash. 504, 102 Pac. 440.

As to the time in which an infant must disaffirm his deed or contract in order to escape the imputation of laches, see note in 18 Am. St. Rep. 675.

There is not sufficient evidence of insanity or incapability of understanding one's legal right so as to toll the statute of limitations, respecting the institution of a will contest, where it merely appears that a man, seventy years of age, retired from active business after meeting with an accident affecting one of his legs, which, with his corpulence, prevented his walking or getting around, and that he believed in spiritualism, and manifested deeply-felt religion by Bible reading, prayer, and singing; while other evidence showed that he retained control of his affairs and had no infirmity of mind: In re Siebs' Estate, 70 Wash. 374, 126 Pac. 912.

As to the operation of the statute of limitations against insane persons, see note in 36 Am. Dec. 71.

As to the interruption of the statute of limitations in favor of an insane plaintiff, see note in Ann. Cas. 1912C, 1011.

§ 173.

Where a judgment upon a bail bond in favor of a county was collected on execution, and afterward reversed on appeal and

the action dismissed, limitations upon the right of action against the county to recover the money collected do not commence to run until the reversal of the judgment; since until that time the former judgment could be pleaded in bar and no action could have been maintained: *Green v. Spokane County*, 55 Wash. 308, 25 L. R. A., N. S., 31, 104 Pac. 510.

This section does not apply where no cause of action was stated or existed at the time the first action was commenced: *Ryno v. Snider*, 58 Wash. 457, 109 Pac. 55.

§ 176.

A written promise to pay the principal of a promissory note for \$1,000, held and owned by O. L. T. of Chapman, Kansas, as soon as the promisor is able to spare the money or a reasonable time, sufficiently identifies a note for \$1,006.50 passed between the parties, and is sufficiently explicit to remove the bar of the statute of limitations, under Ballinger's Code, section 4816, relating to a new promise in writing signed by the party to be charged: *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987.

§ 178.

Under this section, a right of action arising in another state between nonresidents of this state is not barred, when it is not barred by the statutes of the state where it arose: *McElroy v. Gates*, 64 Wash. 249, 116 Pac. 845.

As to law governing statute of limitations, see note in 6 L. R. A., N. S., 658.

Revised Statute of Missouri of 1909, section 1897, providing that if, when an action accrues against a resident of such state, he be absent therefrom, such action may be commenced within the time limited therefor after the return of such person to the state, only applies to persons who are residents of the state of Missouri when the action accrues: *McElroy v. Gates*, 64 Wash. 249, 116 Pac. 845.

Where a resident of Missouri made a note, and left the state before its maturity, and claims that the note is now outlawed by the laws of such state because he was not a resident of the state at the time it accrued, it is incumbent upon him to prove his nonresidence at such time; and it is not sufficient to show that when the note matured he was roving about outside of the state with no fixed abode, the presumption being that he was temporarily absent and a resident of Missouri until he established a residence elsewhere: *McElroy v. Gates*, 64 Wash. 249, 116 Pac. 845.

§ 179.

A parent may maintain an action for malpractice in treating his minor son, whereby

he incurred expense for treatment and suffered loss of services: *Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045.

A taxpayer cannot complain in equity of the misappropriation of public funds by state officers, as the attorney general is the proper person to institute such suits: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

One having a deposit in a bank as agent may sue in his own name to recover the same, as he is a trustee of an express trust, within sections 179, 180: *Goodfellow v. First National Bank*, 71 Wash. 554, 129 Pac. 90.

§ 180.

Under this section, authorizing the trustee of an express trust to sue without joining the cestui que trust, the guardian of infants, to whom a deed was made as trustee without limitations, may be sued as the holder of the legal title, without joining the infants, in an action to foreclose a mechanic's lien: *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118.

§ 181.

A married woman living separate and apart from her husband may maintain an action in her own name for personal injuries sustained by her, under this section, subdivision 3: *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

§ 183.

See notes to § 194.

The sudden unexplained disappearance and absence of a man for seven years raises a presumption of death, the time thereof being a question for the jury; and in an action for insurance, where it appears that the man was under middle age, with a wife and two small children, and was strongly attached to his family, respected in the community, and in good circumstances, the jury would be justified in finding that death was the cause of his disappearance: *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 26 L. R. A., N. S., 293, 101 Pac. 481.

As to presumption of death from absence, see notes in 92 Am. Dec. 704; 104 Am. St. Rep. 198.

The death of a person is sufficiently established by evidence that it was publicly announced in the daily papers of the city, and an undertaker testified that he had embalmed and shipped a body coming into his custody as that of the deceased: *Washington Safe Deposit & Trust Co. v. Lietzow*, 59 Wash. 281, 109 Pac. 1021.

Under the acts of 1909, sections 183, 194, amending former laws which gave a right of action for wrongful death, there can be no recovery by parents for the death of a minor son, in case there is no dependence, absolute or partial, although

they were receiving his wages, and under the construction of former laws the parents might have maintained an action for loss of services: *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833.

Under this section, parents of a boy over nineteen years of age are not "dependent" upon him for support, although he gave them all his wages, three dollars a day, where it appears that they had accumulated considerable property, the father, forty-six years of age, had been engaged in a general teaming business with eight horses, which he sold out, and worked at days' labor, and that he was in good health and able to work, although he testified that he was out of a job and could not do physical work as well as he had formerly done: *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833.

The promise of a son to remain with and support his parents does not create a liability for wrongful death, under the statute making dependence of the parents for support a condition precedent to the right of action: *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833.

As to who is "dependent" within the statute giving right of action for death by wrongful act to persons dependent on deceased, see notes in *Ann. Cas.* 1912B, 733.

As to measure of damages recoverable by parent for death of child, see note in *Ann. Cas.* 1912C, 58.

Under this section, a minor son is entitled to recover for the death of his father such pecuniary loss as the evidence showed he would sustain after his majority, especially in view of the amendment of 1909, adding to the beneficiaries of the statute, parents, sisters and "minor" brothers dependent upon the deceased for support; and the evidence justifies an instruction to that effect where the son was normally defective and the father was not an immoral or improvident man or in bad health: *Rochester v. Seattle, Renton & Southern R. Co.*, 67 Wash. 545, 39 L. R. A., N. S., 1156, 122 Pac. 23.

Under this section and section 967, providing that all other causes of action by one person against another survive to the personal representatives of the former against the personal representatives of the latter, a cause of action for wrongful death survives only against the wrongdoer and abates upon his death: *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687.

Under Ballinger's Code, section 4828, providing that the heirs or personal representatives may maintain an action for the death of persons caused by the wrongful act or neglect of another, separate actions cannot be maintained by a widow and a child of the deceased: *Riggs v.*

Northern Pac. R. Co., 60 Wash. 292, 111 Pac. 162.

In an action for the wrongful death of a father, leaving a minor daughter, an instruction as to the measure of damages accruing to the daughter until she becomes of age is not erroneous where the language carries with it the implied provision that she shall live until that time: *Neal v. Phoenix Lumber Co.*, 64 Wash. 523, 117 Pac. 267.

In an action for death caused by contact with an overcharged secondary electric circuit supplying several establishments, it is competent, on the question of the dangerous condition of the circuit and of the city's negligence, to show that another man in one of the other establishments on the same circuit was found dead from an electric shock, a few moments before; and the evidence cannot be excluded because of its tendency to prejudice the jury: *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629.

WEIGHT AND SUFFICIENCY OF EVIDENCE: See 4 *Remington's Digest*, "Death," §§ 20, 20-1; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629.

In an action for wrongful death, there is sufficient evidence of marriage of the deceased and dependency, where his brother testified that he attended the wedding in a foreign country ten years before, that the ceremony was performed by a priest according to the customs of the country, and that the parties lived together until the deceased came to this country and that three children were born to them: *Koloff v. Chicago Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

Where the immediate cause of a death was pleurisy with effusion, following an accident, the proximate cause of the death was the cause that produced the pleurisy with effusion: *Thompson v. Seattle, Renton & Southern R. Co.*, 71 Wash. 436, 128 Pac. 1070.

As to the doctrine of proximate cause, see note in 36 *Am. St. Rep.* 807.

Rem. & Bal Code, section 183, giving the heirs or personal representatives of one killed a right of action for wrongful death, authorizes but one suit, to be prosecuted in a single proceeding; hence separate actions by different heirs are properly consolidated: *Benson v. English Lumber Co.*, 71 Wash. 616, 129 Pac. 403.

In an action by an executor for wrongful death, brought for the benefit of the widow and children of the deceased, it must be shown that the widow has sanctioned and authorized the suit: *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

The consent of a widow to an action by an executor for the wrongful death of a husband cannot be shown by a letter

written by the sister at her request, she being unable to write, asking her brother in law to send her money for the support of herself and children: *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

Such consent cannot be shown by a certificate of the mayor and secretary of a foreign city, which was not such as to constitute evidence at common law or under any state or federal statute: *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

Such consent cannot be shown by a paper purporting to be signed by the widow, her signature being authenticated only by an acknowledgment in sufficient form before the mayor of a foreign city using a seal, since proof of the execution should have been made by testimony or deposition: *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

DAMAGES, EXCESSIVENESS: See 4 Remington's Digest, "Death," § 29; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 42 L. R. A., N. S., 179, 108 Pac. 593; *Tecker v. Seattle, Renton etc. R. Co.*, 60 Wash. 570, 111 Pac. 791; *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231.

A judgment of \$13,500 for the death of a millwright, thirty-six years of age, in good health, earning about \$1,400 a year, leaving a widow twenty-six years of age and a daughter seven years of age, is not excessive: *Neal v. Phoenix Lumber Co.*, 64 Wash. 523, 117 Pac. 267.

As to damages recoverable for wrongful death, see notes in 12 Am. St. Rep. 375; 70 Am. St. Rep. 669.

TRIAL JUDGMENT AND REVIEW.—In an action for wrongful death from electric shock caused by a defective ground in a secondary wire of a city lighting system, it is not prejudicial error to instruct the jury that every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science, taken in connection with other proper instructions on the subject: *Abrams v. Seattle*, 60 Wash. 356, 140 Am. St. Rep. 916, 111 Pac. 168.

As to duty and liability of corporations maintaining electric wires, see note in 100 Am. St. Rep. 515.

The negligence of the city is for the jury, where a prima facie case was made by the fact that its electric lighting system electrocuted a private consumer while turning on a light in his residence, and there was evidence of a defective ground of the secondary wire, which became crossed with a primary wire, that such condition had existed several hours, without giving notice of its condition, and that the system was not in proper

order or not supplied with modern appliances: *Abrams v. Seattle*, 60 Wash. 356, 140 Am. St. Rep. 916, 111 Pac. 168.

As to liability of city for negligence in operating an electric light plant, see note in Ann. Cas. 1912B, 817.

In an action by a widow for the death of her husband, error cannot be predicated upon the overruling of a general demurrer for want of sufficient facts, on the theory that it did not appear that she was the sole party in interest under this section, authorizing an action by the widow and children of the deceased; inasmuch as, under sections 259, 261, the objection to defect of parties must be by special demurrer or answer: *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072.

§ 186.

Previous chaste character is not a condition precedent to a civil suit for seduction: *Murrilla v. Guis*, 57 Wash. 564, 107 Pac. 378.

As to previous chastity as element of criminal seduction, see note in 19 Ann. Cas. 444.

Corroboration of the plaintiff's testimony is not necessary in a civil action for seduction: *Murrilla v. Guis*, 57 Wash. 564, 107 Pac. 378.

As to necessity of corroboration in criminal action for seduction, see note in 1 Ann. Cas. 869.

There is corroboration of plaintiff's testimony that she was seduced by the defendant, the proprietor of a dance-house in which she worked, where it was shown that he paid unusual attention to her and had opportunities, that he purchased drinks for her at different times, was with her in a bedroom and had drinks with her there, and that she made complaints at about the time, and there was trouble between them: *Murrilla v. Guis*, 57 Wash. 564, 107 Pac. 378.

As to what is seduction and actions therefor, see notes in 44 Am. Dec. 162; 8 Am. St. Rep. 870; 76 Am. St. Rep. 659.

§ 187.

The court should, at any stage of the proceedings, appoint a guardian ad litem for infant parties, whenever their minority is made to appear: *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108.

§ 189.

In an action to restrain a sheriff and creditor from making an execution sale of property, the sheriff is the real and not a nominal party in the trespass, and personally liable for the costs of suit: *Bender v. Ragan*, 53 Wash. 521, 102 Pac. 427.

§ 191.

The right to relief against the forfeiture of building association contracts and to re-

cover money paid thereunder on the ground of fraud in their inception and performance is assignable, under this action, since a chose in action is a right of action ex contractu, or for tort connected with a contract, which includes fraud by which money or property was obtained: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

The assignee of claims or demands in which the assignor still retains an interest may maintain an action thereon in his own name, under this section: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

The rights of the vendor under an option contract for the purchase of land may be assigned, as the principle of personal confidence is not involved, where the vendee will receive a deed impressed with the agreed upon covenants of his vendor: *Big Bend Land Co. v. Hutchings*, 71 Wash. 345, 128 Pac. 652.

A cause of action for money procured by fraud and deceit in the sale of land, rescinded by the purchaser on discovery of the fraud, survives and is assignable: *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289.

In an action upon assigned claims for money procured by fraud and deceit, the assignors are not necessary parties plaintiff as the right of action may be enforced by the assignee: *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289.

§ 192.

Under this section, a contractor and the surety on his bond may be joined as parties defendant in an action on the bond: *Spo-kane v. Costello*, 57 Wash. 183, 106 Pac. 764.

§ 193.

A right of action for damages caused by a fire negligently set out survives to the personal representative, and is therefore assignable: *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656.

The obligations of a building contract which provides that it shall bind the parties, their heirs, and personal representatives, survives on the death of the contractor and binds his administrator: *Macdonald v. O'Shea*, 58 Wash. 169, Ann. Cas. 1912A, 417, 108 Pac. 436.

The death of an officer of a corporation pending suit does not abate the action or affect the duty of the corporation to supply agents necessary to perform its corporate duties: *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

§ 194.

See notes to § 183.

This section requires a substantial degree of dependency arising from necessitous

want, and a recognition of the necessity on the part of the child; and the evidence is insufficient where it shows only occasional contributions in the nature of gifts to parents who supported themselves: *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 Pac. 780.

Under this section, upon the death of a plaintiff, suing for personal injuries from which he afterward died, his wife and minor children are properly substituted as parties plaintiff, to recover the damages which the plaintiff would have been entitled to had he lived: *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795.

This section was not restricted to mean that no action commenced for wrongful death shall abate, by reason of the enactment at the same session of section 183, as originally enacted, giving a widow and children an independent right of action for the wrongful death of the husband and father; but these sections are independent of each other: *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795.

This section is not confined to injuries to male persons, in view of section 144, requiring a liberal construction of the code, and section 148, providing that words importing the masculine gender may be extended to females also; and in view of other sections requiring such extension of the masculine pronoun: *Thompson v. Seattle, Renton & Southern R. Co.*, 71 Wash. 436, 128 Pac. 1070.

Such section is not to be confined to males, as the person upon whom the duty of support devolves: *Thompson v. Seattle, Renton & Southern R. Co.*, 71 Wash. 436, 128 Pac. 1070.

§ 196.

See notes to § 273.

The right of the court to order necessary parties to be brought in is inherent, and is conferred by Ballinger's Code, section 4840: *In re Clerf*, 55 Wash. 465, 104 Pac. 622.

In an action for trespass by the cutting of timber, it is not error to allow a trial amendment to the complaint, bringing in as plaintiffs the plaintiff's father and mother, after the testimony showed that the legal title to the land was in the son and that the parents had some legal or equitable interest therein, the issues not being changed and the defendants not claiming any surprise: *Townsend v. Three Lakes Lumber Co.*, 67 Wash. 654, 122 Pac. 29.

§ 202.

Under this section, a complaint in intervention is too late if not filed until after judgment: *Seattle & Northern R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27.

As to the law of intervention, see note in 123 Am. St. Rep. 280.

Application for leave to intervene being made *ex parte*, the refusal of the court to strike a complaint in intervention, filed without leave, is equivalent to an order permitting the filing thereof: *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

In an action by a councilman to enjoin the city clerk from certifying to an elector's petition for his recall, a taxpayer has no interest entitling him to intervene under this section, it not being alleged that the clerk would not defend the action: *Hilzinger v. Gilman*, 56 Wash. 228, 21 Ann. Cas. 305, 105 Pac. 471.

§ 204.

See notes to § 989.

An action under Rem. & Bal. Code, section 8805, for the recovery of reasonable rent from a tenant by sufferance, is not an action affecting the title to real property, within this section, laying the venue in the county where the same is situated, although the answer sets up title in the defendants and brings the title incidentally in issue: *Sheppard v. Coeur d'Alene Lum. Co.*, 62 Wash. 12, Ann. Cas. 1912C, 909, 112 Pac. 932.

As to venue of action to recover rent, see note in Ann. Cas. 1912C, 914.

An action to reform a deed is transitory, the courts of this state having jurisdiction over the person of the defendant, although the deed was of land in another state: *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054.

§ 206.

Under the statutes authorizing a corporation to be sued in any county where it transacts or transacted business at the time the cause arose, it will be presumed that the corporation did business in a county where it was sued, if there is nothing to the contrary in the record; and a default judgment may be taken against a corporation on a bond executed in the county in which the suit was brought, as that would be the transaction of business in that county, within the meaning of the statute: *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984.

An allegation in a complaint that the defendant is a domestic corporation "doing business" in the county of the venue, admitted by the answer, is sufficient to confer jurisdiction upon the court of that county, although the president was served in another county, and Ballinger's Code, section 4854, requires actions against a corporation to be commenced in any county where it "has an office for the transaction of business," or where any person resides upon whom service could be made: *Collins v. Hazel Lumber Co.*, 54 Wash. 524, 103 Pac. 798.

This section providing that a corporation may be sued in a county wherein it has an office for the transaction of business, or an agent upon whom service may be made, does not require the fact to be affirmatively alleged, nor make a complaint demurrable for want of jurisdiction, where the fact does not appear on its face, since jurisdiction will in such case be presumed: *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

Where a foreign corporation by special appearance tendered a plea to the jurisdiction raising an issue of fact as to whether it was doing business in this state, the appearance was sufficiently general to give the court jurisdiction to determine the issue of fact: *Lively v. Husebye*, 60 Wash. 47, 110 Pac. 673.

§ 207.

See notes to §§ 208, 216.

An action to establish and enforce a trust in real and personal property is transitory, as the decree acts in personam, and the venue is properly changed to the county of defendants' residence: *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 133 Am. St. Rep. 1030, 104 Pac. 607.

Upon application for a change of venue on the ground that the action is not commenced in the county of the defendants' residence, under this section, the plaintiff may controvert the defendants' allegations as to their residence: *Critler v. Jacobson & Lindstrom*, 66 Wash. 322, 119 Pac. 819.

As to change of venue, see notes in 74 Am. Dec. 241; 11 L. B. A. 75.

Upon default by a nonresident defendant in the main action, a garnishee defendant is entitled to a change of venue to the county of his residence for a trial of the issue in the garnishment: *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*, 68 Wash. 321, 121 Pac. 460.

§ 208.

Under this section, an affidavit of merits, in the technical sense, is not necessary upon a demand for a change of venue by a garnishee defendant to the county of his residence, when construed with reference to sections 207 or 209, authorizing a change of venue when it appears by affidavit that the county designated in the complaint is not the proper county, or when necessary to secure a fair trial, or for the convenience of witnesses: *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*, 67 Wash. 321, 121 Pac. 460.

§ 209.

See notes to §§ 208, 216.

Upon a strong *prima facie* showing of local prejudice for a change of venue, the state should make a counter showing: *State v. George*, 58 Wash. 681, 109 Pac. 114.

§ 209-1. Prejudice of Judge—Change of Venue.

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court. [L. '11, p. 617, § 1.]

The fact that a judge on a former trial had decided issues in favor of one party and had been active in promoting a settlement between the parties, does not show bias or prejudice entitling a party to a change of venue on the second trial: *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856.

An affidavit of prejudice, under this section does not deprive the judge of jurisdiction until it is formally called to his notice, under the practice of bringing pleadings to the attention of the court by notice to the opposite party and notation thereof on the clerk's docket: *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265.

A judge will not be held to have arbitrarily held jurisdiction of a cause after an affidavit of prejudice is filed, when there is a disputed question of fact as to his notice thereof, and the clerk's record shows no notice: *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265.

On filing an affidavit of prejudice, under this section, the trial judge has jurisdiction to maintain the status quo by continuing pending hearings, or setting the date for future hearings; as the statute should not be so construed that it will operate to defeat or delay the progress of a case: *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265.

This section, under a reasonable interpretation, requires a timely application that will not interfere with the administration of justice; and the application is too late where the party submits himself

to the jurisdiction of the court, and first sought a continuance of the trial only for the convenience of counsel: *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

A motion for a change of venue upon an affidavit of prejudice of the judge, under this section, is timely, where the accused was not represented by counsel at the time of arraignment and plea when the cause was set for trial, and counsel made the motion at the time of their first appearance, shortly after learning that the trial had been set: *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830.

This section, requiring a change of venue on the filing of an affidavit of prejudice of the trial judge, is imperative, and with the transfer the court acquires full jurisdiction to determine all questions as to where the case shall be tried: *State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 926.

This section, authorizing a change of venue on account of the bias of the judge, applies to a proceeding to modify a decree of divorce respecting the custody of a child: *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594.

An application for change of venue on account of the bias of the judge, made in a proceeding to modify a decree of divorce respecting the custody of a child, is in time if made at the first appearance of the respondent in such proceeding: *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594.

§ 209-2. Affidavit of Prejudice.

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, further, that no party or attorney shall be permitted to make more than one application in any action or proceeding under this act. [L. '11, p. 617, § 2.]

An application to transfer a cause to another judge upon an affidavit of preju-

dice, divests the first judge of jurisdiction to try the case on the merits, if the appli-

cation is timely made: *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688.

An affidavit of prejudice stating that affiant "believes" the judge is prejudiced instead of stating that he "is prejudiced," as required by statute, is sufficient where the statute gives a change of judges where the party or his attorney "cannot, or believes that he cannot, have a fair and impartial trial": *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688.

§ 216.

An agreement in a note that the venue of any action thereon shall be in a particular county is not void as against public policy, in view of this section, permitting parties to stipulate that the action may be tried in any county in the state, and sections 207-209, whereby the court is given jurisdiction regardless of where the action is commenced, and whereby the right to a change to the proper county is waived if not raised at the proper time: *State ex rel. Schwabacher Bros. & Co. v. Superior Court*, 61 Wash. 681, Ann. Cas. 1912C, 814, 112 Pac. 927.

§ 220.

The commencement of an action requires both the filing of a complaint and commencement of service of summons within ninety days, under this section: *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049.

The loss of tentative jurisdiction by failure to serve a summons within ninety days after the filing of a complaint does not prevent the commencement of a new action by subsequently serving the same summons and complaint: *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049.

§ 225.

A wholesale grocery business conducted by a private corporation on lands leased from a railroad company is not a public use, under our eminent domain statutes making the question of public use a judicial question: *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A., N. S., 522, 117 Pac. 864.

As to what uses do not warrant the exercise of the power of eminent domain, see notes in 102 Am. St. Rep. 809; Ann. Cas. 1912D, 1002.

§ 226.

See notes to § 168.

The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service of process upon him, under this section, subdivision 4, authorizing service upon any agent, where he derived no actual authority from the defendant, which had no interest in his office, and his reports

were made to, and his salary was paid by, other companies: *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650.

Under this section, providing for a substituted service upon defendant "at the house of his usual abode," service upon a clerk at defendant's place of business is insufficient: *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045.

As to constitutionality of substituted service by leaving summons at defendant's residence or usual abode, see note in Ann. Cas. 1913A, 1188.

Under the practice in this state of commencing actions by the service of a summons issued by the plaintiff or his attorney, one such notice does not exhaust the power to issue another, and service of a summons with an amended complaint confers jurisdiction, although defendant was not served with the first notice: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

In an action against a corporation in which there appears to have been service upon the vice-president and a trustee, and the judgment recites due service on the defendant, such officers may have been the "other head of the company" or "managing agent thereof," within this section, subdivision 8, authorizing the service on the president or other head, or secretary, cashier, or managing agent thereof: *Silvain v. Benson*, 68 Wash. 236, 123 Pac. 457.

The routing, by a soliciting agent, of freight and passenger business over the line of a foreign railway does not make him an agent of the company upon whom service of process may be made; and when contracts are made therefor as the contracts of other companies, which arranged the division of the transportation, the transaction does not amount to "doing business in this state" by the foreign connecting lines: *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650.

Under the statute authorizing actions against a foreign corporation doing business in this state by serving of summons on any agent within the state, a domestic corporation, appointed the agent at L. of a foreign corporation under a contract to sell its machinery for the season of 1909, at the prices and on the terms fixed by the principal, and account for the proceeds, is an agent upon whom service of summons may be made: *Womach v. Case Threshing Mach. Co.*, 62 Wash. 661, 114 Pac. 509.

As to jurisdiction over foreign corporations, see note in 85 Am. St. Rep. 905.

As to who is managing agent of a foreign corporation for purposes of service of process, see note in 4 L. R. A., N. S., 460.

§ 228.

A valid personal judgment cannot be entered upon a service by publication: *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

Under this section, in an action of attachment brought against a foreign corporation, constructive service by publication and mailing of the summons to the corporation, is not sufficient to confer any jurisdiction over the attached property belonging to a foreign copartnership of the same name and place, there being nothing in the record to show the names of any of the copartners, in view of Rem. & Bal. Code, sections 8366, 8369, contemplating that actions against partnerships shall be prosecuted by and against the general partners only, and the provision of this section requiring that service by mailing be "directed to the defendant," which must be strictly followed: *Yarbrough v. Pugh*, 63 Wash. 140, 33 L. R. A., N. S., 351, 114 Pac. 918.

A service by publication without mailing copies to the defendant does not confer jurisdiction unless it is stated in the affidavit for publication that defendant's residence is not known: *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038.

The failure of an affidavit for publication to state that the residence of the defendant was not known, where copies were not mailed, being a jurisdictional defect, is not capable of amendment after judgment by the filing of another affidavit: *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038.

Where the object of an action was to ascertain and fix the amount of an indebtedness on contract and to direct the sale of attached property to pay the same, a summons for publication is irregular and misleading where it states that the object of the action is to recover a personal judgment in a specified sum for breach of the contract: *Hays v. Peavy*, 54 Wash. 78, 102 Pac. 889.

An affidavit for the service of summons by publication is insufficient under this section, where it fails to state that the defendant is a nonresident, or has property in this state, or the existence of any of the facts, authorizing a service by publication, notwithstanding the fact may appear from the complaint, since strict compliance with the statute is jurisdictional: *Felsing v. Quinn*, 62 Wash. 183, 113 Pac. 275.

§ 233.

A summons for publication requiring the defendant to appear within sixty days after a specified date is "substantially" in the form prescribed by this section, which requires appearance to be within "sixty days after the date of the first publication of this summons, to wit, within sixty days after — day of —," the

omission of reference to the first publication being immaterial where the date thereof itself is given: *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459; *Security Sav. Soc. v. Collins*, 56 Wash. 455, 105 Pac. 1034; *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

§ 234.

Substituted service outside the state upon a nonresident stockholder of a domestic corporation is constructive notice and gives the court jurisdiction of an action to determine the title to the stock, and issuance of an attachment is unnecessary, since the court has jurisdiction of the res, and the corporation is protected by the decree, section 3693 providing that no transfer of stock shall be valid until it is entered on the books of the company: *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060.

Under the statute providing that a personal service of the summons on the defendant outside the state shall be equivalent to service by publication, service outside of the state does not require, as a prerequisite, the preliminary showing that the defendant was a nonresident, as required in the case of service by publication: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

§ 235.

See notes to §§ 464, 806.

§ 236.

Error cannot be urged in that a judgment for rent in an action against joint tenants was not entered against one of the joint debtors, nor against the defendants jointly indebted as far as it may be enforced against the joint property of all, as provided by this section, where such joint debtor was not served and did not appear, the lease recited that he was a nonresident, and there was no evidence that the defendants had any joint property in this state: *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890.

There is no defect of parties defendant from the fact that, in an action on a contract of insurance made by a building agent for the owner, an undisclosed principal, the creditor elected to hold the principal only and discharged the agent: *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash. 689, 116 Pac. 284.

There is no defect of parties plaintiff or misjoinder of causes, in an action brought for malpractice in the treatment of plaintiff's minor son without joining the son, where the plaintiff states but one good cause of action in his favor for ex-

penses incurred and loss of service, although other allegations show that the son also has a cause of action, he being a stranger to the suit: *Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045.

§ 237.

That the server of process was over twenty-one years of age sufficiently appears where he testified that he had been a practicing attorney for thirty years: *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018.

The original summons for publication need not be filed, but jurisdiction is conferred by the publication and proof of service, under this section, providing that the proof of service shall consist of the affidavit of the publisher and a printed copy of the summons: *Security Sav. Soc. v. Collins*, 56 Wash. 455, 105 Pac. 1034.

Where the findings of the court show that no service was had except upon parties who had no interest in the land, there is no presumption in support of jurisdiction that another valid service was had upon other necessary parties: *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 166, 105 Pac. 238.

The presumption of due service of process from recitals in the judgment is only prima facie and may be overcome by an affirmative showing: *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038.

Recitals in a judgment of due service by publication, "after filing of an affidavit for publication by the attorney for the plaintiff," are not sufficient to overcome jurisdictional defects appearing on the face of the affidavit for publication, where there was a subsequent affidavit of the plaintiff's attorney affirmatively pointing out the defect and making it appear that there was no other affidavit in the record to confer jurisdiction: *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038.

As to conclusiveness of officer's return of service of summons, see note in 124 Am. St. Rep. 756.

As to admissibility of evidence of officer's return, see note in 129 Am. St. Rep. 848.

§ 241.

PROCEEDINGS CONSTITUTING APPEARANCE.—A stipulation by defendants allowing the amendment of the complaint is a general appearance: *Robertson Mortgage Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795.

An answer reciting that "now comes the defendant" and alleging facts as a "full and complete and affirmative defense," constitutes a general appearance: *Springfield Shingle Co. v. Edgecomb Mill Co.*, 59 Wash. 620, 101 Pac. 233.

An answer on the merits by a foreign corporation, with a cross-complaint seeking a money judgment, is a general appearance that waives any error in denying defendant's motion to quash service of a summons: *Steenstrup v. Toledo Foundry & Machine Co.*, 66 Wash. 101, Ann. Cas. 1913C, 427, 119 Pac. 16.

WAIVER OF OBJECTIONS.—An objection as to the sufficiency of the summons is waived by a general appearance or voluntarily pleading to the merits and going to trial without saving a special appearance: *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843.

A general appearance in the supreme court, without reserving or alluding to a prior special appearance to object to the jurisdiction, waives the latter; and upon a reversal for a new trial, the lower court is vested with complete jurisdiction: *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439.

It is discretionary for the trial court to vacate a judgment which was entered against a defendant, who had appeared by the service of a demurrer, without the framing of any issues, or notice of the trial or any claim or entry of default, in view of this section, entitling a defendant after appearance to notice of all proceedings: *Molloy v. Union Transfer, Moving & Storage Co.*, 60 Wash. 331, 111 Pac. 160.

§ 242.

A decree of foreclosure of a mortgage, obtained on publication of a summons mailed to the defendant at Toronto, is void, where the plaintiff knew defendant's address to be at Chicago, and defendant had no knowledge of the suit: *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7.

A finding that the plaintiff in a foreclosure suit instituted in 1903 knew the postoffice address of the defendant to be at Chicago will not be disturbed on appeal, where it appears that he had resided there since the execution of the mortgage, except for about six months in 1892, and defendant testified that he and the plaintiff were intimately acquainted for many years and had occasional correspondence and had met in Chicago on several occasions since his return there, although he was flatly contradicted by the defendant: *Johnstone v. Peyton*, 59 Wash. 433, 110 Pac. 7.

An order transferring the cause to another judge, upon an affidavit of prejudice, can only be vacated for fraud in procuring it, after a hearing and the notice required by sections 242, 244: *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688.

§ 243.

This section applies only to purchasers from parties to the action: *Burwell v. Smith*, 63 Wash. 1, 114 Pac. 876.

After the filing of a *lis pendens*, a grantee of the real estate, the subject matter of the suit, is entitled to the benefit of an appeal taken by his grantor, the rule of *lis pendens* being that the action may proceed without any notice being taken of the grantee *pendente lite*: *Trumbull v. Jefferson County*, 60 Wash. 479, 140 Am. St. Rep. 943, 111 Pac. 569.

As to the law of *lis pendens*, see note in 56 Am. St. Rep. 853.

A *lis pendens* to be effective must be filed in compliance with this section, requiring that the complaint be filed at or before the filing of the notice: *Burwell v. Smith*, 63 Wash. 1, 114 Pac. 876.

A *lis pendens* in a mortgage foreclosure suit does not affect a party-wall lien prior to the mortgage, the owners of the lien not being made parties to the mortgage foreclosure: *Biggs v. Hoffman*, 60 Wash. 495, 111 Pac. 576.

The recording of an original contract for the sale of state lands, and the filing of a *lis pendens* in an action against the purchaser for the recovery of the land, by one claiming the right to purchase from the state, imparts notice of the rights of the original purchaser as against grantees of the plaintiff in the suit: *Parker v. Burwell*, 69 Wash. 386, 125 Pac. 151.

A *lis pendens* notice does not constitute a lien upon property, entitling the purchaser to rescind the sale, where a prior title was deraigned through a grantee not a party to the action, and it was not shown that the action had been commenced when the notice of *lis pendens* was filed: *Burwell v. Smith*, 63 Wash. 1, 114 Pac. 876.

§ 244.

See notes to § 242.

§ 245.

Under this section a service is good when made by dropping a copy through the transom on the floor of the office in front of the front door, which was locked, no one being in the office, especially where, upon calling at the office next morning, the copy is found in the possession of the clerk: *Spencer v. Arlington*, 54 Wash. 258, 103 Pac. 30.

§ 247.

Under this section service of a statement of facts by mail is completed when the copy is deposited in the postoffice properly addressed: *State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court*, 63 Wash. 442, 115 Pac. 845.

§ 250. :

Under this section the trial court may extend the time for filing exceptions to

the report of a referee or permit the filing of amended exceptions: *Pederson v. Parke*, 68 Wash. 482, 123 Pac. 777.

§ 258.

In an action to set aside a local assessment, allegations in the complaint that plaintiff's property was taken without due process of law, or any authority, and that the assessment was for a private use, and contrary to law, are mere conclusions of law presenting no issuable facts: *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

A complaint states a cause of action for goods sold, etc., where it alleges that the plaintiff, at the special instance and request of the defendant, furnished certain goods and performed services in conducting the funeral of the defendant's husband and that defendant O.K.'d the bill; and it is immaterial that a bill of particulars showed that defendant guaranteed payment within thirty days, since there was no inference that credit was extended to the estate, and the guaranty goes to the time and was not collateral to the promise of another: *Butterworth v. Bredemeyer*, 62 Wash. 134, 113 Pac. 253.

Objection to a complaint for not separately stating the several causes of action cannot be taken by demurrer, but only by motion: *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

It is inconsistent with the spirit of the code to permit a person who has but one cause of action to allege, as distinct causes, one upon contract and another upon quantum meruit, as permitted at common law to avoid a variance; but he must state one cause in concise language without repetition: *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 133 Am. St. Rep. 1032, 19 Ann. Cas. 972, 104 Pac. 635.

As to complaint stating same cause of action in different counts under the code, see note in 72 Am. Dec. 588.

In an action for railroad construction work done, the plaintiff may plead in the alternative an express contract or an implied contract for the reasonable value, without being subject to an election; and proof of quantum meruit would not be a variance: *Holm v. Chicago M. & P. S. R. Co.*, 59 Wash. 293, 109 Pac. 799.

A complaint against a corporation and its receiver fails to set forth any cause of action against the defendants, where it merely sets up a promissory note given by the promoter of the corporation in payment for machinery, and alleges that the corporation and the promoter were one and the same person, the incorporation of the former being illegal, and that the assets of the corporation were the assets of the promoter, who was undertaking to cheat and defraud the plaintiff, it not being alleged that the defendants

owed the plaintiff anything or had attempted to defraud the plaintiff: *Peterson v. Puget Sound Biscuit Co.*, 60 Wash. 451, 111 Pac. 561.

In an action for equitable relief, an unnecessary prayer for the reformation of an instrument is of no controlling force upon the relief that may be granted, where the complaint and proofs establish a constructive trust *ex maleficio*: *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19.

In an action at law to recover money, the addition of a prayer for "such other relief as to equity may belong" does not change the nature of the action: *Hotchkin v. McNaught-Collins Improvement Co.*, 67 Wash. 206, 121 Pac. 455.

ALLEGATIONS OF FRAUD.—Fraud need not be alleged in direct terms, it being sufficient if the facts constituting the fraud are set forth: *Miner v. Paulson*, 60 Wash. 150, 110 Pac. 994.

As to necessity and sufficiency of allegation of scienter, see note in 16 Ann. Cas. 646.

A complaint states a good cause of action for conspiracy to defraud, where it is alleged that the plaintiff was induced by the defendants, through false representations and a prior course of dealing, to put up \$3,000 to pay for a worthless timber claim which one of the defendants had agreed to repurchase for a client at an advance: *Merritt v. Hibbard*, 61 Wash. 368, 112 Pac. 350.

In such a case, an allegation that the claim was of no value is not essential to the recovery of damages, where the plaintiff was induced to put up the money and was not to take any title, the name of the grantee in the deed being left blank and to be filled in on the resale to defendant's client: *Merritt v. Hibbard*, 61 Wash. 368, 112 Pac. 350.

A complaint states a cause of action for fraud in the sale of shares of corporate stock in that the vendor falsely represented that the corporation was not indebted on certain promissory notes, without alleging that the plaintiffs had paid the notes, or without alleging the value of the stock, or stating in so many words, that it was of less value by reason of liability on the notes: *Mills v. Knudson*, 54 Wash. 614, 103 Pac. 1123.

§ 259.

See notes to §§ 183, 3715.

WANT OF CAPACITY.—Objection to the capacity of a minor to sue, appearing on the face of the complaint, is waived by failing to demur on that ground: *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480.

An objection to the minority of the plaintiff is waived by answer on the

merits: *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108.

PENDENCY OF OTHER ACTION.—An answer pleading another action between the same parties involving the same matter is bad as a plea in abatement where it fails to allege that the same was pending when the action was commenced: *Westmoreland Co. v. Hewell*, 62 Wash. 146, 113 Pac. 281.

In an action to recover on a severable contract for clearing land, recovery cannot be had for the reasonable value of the entire work upon defendants' breach of the contract and refusal to allow plaintiff to perform, where plaintiff had pending another action to recover the first installment due on completing the first acre, or had been paid therefor: *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741.

A motion to vacate a judgment cannot be pleaded in abatement of another action for the same cause, where the motion was dismissed on stipulation without prejudice before the plea in abatement was filed: *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119.

As to abatement of one action by another pending in the same state, see note in 84 Am. Dec. 452.

DEMURRER TO PLEADING GOOD IN PART.—A general demurrer in an action against two defendants, only one of whom is liable, should be overruled as to one and sustained as to the other: *Humphries v. Cooper*, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606.

A general demurrer by two or more defendants should be overruled if the complaint states a good cause of action against either defendant: *Beyer v. Bullock*, 56 Wash. 110, 105 Pac. 155.

A general demurrer to several causes of action on the ground that the statute of limitations has run must be overruled if any one of the causes is not barred by the statute: *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

An objection that causes of action are not separately stated cannot be raised by demurrer, but only by motion: *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635.

A complaint stating any cause of action is not demurrable for want of sufficient facts because it attempts to state another cause of action which plaintiff is not entitled to maintain: *Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045.

A complaint for the breach of a written contract of employment at a specified sum per month is not subject to a general demurrer for want of sufficient facts to state a cause of action, from the fact that it also alleges a contemporaneous oral agreement to advance expense money, evidence as to which might have been inadmissible as varying the terms of the

writing: *Rehlow v. Schmitt*, 63 Wash. 666, 116 Pac. 267.

In pleading a written contract which speaks for itself as to the consideration, an allegation that it was without consideration is nothing more than the pleader's conclusion, and without avail on demurrer: *Brinker v. Oldham & Sons*, 63 Wash. 620, 116 Pac. 263.

In the absence of a motion to make more definite and certain, a demurrer should not be sustained because of the failure of a complaint to allege a certain fact, where the fact can be inferred from the whole complaint: *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497.

A demurrer does not admit facts that may be inferred from a legal conclusion: *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

Where a fire insurance company, having paid a loss and taken an assignment of insured's cause of action, brought action for the amount of the policy against the party whose negligence caused the fire, the defendant cannot, after admitting that it had settled with the insured for his loss in excess of the policy, object that there is a splitting of the causes of action and that plaintiff owned only part thereof, since the defect was one of parties plaintiff, which could have been cured by amendment, and the settlement had the same effect, leaving but one cause of action owned entirely by the plaintiff: *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.*, 58 Wash. 332, 108 Pac. 770.

§ 261.

See notes to § 183.

§ 262.

It is discretionary to refuse leave to file amended answers at the trial, where two years had elapsed after demurrers were sustained to the new matter in the answers: *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

§ 263.

Where no demurrer is interposed to a complaint, it will be liberally construed and the cause determined by the proof, rather than by a strict construction of the pleading: *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114.

The objection that a petition does not state sufficient facts to support the findings cannot be urged where no demurrer was interposed to the petition or objection made prior to the trial, and the evidence admitted cured any defect in the pleading: *Wheatman v. Kane*, 55 Wash. 226, 104 Pac. 258.

Error in overruling a demurrer to a complaint is waived by answer and trial on the merits: *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22.

In an action to recover on a sight draft, a demurrer to the complaint, on the ground that an acceptance in writing was not alleged, is waived by pleading over, admitting the execution of the draft and setting up a partial failure of consideration through a mutual mistake: *Clemens v. Stanton Co.*, 61 Wash. 419, 112 Pac. 494.

The allowance of the filing of a so-called supplemental complaint as an amended complaint cannot be urged as error after issue joined and trial and judgment on the merits: *Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 109 Pac. 205.

Technical objections to a complaint that might have been taken by demurrer or motion are waived by default in appearance, and the complaint will be liberally construed after judgment, although the judgment was by default: *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160.

On demurrer to the complaint for fraud in the sale to plaintiff of an undivided interest in certain land, it cannot be assumed that the undivided interests were uncertain or incapable of being made certain, where such fact was not pleaded: *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289.

§ 264.

PLEADING INCONSISTENT DEFENSES IN GENERAL.—Defenses so inconsistent that one must necessarily be untrue are not permissible under the code, and in an action for the price of a traction engine, a defense that the notes and contract were only delivered conditionally and were not effective or delivered, because the engine did not fulfill conditions, is inconsistent with a counterclaim for damages by reason of the insufficiency of the engine; and defendant is properly required to elect between them: *Hart-Parr Co. v. Keith*, 62 Wash. 464, Ann. Cas. 1912D, 243, 114 Pac. 169.

The plea of plaintiff's contributory negligence is not necessarily inconsistent with a general denial of defendant's negligence: *Kimble v. Stackpole*, 60 Wash. 35, 35 L. R. A., N. S., 148, 110 Pac. 677.

GENERAL DENIAL.—In an action for damages for assault and battery, justification by reason of preventing the defendants from using a public road cannot be shown under a general denial: *Neilsen v. Hovander*, 56 Wash. 93, 21 Ann. Cas. 113, 105 Pac. 172.

A general denial of each and every allegation of a paragraph of a complaint, alleging that a certain sum is the reasonable value of plaintiff's services, is sufficient to put the same in issue, under this section, without any specific denial that some lesser sum was due, since a general

denial under the code is the equivalent of the general issue: *Peters v. McPherson*, 62 Wash. 496, 114 Pac. 118.

Where a general denial in a paragraph in a complaint alleged that the defendant through an agent and attorney in fact orally employed plaintiff upon a certain consideration to build a house, a general denial thereof and particularly that any other contract was made than a certain written contract, does not put in issue the authority of the agent to represent the defendant in the transaction, where another paragraph of the complaint alleging that the person was the agent and attorney in fact of the defendant was not denied in the answer: *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

DENIAL ON INFORMATION AND BELIEF.—A denial, on information and belief, as to the filing of a lien notice in the county auditor's office is insufficient: *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752; *Belknap Glass Co. v. Brown*, 69 Wash. 127, 124 Pac. 390.

In an action to foreclose a special street assessment lien, an answer denying any knowledge on information sufficient to form a belief as to the agency of one who was alleged in the complaint to be the defendant's agent is evasive and is not sufficient to raise any issue thereon: *Olympia v. Turpin*, 70 Wash. 581, 127 Pac. 210.

NEGATIVE PREGNANT.—A denial in manner and form that plaintiffs expended the specified sum of money alleged by them in a certain action or at all is a negative pregnant and insufficient: *Peters v. McPherson*, 62 Wash. 496, 114 Pac. 188.

The denial of each and every allegation of a complaint by one alleging himself to be a stockholder in a corporation does not put his ownership of stock in issue, where other portions of the answer are pregnant with admissions of such fact: *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

ADMISSIONS BY FAILURE TO TRAVERSE OR DENY.—Where a complaint alleges that corporate stock was worth seventy-five cents to one dollar per share, and the answer denies that its value exceeds five cents per share, the value stated in the answer is not admitted and taken as true for want of any reply: *Bell v. Scranton Coal Mines Co.*, 59 Wash. 659, 110 Pac. 628.

MATTERS TO BE PROVED.—An answer admitting the receipt of a notice of demand against a city, as set up in one paragraph of the complaint, and denying all the allegations of another paragraph alleging a demand, is not sufficient to put the fact of notice and demand in issue: *Fransioli v. Tacoma*, 60 Wash. 463, 111 Pac. 564.

Where the complaint alleges, and the answer admits, that a slough is navigable, it is not error to exclude evidence to show that it was navigable only for floating logs and not in a "commercial sense," as there was no issue as to the navigability: *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

Waiver by plaintiff of a contract for services may be shown in an action for the services under a general denial, where the evidence tended to show that the services had not been performed: *Buttz v. Cook*, 62 Wash. 90, 113 Pac. 282.

In an action to compel a town to levy a tax to meet warrants issued in payment of a lease, an answer that the lease was for the purpose of securing a water supply without the sanction or authority of the qualified voters of the town, and that the lease was therefore void, pleads a fact and not merely a conclusion, and is sufficiently definite and certain to be proof against demurrer: *State ex rel. Craig v. Newport*, 70 Wash. 286, 126 Pac. 637.

A motion for judgment on the pleadings is proper practice where the plaintiff's objections to an answer do not go to the form or manner of the allegations, but raise the point that the facts themselves, even if well pleaded, do not constitute a defense: *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462.

§ 265.

In an action on contract to subject pledged property to a debt, a claim in tort for plaintiff's conversion of part of the property is not a proper item for counterclaim: *First National Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038.

In an action to enjoin the defendant from filling up a drainage ditch constructed by the plaintiffs, an independent claim by defendant for damages to his land by reason of the construction of the ditch is not a proper counterclaim, within this section: *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772.

In an action for the price of a pump to be manufactured and shipped within a specified time, the defendant cannot recover loss of rentals during delay in delivery, where there was nothing to show that such damage was within the contemplation of the parties or actually sustained, or that there was any opportunity to rent it if it had been promptly delivered, and it was received before the defendant was ready to use it: *Eichbaum v. Caldwell Bros. Co.*, 58 Wash. 163, 108 Pac. 434.

§ 266.

Where potatoes are sold by various parties and intermingled by the defendant, and all claims for the price were assigned

to one person, who sued therefor, the defendant is entitled to a deduction for part returned as unmarketable, although he would have been unable to secure an offset against any individual claim: *Kempe v. Johnson*, 57 Wash. 154, 106 Pac. 619.

Under this section, defendants, who, as ship lighters, had agreed with the charterers of a vessel to collect and turn over all freight charges less compensation for lighterage, may offset an indebtedness to them from the charterers for their failure to deliver coal and grain shipped in their care, in an action for the freights collected, brought by the owners of the vessel upon abandonment of the vessel by the charterers; the lighters having had no notice that the charterers had abandoned the vessel or agreed to collect and hold in trust for the owners the proceeds of the voyage: *Boston Tow Boat Co. v. Sesnon Co.*, 64 Wash. 375, 116 Pac. 1083.

§ 273.

A general denial of the execution of a note is not inconsistent with an affirmative defense alleging the securing of defendant's signature by fraud while intoxicated, and want of consideration: *Gibson v. Feeney*, 66 Wash. 531, 120 Pac. 97.

In an action by a vendor to recover money paid to a bank by the vendee in a land contract, executed and claimed by the plaintiff, a defense that money which had been paid by the bank to the plaintiff's father for an assignment of the contract had been deposited to the father's credit in the bank and checked out and used by him on improvements to the plaintiff's property, is not inconsistent with other defenses to the effect that the land contract was for the sale of lots in reality belonging to the father, for whom the plaintiff was only a trustee of the title, and that the father was insolvent and indebted to the bank, had sold the contract to the bank, had been fully paid, and that an account had been stated between plaintiff and the bank; and it is immaterial that the conclusions of the pleader were not consistent, it being the province of the court to draw conclusions from the pertinent facts stated: *Cooper v. Farmers & Merchants' Bank*, 68 Wash. 310, 123 Pac. 465.

In an action on contract, an admission of the execution of the contract and a general denial of performance on the part of plaintiff is not inconsistent with affirmative defenses to the effect that plaintiff had breached the contract, which was thereupon terminated, and the plaintiff had elected to rescind and receive full satisfaction under a quantum meruit for the work done at the time of rescission: *Williams v. Wright*, 68 Wash. 341, 123 Pac. 446.

Where it is manifest from the whole record that the defendant only desired to have an offset, which had been inconsistently pleaded as a counterclaim in a cross-complaint, defendant should be allowed to correct the pleadings by dismissing the cross-complaint: *Miller v. Commercial Union Assur. Co.*, 69 Wash. 529, 125 Pac. 782.

In an action upon an assigned account, where the defendant sets up equitable defenses seeking equitable relief against the assignor, the court has power to require the assignor to be made a party to the end that a complete determination of the controversy may be had, under section 273, giving the defendant the right to set forth legal or equitable defenses, and section 196, authorizing the court to bring in the real parties in interest: *State ex rel. Adjustment Co. v. Superior Court*, 67 Wash. 355, 121 Pac. 847.

§ 275.

A so-called affirmative defense reiterating facts appearing on the face of the complaint, and challenging their legal sufficiency, is properly stricken as presenting no issue: *Stone v. Insurance Co. of North America*, 56 Wash. 427, 105 Pac. 856.

§ 277.

In an action to quiet title, in which the complaint alleged that defendant claims some interest adverse to the plaintiffs, which was without right, and the defendant answered claiming title under a deed from the plaintiffs, it is a fatal departure, authorizing judgment for the defendant on the pleadings, for the plaintiffs to reply that the deed, executed in blank, was fraudulently procured by one B. and wrongfully delivered to defendant as security for a loan to B. for not more than six hundred and fifty dollars, and that if defendant had any interest at all, it was only as a mortgagee: *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081.

§ 278.

The sustaining of a demurrer to affirmative defenses does not entitle the plaintiff to judgment on the pleadings where other issues are presented by denials in the answer: *Levy v. Seattle*, 61 Wash. 540, 112 Pac. 639.

A plea of tender does not entitle the defendant to judgment on the pleadings, since the plaintiffs can admit the same without waiving their cause of action: *Peters v. McPherson*, 62 Wash. 496, 114 Pac. 188.

§ 284.

It is not an abuse of discretion to deny a motion to make a bill of particulars more specific in an action to foreclose a mechanics' lien, by setting out the names of all per-

sons who labored on the building, in order that defendant may secure their evidence: *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843.

It is not an abuse of discretion to refuse to order a bill of particulars as to the negligent construction of a penstock of a mill, alleged to be such that the penstock would not withstand the pressure of high water when it was empty, where the defendant had owned it for twelve years and knew the manner of its construction, especially in an action for death caused thereby: *Neal v. Phoenix Lumber Co.*, 64 Wash. 523, 117 Pac. 267.

§ 292.

See notes to § 2424.

It is libelous per se for the physicians in an office building to sign and publish a petition to the owners of the building reciting that they as reputable physicians, desiring to uphold the honor of their profession, demanded the removal from the building of osteopaths, . . . criminal practitioners, . . . fakirs, quacks, charlatans and other fraudulent concerns and . . . undesirable tenants, intending to refer to the plaintiff, who was a duly licensed osteopath having an office in the building: *Lathrop v. Sundberg*, 55 Wash. 144, 25 L. R. A., N. S., 381, 104 Pac. 176.

A newspaper publication falsely charging a city inspector of sidewalks with being part of a system of jobbery and graft in the management of city contracts is libelous per se, since it imputes criminal offenses or moral delinquency in office tending to bring him into public hatred, contempt, or ridicule: *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 104 Pac. 181.

A charge of "graft" in a libelous publication implies a dishonest or corrupt transaction in office: *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.

As to what words are libelous per se, see note in 116 Am. St. Rep. 802.

As to charge of "graft" as libelous per se, see note in 15 L. R. A., N. S., 497.

As to justification in libel or slander, see note in 91 Am. St. Rep. 285.

An osteopath cannot recover damages for a libel characterizing him as a quack and charlatan, where it appears from his testimony that he was practicing osteopathy in violation of the laws of the state making it a misdemeanor to maintain an office with his name and the word "doctor" in public view: *Lathrop v. Sundberg*, 62 Wash. 136, Ann. Cas. 1912C, 891, 113 Pac. 574.

The report of a mercantile agency is not libelous per se, where it simply gave plaintiff a rating which is stated not to be a credit rating, but that the agency preferred to furnish information upon application at the office; since the words are to be considered in their natural sense, are innocent

without the aid of special knowledge, and do not imply malice, or hold the party up to public ridicule or involve moral turpitude: *Denney v. Northwestern Credit Assn.*, 55 Wash. 331, 25 L. R. A., N. S., 1021, 104 Pac. 769.

As to privilege of communications by mercantile agencies, see note in 36 L. R. A., N. S., 452.

Where a newspaper charge of "graft" respecting a public officer is found to be false, it is without the rule of privilege, and actionable, although made in good faith: *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.

A libelous petition by physicians demanding the removal from a building of osteopaths, fakirs, quacks and charlatans, is not privileged from the fact of the interest of the parties; and the publication of the same in the newspapers would be an abuse of any privilege; also, an abuse in going beyond the necessities of the case: *Lathrop v. Sundberg*, 55 Wash. 144, 25 L. R. A., N. S., 381, 104 Pac. 176.

One illegally advertising as a doctor cannot maintain an action for libel on the theory that he had a common-law right to practice osteopathy: *Lathrop v. Sundberg*, 62 Wash. 136, Ann. Cas. 1912C, 891, 33 L. R. A., N. S., 90, 113 Pac. 574.

As to right of person practicing profession in violation of statute to recover for libel or slander of him in connection with such practice, see note in Ann. Cas. 1912C, 893.

This section does not obviate the necessity of pleading that the publication was so understood by persons seeing it; and a complaint is insufficient, although it contains such general allegation, where it negatives the fact that plaintiff was referred to in the defamatory matter: *Dunlap v. Sundberg*, 55 Wash. 609, 133 Am. St. Rep. 1050, 104 Pac. 830.

In order to render a publication affecting plaintiff's business credit actionable, the words not being libelous per se, the special damages resulting from loss of credit must be specifically set out, showing the names of parties refusing credit or withdrawing custom, or that it is impossible to do so: *Denney v. Northwestern Credit Assn.*, 55 Wash. 331, 25 L. R. A., N. S., 1021, 104 Pac. 769.

The truth of a newspaper publication charging a city sidewalk inspector with graft and jobbery is not necessarily established by evidence that many sidewalks were poorly constructed and not up to the requirements of the contracts and that the inspector had been discharged for incompetency, the same being competent but not conclusive evidence: *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.

Defendant's statement that plaintiff left his wife in the east on her deathbed and

came west with a whore is capable of a construction imputing the criminal offense of living in a state of adultery and involving moral turpitude; and it is accordingly not error, as against the defendant, to submit to the jury the question whether it did impute such crime: *Jeffrey v. Gill*, 56 Wash. 586, 106 Pac. 129.

It cannot be said, as a matter of law, that a publication by a credit association as to plaintiff's credit, was made to extort money or coerce payment of a debt held by the agency for collection so as to make the same libelous per se, within the rule allowing a recovery in the case of publications showing blackmail on their face: *Denny v. Northwestern Credit Assn.*, 55 Wash. 331, 25 L. R. A., N. S., 1021, 104 Pac. 769.

In an action for slander of title, only special damages can be recovered, and they must be pleaded and proved; and a claim for an attorney's fee in the current action is not recoverable, either as damages or costs, other than statutory: *McGuinness v. Hargiss*, 56 Wash. 162, 21 Ann. Cas. 220, 105 Pac. 233.

As to actions for slander of title, see note in 87 Am. Dec. 562.

In an action for a newspaper libel by the publication of matter libelous per se, in which the defendant denied certain material allegations of the complaint, but admitted the publication and pleaded mistake and a retraction, the burden of proof is upon the plaintiff, and he has the right to open and close: *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, Ann. Cas. 1913B, 636, 117 Pac. 596.

No duty rests upon one who is libeled by a newspaper to request the publication of a retraction or other articles reducing the plaintiff's damages, and a mere offer to retract does not deprive the libeled party of his right to recover damages: *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, Ann. Cas. 1913B, 636, 117 Pac. 596.

A verdict for five thousand dollars for a newspaper libel, by a newspaper of wide circulation, seriously reflecting upon the character of a young woman, will not be set aside as excessive, where the trial judge refused to set aside the verdict: *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, Ann. Cas. 1913B, 636, 117 Pac. 596.

As to what damages are excessive in actions for libel or slander, see note in Ann. Cas. 1913B, 700.

A letter charging that an attorney presented forged receipts and attempted to collect money on them, is not libelous per se, it not being charged that he forged the receipts or that he uttered the same with guilty knowledge of the forgery: *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876.

Words not libelous per se are not actionable unless special damage is alleged: *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876.

Whether language is libelous per se is a question of law for the court, unless the writing is ambiguous: *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876.

A church committee's report upon an investigation of a minister who desired to be called, made according to the established rules of the church of which the minister was a member, is absolutely privileged, whether it contains matter libelous per se or not; and when on its face it shows that it was made in good faith, it disproves malice: *Bass v. Matthews*, 69 Wash. 214, 124 Pac. 384.

As to what statements are privileged, see note in 104 Am. St. Rep. 110.

In an action for slander in applying the word "thief" to an agent who had taken his principal's money, it is proper to instruct that defendant must show, on his plea of justification, that the plaintiff not only took the money, but did so with criminal intent, where the plaintiff had full charge of the business, receiving all moneys and paying all demands, including his own salary, and claimed that he took the money under a good faith claim that he was entitled to take it to pay a debt: *Eddy v. Cunningham*, 69 Wash. 544, 125 Pac. 961.

Since calling plaintiff a "thief" is only prima facie actionable, malice being the gravamen of the charge, the defendant would not be liable if the words were used merely as terms of abuse in relation to a transaction that was fraudulent but not criminal, and justified by the attending circumstances and relations of the parties: *Eddy v. Cunningham*, 69 Wash. 544, 125 Pac. 961.

In an action for slander in calling a man a "pimp," the plaintiff was "living with" a prostitute, within Rem. & Bal. Code, § 2440, and the defendant was accordingly justified, where it appears that the plaintiff was a clerk in a hotel where prostitutes frequently stopped for several days at a time, and that as a rule he assigned them to a room convenient to his own, and consorted with one of them regularly and with others occasionally, although there was no proof that they "lived with" each other as man and wife: *Eddy v. Cunningham*, 69 Wash. 544, 125 Pac. 961.

§ 293.

Under a complaint for libel in charging an osteopath with being a quack and a charlatan, it cannot be claimed that the publication was of and concerning osteopathy as a profession, and that the damage resulted to the plaintiff as a member of that profession: *Lathrop v. Sundberg*, 62 Wash. 136, Ann. Cas. 1912C, 891, 33 L. R. A., N. S., 90, 113 Pac. 574.

The truth of published statements concerning a public officer is a defense to an action for libel: *Quinn v. Review Pub. Co.*,

55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.

A libelous publication in a newspaper is not mitigated or cured by another article in the same issue, and the latter is properly excluded: *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.

§ 294.

Allegations in a complaint and affidavit in a divorce case charging adultery with a certain person are absolutely privileged if pertinent and relevant to the issue; and the rule of privilege is not changed by this section; hence a complaint by the co-respondent for libel is demurrable, though the words are alleged to be false and malicious, where it is not charged that they were not pertinent and relevant to the issue: *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845.

As to libel and slander in judicial proceedings, see note in 123 Am. St. Rep. 631.

§ 296.

The court has discretion to consolidate two equitable actions between the same parties relating to the same subject matter, i. e., the obstruction of two irrigation ditches, which might have been joined in one action: *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141.

Upon breach of a contract whereby plaintiff was prevented from completing performance, he may elect to sue on the contract for partial performance and loss of profits, or waive the contract and recover upon quantum meruit, but he cannot pursue both remedies: *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 133 Am. St. Rep. 1032, 104 Pac. 635.

An action upon an injunction bond indemnifying the plaintiff to the extent of five hundred dollars is not demurrable on the ground of misjoinder of causes of action, from the fact that it alleges damages and prays for judgment in excess of the amount of the bond, where all the damages alleged were of such a nature as to be secured by the bond up to the amount limited therein: *Maughlin Mill Co. v. Hamilton*, 61 Wash. 66, 111 Pac. 1067.

A party may sue on a severable contract for all items due when suit is brought, and there is no splitting of causes of action: *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741.

CLAIMS ARISING OUT OF SAME TRANSACTION.—The maker of a note and its guarantors under a written guaranty may be joined in one action: *Bank of California v. Union Packing Co.*, 60 Wash. 456, 111 Pac. 573.

There is no misjoinder of causes of action in suing the owner and its building agent for the premium on an accident insurance policy issued in the name of the agent by

authority of and for the benefit of the owner: *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash. 689, 116 Pac. 284.

Where an employer maintained a hospital by hospital fees retained from wages of employees, causes of action for personal injuries sustained through the employment of incompetent fellow-servants, and for failure to use reasonable diligence in carrying plaintiff to the hospital for treatment, both spring from contractual relations, even if one sounds in tort and the other in contract, and in any event, may be joined under this section: *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635.

It is not a misjoinder of legal and equitable causes of action to sue to quiet title to several tracts, and to recover possession of part thereof in the possession of the defendant: *Wilkeson v. Miller*, 63 Wash. 680, 116 Pac. 268.

A mortgage and a mechanic's lien upon the same property held by the same person may be foreclosed in a single action: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

In an action against plaintiff's manager, involving an accounting of the business for about one year, for money and property misappropriated, other legal causes of action for the conversion of certain property, and for negligence in conducting the business, are so connected with or growing out of the principal transaction as to be triable with it in equity, to avoid a multiplicity of suits: *Lindley v. McGlauffin*, 57 Wash. 581, 107 Pac. 355.

The joinder of improper parties, on a theory of their liability that would exonerate other parties liable, does not constitute a misjoinder of causes of action, the plaintiff being entitled to join all persons connected with the matter whom he conceived to be liable: *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

Causes of action to recover the sum paid for a horse, on breach of a warranty that it was gentle, and for damages received in a runaway while attempting to drive it, may be united, as they both arise out of the same transaction, the breach of warranty: *Mullerleile v. Brandt*, 64 Wash. 280, 116 Pac. 868.

Several rights of action against one defendant for money procured by fraud and deceit, assigned by various parties to one of their number, may all be joined and recovery had in one action under this section: *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289.

Under this section, requiring several causes of action to be separately stated, a complaint may be struck out where it pleads as one cause of action a wrongful eviction from a leasehold, damages by reason of a leaky roof, and injury from change of a

street grade: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

In an action for the wrongful death of a coal miner, the complaint states but a single cause of action, and it is error to require an election, where it is alleged, as proximate causes of the death, (1) that overhead rock fell upon the decedent through defendant's failure to furnish proper timbers, which caused gases to collect, and (2) that, through want of a sufficient ventilating system in decedent's working place, the gases caused decedent to fall to his death, since the two causes were concurrent: *Davies v. Rose-Marshall Coal Co.*, 73 Wash. 560, 129 Pac. 98.

As to joinder of causes of actions generally, see notes in 1 L. R. A. 125; 11 L. R. A. 222.

§ 299.

ISSUES, PROOF AND VARIANCE.—

In an action for services under a joint contract of employment, it is competent, under a general denial, to disprove the contract alleged by showing a different contract whereby plaintiff was employed by only one of the defendants: *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573.

Under a complaint making a general charge of seduction, the evidence shows an actionable wrong, even if not a technical seduction, and there is no fatal variance between the pleading and the proof, in the absence of a motion to make the complaint more specific, where the plaintiff's evidence showed a case of rape in the first instance, the relations were continued under a promise of protection by reason of her frame of mind produced by the first ravishment until pregnancy arose, which was avoided by abortive means provided by the defendant: *Murilla v. Guis*, 57 Wash. 564, 107 Pac. 378.

It is not a fatal variance for a mechanic's lien notice to claim a lien for the construction and erection of a building, and to prove an alteration or improvement of a new building by the addition of a mezzo or balcony floor, where the party could not have been actually misled to his prejudice, within this section, which is applicable to lien cases; especially where the building had never been occupied and the contractor may have taken it to be part of the original plan: *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248.

Under a complaint for the reasonable value of services rendered "at the instance and request of the defendant," it is not a fatal variance to prove that the services were rendered "with the knowledge and consent of the defendant," where there was no showing that the opposite party was actually misled as required by this section: *Butterworth & Sons v. Teale*, 54 Wash. 14, 18 Ann. Cas. 854, 102 Pac. 768.

It is not a fatal variance that the pleading alleged an implied contract to carry and

deliver livestock as at common law, and the proof showed a special contract by bill of lading, where the proof was admitted without objection: *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487.

In an action upon a contract to recover "ten per cent on any business" done for the defendant, it is not a failure of proof or a material variance to prove a contract by defendant's letters for "a commission of ten per cent on all goods of our manufacture," where in another letter "ten per cent on any business you secure for us" was stated to mean "ten per cent to you on all goods of our manufacture": *Eaton v. General Compressed Air etc. Mach. Co.*, 62 Wash. 373, 113 Pac. 1091.

Where plaintiffs were orally promised a written contract for the logging of land, and moved their outfit preparatory to the work in reliance thereon before any contract was made, upon failure of the action for breach of the contract to log, in which there was no offer to amend or proof of any damage by reason of the moving of the outfit, the complaint should not be treated as amended on appeal or the judgment of dismissal reversed to allow a recovery for damages: *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135.

In an action for the price of an ice-making plant sold under a contract providing for a specified test to determine whether the plant was up to the guaranty, and that at such time the plant should be either rejected or accepted, acceptance to be conclusive and a complete discharge, an answer denying performance according to the guaranty raises no issue, where its effect is offset by admissions showing the performance of the work, a satisfactory test, and an unqualified acceptance by the defendant: *Wolf Co. v. Northwestern Dairy Co.*, 55 Wash. 665, 104 Pac. 1123.

In an action for the price of a harvester sold by agents, an affirmative defense of a contemporaneous oral agreement, contradicting the writing, to the effect that the contract was not to be effective for one month and that pursuant thereto it was canceled by the purchaser, does not admit of proof, over defendant's objection, that the written contract was canceled by mutual consent: *Holt Mfg. Co. v. Odenrider*, 61 Wash. 555, 112 Pac. 670.

In an action for damages on a vendee's rescission of a land contract, on failure of the owners to deliver a deed upon demand upon one defendant, there is a failure of proof as to default by another defendant having an interest in the land who tendered a deed within a reasonable time thereafter, where it appears that he had no previous knowledge of the sale, and his only connection with the matter was through an agency expressly limited to the execution of a contract without power to make deeds until

certain conditions were performed: *Walsh v. Colvin*, 53 Wash. 309, 101 Pac. 1085.

In an action to recover possession of a mining claim, in which there is no dispute as to the boundaries, a variance between the descriptions in location notices is not material, where both included the plaintiff's improvements, the claims were marked on the ground, and the boundaries were known to defendant, who was not misled to his prejudice, within this section: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

In an action on an indemnity bond, it is not a fatal variance that the contract provided that the work should be done under one ordinance, which ordered the improvement and the bond refers to the fulfillment of the contract under another ordinance, which provided for the plan of a special assessment, the engagement of the bond to underwrite the contract being sufficiently set out: *Yost v. Empire State Surety Co.*, 69 Wash. 397, 125 Pac. 167.

In an action for wrongful discharge and breach of a contract whereby tunnel work was sublet to the plaintiff, he agreeing to furnish an approved bond in the sum of twenty-five thousand dollars, it is admissible, under a general denial of performance, to show that any performance by plaintiff was under an oral working agreement pending his efforts to procure the bond: *Williams v. Wright*, 68 Wash. 341, 123 Pac. 446.

It is a departure for plaintiff in garnishment to seek recovery from the garnishee on the theory that the garnishee was indebted to the plaintiff: *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

A judgment for personal injuries should not be set aside for failure to prove the facts precisely as alleged, where the evidence sustained the substance of the issue, and there was not a substantial departure: *Hansen v. Rounds*, 70 Wash. 350, 126 Pac. 927.

In an action to recover for services rendered, the defendant cannot claim a variance in that the complaint was for the breach of an express contract, while the case-made was on quantum meruit for service rendered, where it appears that the complaint was susceptible of two constructions, covering either phase of the case, and the defendant had not moved that it be made more definite and certain or required that plaintiffs make an election before the trial: *Blair v. Wilkeson Coal & Coke Co.*, 54 Wash. 334, 103 Pac. 18.

An answer on the merits without objection waives an objection at the trial that an amended complaint is a departure and states a different cause of action from the original complaint: *Curtis v. Parks*, 57 Wash. 223, 106 Pac. 740.

It is an immaterial variance that the complaint alleged that the defendant's engineer saw plaintiff's automobile stalled on

a crossing in time to have stopped the train, and the proof showed that had the engineer been keeping a proper lookout, he could have seen plaintiff's signals, as he ran down the track to give warning, in time to have stopped the train and avoided the collision: *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628.

Refusing permission to amend an answer upon sustaining a demurrer thereto is within the discretion of the trial court, which will not be disturbed except for abuse; and no abuse appears, where the proposed amended answer states no additional facts or defenses material to the action not already pleaded in the original answer: *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 127 Pac. 568.

§ 303.

See notes to §§ 22, 464.

LEAVE OF COURT TO AMEND: See 4 Remington's Digest, "Pleadings," §§ 101-103; *Stone v. Insurance Co. of North America*, 56 Wash. 427, 105 Pac. 856; *International Dev. Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034; *Eaton v. General Compressed Air etc. Mach. Co.*, 62 Wash. 373, 113 Pac. 1091; *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463; *Neilsen v. Hovander*, 56 Wash. 93, 21 Ann. Cas. 113, 105 Pac. 172; *Roberts v. Tacoma R. & Power Co.*, 59 Wash. 226, 109 Pac. 605.

AMENDMENT TO CONFORM TO PROOFS: See 4 Remington's Digest, "Pleadings," § 104; *Wilson v. Seattle, Renton etc. R. Co.*, 55 Wash. 656, 104 Pac. 1114; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039; *International Dev. Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

A motion for a nonsuit on the ground that an essential fact had not been alleged in the complaint is properly denied where the motion was not made until the fact had been proved, since the complaint will be deemed amended: *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

Error cannot be assigned upon a trial amendment to the complaint where no claim of surprise or request for a continuance was made: *Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 132 Am. St. Rep. 1053, 101 Pac. 498.

It is not error to allow an amendment before trial, increasing the amount claimed on a contract of guaranty, where no surprise was claimed or continuance asked; and no variance results from proof of the increased amount: *Schoening v. Maple Valley Lumber Co.*, 61 Wash. 332, 112 Pac. 381.

As amendment of ad damnum clause after verdict, see note in Ann. Cas. 1913B, 709.

A verdict for plaintiff, in an action for the conversion of horses shipped by defendants' road, cannot be sustained upon evidence of a breach of defendants' contract of carriage, as against a motion for non-

suit or judgment non obstante veredicto, as amendments to conform to proof do not permit allegation of one cause and proof of an entirely different cause: *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 Pac. 794.

In an action by bailors to recover the value of goods lost by a bailee, it is not error to allow the complaint to be amended to allege that the plaintiffs were the owners of the goods: *Nowell v. Seattle Transfer Co.*, 63 Wash. 685, 116 Pac. 287.

It is not an abuse of discretion to allow an amendment to conform to proof as to the permanent nature of personal injuries, where the court offered to appoint physicians for a physical examination, with a view to granting a continuance if the examination demonstrated a surprise preventing a fair trial, and defendant failed to avail itself of the offer: *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

In an action upon an account, in which the defendant alleged an assignment by him and substitution of the assignee, and also sought an accounting alleging a balance due to defendant, plaintiff's failure to reply to the defense of substitution is inadvertence that may be cured by amendment, especially where defendant offered no objection to the appointment of a referee to take the account: *Walsh Lumber Co. v. Chaney*, 67 Wash. 583, 122 Pac. 10.

It is not an abuse of discretion to allow the plaintiffs to amend their reply, long before the trial commenced, to correct an inadvertent omission, and to amend the complaint at the trial to conform to the proofs, where, as a condition precedent, a continuance at the plaintiffs' cost was granted until such time as the defendants could fully prepare to meet the new issues, and no prejudice is claimed: *Behne v. Stapish*, 68 Wash. 204, 122 Pac. 1002.

Pleadings for a divorce will on appeal be deemed amended to conform to proof that the parties were residents of the county and of the state for one year preceding the commencement of the action: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

A trial amendment to the complaint is within the discretion of the court, and will not be disturbed except for abuse of discretion, and none appears, where omissions in the complaint were not called to the attention of the trial court until after the close of plaintiff's evidence, which fully covered the defects: *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292.

Upon failure of proof as to the terms of a contract of employment, the complaint should be deemed amended to conform to proof of quantum meruit for the services performed: *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625.

In an action for trespass by the cutting of timber in which the answer pleaded payment for the timber under a written con-

tract, it is not error to treat the answer as amended to conform to proof of payment under an oral contract, where evidence thereof was admitted without objection other than to its admission as varying the terms of the writing pleaded, and appellant had full opportunity to and did offer considerable evidence to meet it: *Stocking v. Boyer*, 70 Wash. 615, 127 Pac. 194.

As to amendments to pleading varying or altering the cause of action, see notes in 34 Am. Dec. 158; 51 Am. St. Rep. 414.

As to right to amend after default, see note in Ann. Cas. 1913B, 481.

As to amendments as requiring new process, see note in Ann. Cas. 1913B, 831.

RELIEF FROM JUDGMENT.—Under this section, authorizing a court to grant relief from a judgment within a reasonable time, and section 466, fixing the extreme limit beyond which judgments cannot be vacated at one year, purchasers at an execution sale under a judgment fair on its face are not represented by the judgment creditor or his attorney after the expiration of one year; and the vacation of a judgment thereafter on notice only to such attorney is void as to purchasers not made parties, regardless of whether the judgment was void: *Keith v. Rose*, 59 Wash. 197, 109 Pac. 810.

As to vacation of judgment on motion when not specially authorized by statute, see note in 60 Am. St. Rep. 633.

As to vacation of judgment on ground of mistake or negligence of attorney, see note in 96 Am. St. Rep. 108.

As to relief in equity from judgments, see note in 54 Am. St. Rep. 218.

It is not an abuse of discretion to set aside a default judgment for mistake, under this section, where the defendant had consulted with, and believed in good faith that he had employed, a lawyer to defend the action, although the attorney denied the employment: *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573.

A misunderstanding between counsel, in which each acted in good faith, resulting in a default judgment, may be sufficient to warrant the court in opening the default, where the right to trial on the merits is not denied: *Coleman v. Security Sav. Soc.*, 57 Wash. 675, 107 Pac. 842.

It is not an abuse of discretion to deny a motion to vacate a default judgment on the ground of excusable neglect, where the only excuse was a business trip of the defendant's attorney taking him outside the state, the attorney having had thirteen days in which to prepare a demurrer to a complaint which he claimed failed to state a cause of action, and the answer prepared containing nothing but denials and admissions, and no excuse being offered for not appearing within the thirteen days: *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160.

It is not an abuse of discretion to refuse to open a default judgment upon the affidavit of the defendant that he was misled by the plaintiff by promise to settle out of court, where the evidence is conflicting, and the plaintiff's counter-affidavit indicating that no such promise was made is not contradicted, and other admitted circumstances corroborate the plaintiff: *Swasey v. Mikkelsen*, 65 Wash. 411, 118 Pac. 308.

The sickness of defendant's wife is not a sufficient excuse for opening a default judgment, where it appears that it did not prevent defendant from attending to business or employing an attorney: *Swasey v. Mikkelsen*, 65 Wash. 411, 118 Pac. 308.

As to vacation of default judgments, see note in 58 Am. Dec. 392.

§ 304.

The amendment of a complaint, in an action for an attachment, repeating the original demand and adding another cause of action, is not an amendment of the first cause of action, and does not deprive the court of jurisdiction to adjudicate the first cause of action: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

§ 308.

Usually, for the recovery of damages occurring after the commencement of an action, the plaintiff should file an amended or supplemental complaint: *International Dev. Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

In an action for breach of covenant against encumbrances, it is not an abuse of discretion to deny leave to file a supplemental complaint, after a trial before the court without a jury and after the court had orally announced its decision for nominal damages, in order to show payment and discharge of the encumbrances by the plaintiff after the decision was made: *Harsin v. Oman*, 59 Wash. 693, 110 Pac. 621.

Where an action is prematurely commenced, it cannot be made the basis for a supplemental complaint upon the maturing of the debt: *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A., N. S., 232, 106 Pac. 495.

Notwithstanding this section allowing supplemental pleadings to show facts that occurred "after the former pleadings were filed," it is not error to permit a supplemental complaint to show facts that arose subsequent to the commencement of the action but prior to the filing of an amended complaint, and within the pleader's knowledge at the latter date, in view of the common-law rule and the liberal rules of pleading enjoined by the code: *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563.

Under this section, authorizing supplemental pleadings to show facts occurring after issue joined, it is proper to allow defendant to withdraw an answer and demur

on the ground that the complaint was not filed within time to toll the statute of limitations, where the objection was not available at the time the issue was made up: *Petree v. Washington Water Power Co.*, 64 Wash. 636, 117 Pac. 475.

§ 315.

Upon the submission of questions to a jury in an equitable case, the verdict is advisory only, and inconsistency between special findings and the general verdict is immaterial: *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449.

§ 316.

See notes to § 1179.

Constitution, article 1, section 21, providing that the right to trial by jury shall remain inviolate, means that the right, as it existed in the territory when the constitution was adopted, shall continue unimpaired and inviolate: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

As to validity of statute depriving of right to trial by jury in lower court but providing for jury trial on appeal, see note in Ann. Cas. 1912C, 1109.

As to general scope of constitutional provisions guaranteeing right of trial by jury, see note in 1 Ann. Cas. 703.

The federal constitutional guaranty of a trial by an impartial jury has no application to prosecutions in a state court for the violation of state laws: *State v. McDowell*, 61 Wash. 398, Ann. Cas. 1912C, 782, 32 L. R. A., N. S., 414, 112 Pac. 521.

LEGAL OR EQUITABLE ACTIONS OR ISSUES.—An action to restrain a trespass is of equitable cognizance and without right to a jury trial: *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179.

An action upon lost notes, seeking their establishment and recovery upon indemnifying the defendant against liability on the original notes, is one of equitable cognizance, and defendant is entitled to a jury trial: *Hart-Parr Co. v. Keith*, 62 Wash. 464, 114 Pac. 169.

In an action to foreclose a subcontractor's lien, a defendant is not entitled to a jury trial of the legal issues arising between the defendants; since equity, having obtained jurisdiction, retains it to the end: *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

As to the right to jury trial in action to foreclose mechanic's lien, see note in Ann. Cas. 1913B, 283.

An action for breach of a contract to purchase plaintiff's pack of salmon is properly tried to a jury as a law case, and not in equity for an accounting, where the issue was as to the terms of the contract, and an accounting was only incidentally involved to determine the extent of the damages: *Car-*

lisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172.

WAIVER OF RIGHT.—Failure to demand a jury in a condemnation proceeding at the time the case is set down for trial waives the right to a jury trial: *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031.

It is discretionary to submit the issues to trial by jury, although no demand for a jury was made before trial, as required by this section, to avoid a waiver of the right: *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 28 L. R. A., N. S., 1053, 105 Pac. 632.

A demand for a jury trial is unconditionally withdrawn, where after a great deal of colloquy, the demand was withdrawn until the plaintiff should make an election, which plaintiff refused and was not required to make, and after refusal of an order to dismiss for want of election, defendant's counsel stated that he withdrew his demand for a jury: *Forrester v. Reliable Transfer Co.*, 65 Wash. 602, 118 Pac. 753.

It is not ground for a new trial in a criminal case that a challenge to a juror was sustained on evidence as to his citizenship which left the matter in doubt, where no prejudice was shown and a fair and impartial jury was secured: *State v. Phillips*, 65 Wash. 324, 118 Pac. 43.

§ 319.

The notice of trial required by this section is not jurisdictional, and is waived, on the preliminary hearing in a condemnation suit, where the party made no motion to set aside the adjudication of public use, and subsequently went to trial on the question of damages, after ample time to prepare for the same: *In re Western Avenue*, 57 Wash. 290, 106 Pac. 901.

While it is discretionary to dismiss an action for failure to prosecute it diligently, under this section, it is not an abuse of discretion to refuse to dismiss upon plaintiff's failure to notice it for trial for nearly two years after issues joined, where the plaintiff had not abandoned the action and the defendant might have noticed it for trial, and was, by stipulation, secured the benefit of testimony of a witness who had died in the meantime: *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086.

§ 322.

It is not an abuse of discretion to refuse a continuance, asked on account of the absence of the defendant, where it appears that the defendant in an action on promissory notes was absent in Alaska several months while the case was pending; that on June 24th the case was set for trial on September 26th, and later continued to October 5th and 9th; that defendant could have been reached by telegraph or mail and advised of the date of trial in time to at-

tend, but he failed to keep his attorney posted as to his address or how to reach him: *Nye v. Manley*, 69 Wash. 631, 125 Pac. 1009.

It is not an abuse of discretion to refuse to grant a continuance upon the ground of the absence of nonresident counsel for the defendant, who was familiar with the facts and expected to try the case, but was sick at his home in another state and could not be present at the trial, resident counsel claiming that he was not in a position to intelligently conduct the defense, such a continuance being a matter of grace: *Steenstrup v. Toledo Foundry & Machine Co.*, 66 Wash. 101, Ann. Cas. 1913C, 427, 119 Pac. 16.

As to continuances in civil cases, see note in 74 Am. Dec. 141.

As to imposition of terms on granting continuance, see note in Ann. Cas. 1913A, 306.

As to continuance to secure presence of witness, see note in 37 L. R. A., N. S., 760.

ABSENCE OF WITNESS OR EVIDENCE.—It is not an abuse of discretion to refuse a continuance in a criminal case, asked on account of the absence of a witness who was present when the case was set for trial and would probably have been present but for a wreck which detained him, where the case had been once continued on a like showing and due diligence was not shown by subpoenaing him, and it was not made to appear reasonably certain that he would be present later: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

It is not error to refuse a continuance to secure the evidence of an absent witness where such evidence appears to be immaterial: *Jackson v. Mercantile Mut. Fire Ins. Co.*, 45 Wash. 244, 88 Pac. 127.

In a prosecution for selling liquor to an Indian, it is not an abuse of discretion, after the Indian had testified as to his parentage and that his parents were living, to refuse a continuance until the parents could be called, where it does not appear that they would testify differently: *State v. Rackich*, 66 Wash. 390, Ann. Cas. 1913C, 312, 37 L. R. A., N. S., 760, 119 Pac. 843.

It is discretionary to grant a continuance to enable a party to secure evidence, and error cannot be predicated thereon when the adverse party did not ask for costs as a condition precedent: *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 28 L. R. A., N. S., 1053, 105 Pac. 632.

It is not an abuse of discretion to refuse a continuance, where two days' time was granted to take the deposition of the absent party: *Furman v. Bon Marche*, 71 Wash. 238, 128 Pac. 210.

It is not an abuse of discretion to deny a continuance on account of the absence of a witness, defendant's general manager, needed in the preparation of the defense, where it is admitted by the plaintiff that

the witness if present would testify as it was claimed he would, and another witness testified in substance to the same effect, and was better able to give assistance in preparation than the manager: *Sorenson v. Danaber Lumber Co.*, 71 Wash. 38, 127 Pac. 586.

It is not an abuse of discretion to deny a continuance in a condemnation case, asked when the case was called on February 26th, because the ground was covered with snow and could not be shown to the witnesses, where the party made no objection on February 10th to the setting of the case for trial on February 14th, and made no showing that conditions had changed, and where the opposite party was in court ready for trial when the case was called: *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031.

A continuance is properly denied to defendant to secure the attendance of a witness in its employ in British Columbia and under its control, where his evidence had been given on a former trial, issues on amended pleadings had been made up for two months, and no excuse was shown for failing to take his deposition, nor due diligence exercised to secure his attendance: *La Bee v. Sultan Logging Co.*, 59 Wash. 341, 109 Pac. 1023.

In an action on a contract whereby the plaintiff had agreed to furnish secret formulae for the manufacture of an article, and defendant's answer specifically denied that the same was furnished, it is not an abuse of discretion to refuse plaintiff a continuance in order to obtain rebuttal evidence on the issue, the answer indicating that defendant would deny the formulae had been furnished, as testified by the witness for the plaintiff, and it appearing by subsequent letters that repeated demands had been made for the formulae, which the plaintiff agreed to furnish: *Perolin Co. v. Young*, 65 Wash. 300, 118 Pac. 1.

In an action by the state to dissolve an unlawful building and loan association, tried by the court without a jury, it is an abuse of discretion to refuse a continuance for less than one day to enable the state to obtain competent proof of the prerequisite auditor's notice to the attorney general to prosecute the suit, if, by any misunderstanding, counsel for the state had failed to prove such preliminary fact: *State ex rel. Tanner v. Northwestern Investment Co.*, 70 Wash. 381, 126 Pac. 895.

SURPRISE AT TRIAL.—In the absence of special showing of prejudice, it is not error to deny a continuance to the defendant upon allowing plaintiff to file a supplemental complaint, where a reasonable time appears to have elapsed before the date of the trial: *Edwards v. Seattle, Renton & S. R. Co.*, 62 Wash. 77, 113 Pac. 563.

In an action for personal injuries in which the complaint alleged injury to plain-

tiff's "left" kidney, it is not an abuse of discretion to allow a trial amendment to make the reference to the "right" kidney, and to deny a continuance for surprise, where the defendant was allowed and availed itself of the privilege of a physical examination by physicians who testified for the defendant: *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211.

It is not error to refuse a continuance asked on account of a trial amendment to the complaint, stating in more detail matters that had been stated generally in the original pleading, where the amendment was not very material and did not affect in any way the issues on the merits or require different proofs to meet it: *Hood v. Gerrick*, 69 Wash. 607, 125 Pac. 956.

A continuance need not be granted for failure of the plaintiff to answer interrogatories, where they were not served until six months after the commencement of the action, and at a time when the case had been or was about to be set for trial, and a motion to strike the interrogatories was pending, with no effort made to dispose of the motion: *Steenstrup v. Toledo Foundry & Machine Co.*, 66 Wash. 101, Ann. Cas. 1913C, 427, 119 Pac. 16.

§ 329.

A challenge to the panel is not sustainable by reason of the drawing of three jurors who had served on a former trial, since they could be challenged for cause: *State v. Barnes*, 54 Wash. 493, 23 L. R. A., N. S., 932, 103 Pac. 792.

§ 331.

In a prosecution for the infringement of a labor union trademark, prejudice of a juror is not shown, and it is not an abuse of discretion to overrule a challenge for cause, where the juror was not acquainted with the defendant, knew nothing of the case, and was not a member of any union, although he had been a member and was favorably inclined toward unions: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

As to sympathy for laboring men generally as ground for challenge for cause, see note in Ann. Cas. 1913A, 1279.

A juror is not disqualified by the opinion that, when a homicide is admitted by the accused, it will be presumed that he was guilty of a crime until evidence of justification is submitted; and this does not conflict with the rule that the juror must, in proper cases, accord the accused the presumption of innocence: *State v. Ware*, 58 Wash. 526, 109 Pac. 359.

As to effect of previously formed opinion from reading account of offense, see note in 35 L. R. A., N. S., 985.

Error, if any, in denying a challenge to a jury for actual bias, is waived, where the state withdrew its opposition, and the court

offered to permit the defense to again exercise its challenge, the defense refusing to avail itself thereof or take any action thereon: *State v. Jahns*, 61 Wash. 636, 112 Pac. 747.

§ 335.

A juror, described in the jury list and summoned as, and answering to the name of, Hall Horton, who was examined and accepted by both sides as satisfactory without either side asking his name, was qualified and competent, notwithstanding his name may have been Horton Hall: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

In the examination of a juror on his voir dire, it is not prejudicial error for the court to curtail counsel in questions bringing out the fact that the court had criticised a jury in another case, where he was permitted to go far enough to lay the ground for a peremptory challenge if the juror had served in such case: *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

As to examination of juror on voir dire, see note in 23 Am. Dec. 128.

As to right of counsel to examine juror on voir dire to determine whether to exercise right of peremptory challenge, see note in 109 Am. St. Rep. 563.

§ 339.

See notes to § 384.

CONDUCT OF TRIAL.—Remarks and conduct of judge: See 4 Remington's Digest, "Trial," § 14; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149; *In re Western Avenue*, 57 Wash. 290, 106 Pac. 901; *State v. McDowell*, 61 Wash. 398, Ann. Cas. 1912C, 782, 32 L. R. A., N. S., 414, 112 Pac. 521; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563.

After a trial and oral decision it is error to retry the cause upon affidavits without an opportunity to meet the same: *Schultz v. Schultz*, 71 Wash. 327, 128 Pac. 660.

It is proper to consolidate an action for the foreclosure of a mortgage and actions to foreclose laborers' lien on the same property, and to enter a single decree defining the rights of the respective parties: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

ARGUMENTS AND CONDUCT OF COUNSEL: See 4 Remington's Digest, "Trial," §§ 43-52; *Passage v. Stimson Mill Co.*, 52 Wash. 661, 101 Pac. 239; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 194; *Madrona Grocery Store Co. v. Wallin*, 57 Wash. 136, 106 Pac. 617; *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515; *Northern Pac. R. Co. v.*

Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453; *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915.

This section, providing that no argument shall be allowed in the opening statement, is not violated by a lengthy and detailed statement of the facts, even if some slight inferences are drawn; and no prejudice results where counsel desisted on objection made, and nothing was said not fully justified by the testimony produced: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

A statement of an attorney in argument that he was thoroughly convinced from the facts proven of a certain fact in issue is nothing more than a conclusion and not misconduct requiring a reversal: *Kalberg v. The Bon Marche*, 64 Wash. 452, 117 Pac. 227.

Counsel may, in argument, draw a legitimate conclusion from the evidence: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

It is not sufficient to authorize a reversal that the prosecuting attorney remarked, after objections were overruled, that he did not blame defendant's counsel for winning: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

It is improper for counsel in argument to discuss the legal effect of the answer to special interrogatories, or their legal bearing upon the general verdict: *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88.

It is not misconduct of counsel, warranting a new trial in a personal injury case, to ask plaintiff if two children present were her children: *Keough v. Seattle Elec. Co.*, 71 Wash. 466, 128 Pac. 1068.

It is not misconduct for a prosecuting attorney to address argumentative remarks to the jury if they are free from expressions of individual opinion as to the defendant's guilt independent of the testimony in the case: *State v. Peeples*, 71 Wash. 451, 129 Pac. 108.

As to limitations that may be imposed upon argument of counsel, see note in 46 Am. St. Rep. 23; as to misconduct in argument which calls for a new trial, see note in 9 Am. St. Rep. 559; and as to misconduct of attorneys at trial and its effect, see note in 109 Am. St. Rep. 690.

As to argument of prosecuting attorney, see note in 38 L. R. A., N. S., 1130; as to the propriety of his reference to the prevalence to crime, see note in Ann. Cas. 1912A, 1019.

INSTRUCTIONS — COMMENT ON FACTS: See 4 Remington's Digest "Trial," §§ 66-73; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888; *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620; *In re Westlake Avenue*, 60 Wash. 549, 111 Pac. 780; *Bush v. Independent Mill Co.*, 54 Wash. 212, 103 Pac. 45; *Caywood v. Seattle Elec. Co.*, 59 Wash. 566, 110 Pac. 420; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *Staats v. Pioneer Ins.*

Assn., 55 Wash. 51, 104 Pac. 185; McKenzie v. North Coast Colliery Co., 55 Wash. 495, 28 L. R. A., N. S., 1244, 104 Pac. 801.

It is not an unlawful comment on the facts to instruct as to defendant's liability, assuming a certain fact, where, by the previous instruction, such fact was properly submitted to the jury: Nolan v. Stillwater Lumber Co., 65 Wash. 445, 118 Pac. 340.

PRESUMPTIONS AND BURDEN OF PROOF.—An instruction as to the burden of proof is correct when it defined the same as requiring a party to establish the fact to the satisfaction of the jury by a fair preponderance of the evidence: Bush v. Independent Mill Co., 54 Wash. 212, 103 Pac. 45.

Where there are correct general instructions as to the burden of proof and the preponderance of the evidence, it is not error to precede other instructions by the introductory clause, "If you find from the evidence" and so forth, without repeating the previous general instructions: Wiemann v. Jackman R. Co., 57 Wash. 682, 107 Pac. 844.

An instruction that the preponderance of the testimony is the excess over the amount necessary to balance the scales, entitling the party furnishing it to a verdict, is proper: Palmer v. Huston, 67 Wash. 210, 121 Pac. 452.

INFLUENCE OF ARGUMENTS OF COUNSEL.—An instruction that the jury are to "disregard the statements of the attorneys as to the value of the lands," while not commendable, is not prejudicial, where it goes no further than to suggest that the statements are not to be regarded as evidence: Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.

As to instruction to jury to pay no attention to remarks of counsel, see note in Ann. Cas. 1912C, 817.

WRITTEN INSTRUCTIONS — REQUESTS FOR REDUCTION TO WRITING.—Where it does not appear that a stenographic report of instructions to the jury was made under a private contract with a party, it will be assumed, in the absence of anything in the record to the contrary, that the stenographer was under the direction and control of the court, thereby constituting the instructions a charge in writing, within the meaning of Laws of 1903, page 119, section 1: State v. Erickson, 54 Wash. 472, 103 Pac. 796.

A defendant in a felony case may waive the statutory requirement that the instructions to the jury be given in writing: State v. Andrews, 71 Wash. 181, 127 Pac. 1102.

When the parties stipulated that instructions might be partly oral and partly in writing, they may be so given: Wheeler v. Hotel Stevens Co., 71 Wash. 142, 127 Pac. 840.

Under this section, it is reversible error to give oral instructions over the objection of the appellant: State v. Burnam, 71 Wash. 199, 128 Pac. 218.

Error cannot be predicated upon the refusal to give an instruction which was dictated to the court stenographer without calling the court's attention to the same at the time, and which was not written, marked refused, and filed with the clerk as part of the instructions offered by the appellant, in view of the statutory requirement that the instructions shall be reduced to writing, and the rules of court requiring proposed instructions to be in writing and filed in the cause and handed to the court: Murphy v. Chicago, Milwaukee & St. Paul R. Co., 66 Wash. 663, 120 Pac. 525.

This section, requiring written instructions to the jury, is not violated where written instructions upon the principles of law were given, and the court added an oral explanation of what he had read that did not amount to a positive direction as to the law of the case: State v. Marion, 68 Wash. 675, 124 Pac. 125.

Under this section, providing that the charge of the court must be reduced to writing and taken to the jury-room, and section 395, providing that the same shall become a part of the record upon being filed with the clerk, it is reversible error to give orally an instruction relating to the credibility of witnesses, which could not be taken to the jury-room, or made a part of the record without a statement of facts; and the statute being mandatory, it is immaterial that the instruction was without prejudicial effect: Raynor v. Tacoma R. & Power Co., 70 Wash. 133, 126 Pac. 91.

FORM AND SUFFICIENCY: See 4 Remington's Digest, "Trial," §§ 81-88; Silver v. London Assurance Corp., 61 Wash. 593, 112 Pac. 666; Childs v. Childs, 49 Wash. 27, 94 Pac. 660; Shaw v. Woodland Shingle Co., 61 Wash. 56, 111 Pac. 1070.

An instruction upon demurrage charges may properly assume that the parties had waived provisions requiring written notice of extra work, where that was the established fact: Gehri & Co. v. Dawson, 64 Wash. 240, 116 Pac. 673.

An instruction concisely informing the jury of the issues is not erroneous in failing to state the case or in failing to state the admitted facts, even though the pleadings were taken to the jury-room: Tibbits v. Spokane, 64 Wash. 570, 117 Pac. 397.

Where the court had instructed the jury generally that a passenger (suing for damages for failure to perform the contract of carriage) is bound to do everything in her power to reduce the damages and cannot complain of consequences flowing from her refusal to do so, it is not error to refuse a request for a more particular instruction on the subject dealing with the particular circumstances of the case: Harvey v. Tacoma

R. & Power Co., 64 Wash. 143, 116 Pac. 644.

Instructions directing the jury to find the facts according to their conscientious belief are not misleading as addressed to their consciences rather than their minds: **Wheeler v. Hotel Stevens Co.**, 71 Wash. 142, 127 Pac. 840.

Where there is a seeming necessity, the jury may be cautioned not to allow sympathy or prejudice to influence the verdict: **Wheeler v. Hotel Stevens Co.**, 71 Wash. 142, 127 Pac. 840.

Instructions basing the right of recovery entirely on belief in the plaintiff's version of a disputed fact are proper where there was direct conflict on an essential matter and no middle ground on which a verdict could be predicated: **Wheeler v. Hotel Stevens Co.**, 71 Wash. 142, 127 Pac. 840.

APPLICABILITY TO PLEADINGS AND EVIDENCE: See 4 Remington's Digest, "Trial," §§ 93-95; **Staats v. Pioneer Ins. Assn.**, 55 Wash. 51, 104 Pac. 185; **Gabrielson v. Hague Box & Lumber Co.**, 55 Wash. 342, 133 Am. St. Rep. 1032, 104 Pac. 635; **Helland v. Bridenstine**, 55 Wash. 470, 104 Pac. 626; **Caywood v. Seattle Elec. Co.**, 59 Wash. 566, 110 Pac. 420; **Johnson v. Caughren**, 55 Wash. 125, 19 Ann. Cas. 1148, 104 Pac. 170.

A requested instruction assuming facts as proven which were for the jury is properly refused: **Harkins v. Veness Lumber Co.**, 69 Wash. 196, 124 Pac. 492.

In an action for malpractice, instructions on the theory that the defendants treated plaintiff as specialists, are proper where the undisputed evidence showed that to be the case, notwithstanding the complaint alleged the cause of action against them as general practitioners: **Williams v. Wurdemann**, 71 Wash. 390, 128 Pac. 639.

Upon an issue as to whether defendant had notice of work going on in a cut near the street line under a city permit, the jury may take into consideration the fact that a permit had been issued for such work, where there was evidence that the defendant had seen the permit, and had inspected the work, and urged its completion, since the permit was one item in the line of circumstances tending to show notice: **Gasof v. Standard Ice Co.**, 71 Wash. 537, 129 Pac. 101.

REQUESTED INSTRUCTIONS ALREADY GIVEN.—It is not error to refuse requested instructions that are covered in the general charge: **Menasha Wooden Ware Co. v. Nelson**, 53 Wash. 160, 101 Pac. 720; **Bush v. Independent Mill Co.**, 54 Wash. 212, 103 Pac. 45; **Spencer v. Arlington**, 54 Wash. 259, 103 Pac. 30; **Conrad v. Graham & Co.**, 54 Wash. 641, 132 Am. St. Rep. 1137, 103 Pac. 1122; **Spencer v. Arlington**, 54 Wash. 259, 103 Pac. 30; **Conrad v. Graham & Co.**, 54 Wash. 641, 132 Am. St. Rep. 1137, 103

Pac. 1122; **Sudden & Christenson v. Morse**, 55 Wash. 372, 104 Pac. 645; **Johnson v. Caughren**, 55 Wash. 125, 19 Ann. Cas. 1148, 104 Pac. 170; **State ex rel. Merriam v. Superior Court**, 55 Wash. 64, 104 Pac. 148; **Harris v. Brown's Bay Logging Co.**, 57 Wash. 8, 106 Pac. 152; **Wharton v. Tacoma Fir Door Co.**, 58 Wash. 124, 107 Pac. 1057; **Weed v. Foster**, 58 Wash. 675, 109 Pac. 123; **State v. George**, 58 Wash. 681, 109 Pac. 114; **Tecklenburg v. Everett R. L. & W. Co.**, 59 Wash. 384, 34 L. R. A., N. S., 784, 109 Pac. 1036; **Merrill v. Stevens & Co.**, 61 Wash. 28, Ann. Cas. 1912B, 1011, 112 Pac. 353; **Edwards v. Seattle, Renton etc. R. Co.**, 62 Wash. 77, 113 Pac. 563; **Domke v. Gunning**, 62 Wash. 629, 114 Pac. 436.

Requested instructions are properly refused, if faulty, inapplicable, or covered by the general charge: **State v. Johnson**, 47 Wash. 227, 91 Pac. 949.

A technically erroneous instruction purporting to state the issues, and alluding to the plaintiff's expectancy of life as if alleged in the complaint (which only alleged his age), does not require a reversal where it did not state what the life expectancy actually was: **Wiemann v. Jackman R. Co.**, 57 Wash. 682, 107 Pac. 844.

A party is not entitled to an instruction in any particular form of words, where its substance is given: **Averbuch v. Great Northern R. Co.**, 55 Wash. 633, 104 Pac. 1103.

It is not necessary that instructions be given in the language requested, where the same were fairly presented: **Hall v. Northwest Lumber Co.**, 61 Wash. 351, 112 Pac. 369.

Under this section it is discretionary for the court to refuse to give a further instruction after argument of the counsel: **State v. Brache**, 63 Wash. 396, 115 Pac. 853.

CONSTRUCTION AND OPERATION AS A WHOLE: See 4 Remington's Digest, "Trial," §§ 116, 117; **St. John v. Cascade Lumber & Shingle Co.**, 53 Wash. 193, 101 Pac. 833; **Sudden & Christenson v. Morse**, 55 Wash. 372, 104 Pac. 645; **Olmstead v. Olympia**, 59 Wash. 147, 109 Pac. 602; **Myhra v. Chicago, M. & P. S. R. Co.**, 62 Wash. 1, 112 Pac. 939; **Averbuch v. Great Northern R. Co.**, 55 Wash. 633, 104 Pac. 1103.

Where the issue on defendant's negligence was whether he had furnished sufficient men to handle a door, the error in a concrete instruction that he was negligent if he did not furnish sufficient men to handle it with reasonable safety is not cured by a later abstract instruction in the most general terms as to the rule for determining the negligence of either party by reference to the conduct of ordinarily prudent men: **Rosin v. Danaher Lumber Co.**, 63 Wash. 430, 40 L. R. A., N. S., 913, 115 Pac. 833.

EXCEPTIONS, TIME FOR TAKING. Exceptions to instructions, taken imme-

diately after the jury retired, are within time, in compliance with this section: *State v. Neis*, 68 Wash. 599, 123 Pac. 1022.

RECEPTION OF EVIDENCE, INTRODUCTION, OFFER, AND ADMISSION: See 4 Remington's Digest, "Trial," §§ 18-25; *Craver v. Mossbach*, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016.

The practice of permitting a witness to illustrate his testimony, in comparing handwriting on a forged check with admitted handwriting, by illustrations on a blackboard cannot be commended, for the illustrations cannot be preserved in the record: *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179.

It is not an abuse of discretion to grant plaintiff's request for the exclusion of defendant's witnesses, where it was indicated that a like request by defendant would have been granted if it had been made: *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810.

It is discretionary to permit leading questions: *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73.

PRACTICE RELATING TO.—Upon a second trial of a case, it is not objectionable to allow a witness to explain one of his answers at the former trial by stating how he understood the question: *Haggard v. Seattle*, 61 Wash. 499, 112 Pac. 503.

In a prosecution for lewdness, a question as to the "reputation" for chastity of the defendant's paramour means when unqualified, *ex vi termini*, "general reputation," and is not objectionable in form: *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

A witness may be allowed to testify through an interpreter as to a statement made by the accused, where it appears that he understood the language used by the accused but was incapable of expressing himself clearly in the English language: *State v. Wilson*, 464, 123 Pac. 795.

As to proper manner of conducting examination of witness through interpreter, see note in *Ann. Cas.* 1912B, 726.

In an action upon an account assigned by a corporation, an assignment to plaintiff purporting to have been executed by the assistant treasurer of the corporation is admissible as against the objection "that it did not tend to establish any of the allegations of the complaint": *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069.

ORDER OF PROOF AND REBUTTAL: See 4 Remington's Digest, "Trial," §§ 27-33; *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42; *Kimble v. Stackpole*, 60 Wash. 35, 35 L. R. A., N. S., 148, 110 Pac. 677; *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1089; *Spencer v. Alki Point Transp. Co.*, 53

Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

After accused had denied that he and his codefendants had rehearsed their testimony in detail, evidence in rebuttal to show that the statement was untrue is admissible, within the discretion of the court, as affecting their credibility: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

EVIDENCE—JUDICIAL NOTICE.—An appellate court cannot take judicial notice of what the trial court cannot judicially notice: *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

The courts take judicial notice that in this latitude in August it is daylight in the morning at 5:30 o'clock: *State v. Gunderson*, 56 Wash. 672, 21 Ann. Cas. 350, 106 Pac. 194.

The court will take judicial notice of the financial panic prevailing in 1893 and subsequent years: *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 107 Pac. 187.

The court will take judicial notice of the custom to record executory contracts for the sale of real estate, and to record instruments affecting the title to real property in deed records, encumbrances in mortgage records, and evidences of title to personal property in miscellaneous records: *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

The court cannot take judicial notice of its records in other actions: *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

In an action by a minor, by his guardian ad litem, the court will take judicial notice of its order appointing the guardian ad litem, for the purpose of the action, entered upon a petition referring to the complaint on the same day the complaint was filed: *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480.

The court cannot take judicial notice of the record in another cause, even between the same parties in the same court, when not pleaded or proved: *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

The courts will take judicial notice of the practice of spouses in this state to make mutual wills of community property: *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255.

The courts take judicial notice of the rules and practice of the Interior Department: *Adams v. Canutt*, 66 Wash. 422, 119 Pac. 865.

The supreme court will take judicial notice that judgment is not always entered immediately on receiving a verdict, where motion for new trial is made: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

As to judicial notice in general, see notes in 89 Am. Dec. 663; 124 Am. St. Rep. 756.

As to judicial notice of boundaries and locations, see note in 82 Am. St. Rep. 439.

As to judicial notice of proceedings in other causes, see note in Ann. Cas. 1913A, 140.

As to judicial notice of usage or custom, see note in Ann. Cas. 1912A, 397.

As to right of jurors to act on their own knowledge, see note in 37 L. R. A., N. S., 790.

BURDEN OF PROOF.—The burden of proving an affirmative defense is upon the defendant: *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

Negative testimony which cannot be accounted for or explained away on the theory of mistake or lack of knowledge is entitled to the same consideration as other testimony: *Catlin v. Sheldon*, 56 Wash. 423, 105 Pac. 828.

Where the only issue on a counterclaim was the defendants' measure of damages in the sale of a horse, to be determined by the difference between the price paid and its actual value, the burden of proof is upon the defendants, with the right to open and close: *Kleeb v. McInturff*, 71 Wash. 419, 128 Pac. 1076.

RELEVANCY—IN GENERAL.—Wooden models, fairly representing the place of an accident, are admissible, within the discretion of the court, to illustrate the conditions, although not drawn to a scale: *Harris v. Seattle, Renton & Southern R. Co.*, 65 Wash. 27, 117 Pac. 601.

In an action on open account by a bookkeeper and timekeeper, employed by defendant's decedent on contract work, in which plaintiff seeks recovery for moneys advanced to the deceased in addition to wages, it is error to exclude evidence offered by the defendant to show that the contract was a profitable one on which there was a large sum due the deceased at the time of his death, as tending to show that deceased would not have borrowed money from plaintiff, circumstantial evidence being especially admissible in favor of the estate of a deceased person: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

VALUE OR MARKET PRICE OF PROPERTY.—Upon an issue as to the value of a lot, it is not competent to prove in rebuttal that property in the vicinity had been offered and listed at specified prices: *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515.

Upon an issue as to the value of a horse sold by defendant at Seattle, evidence of the price paid for it by the defendant at North Yakima is inadmissible: *Abrahamson v. Cummings*, 65 Wash. 35, 117 Pac. 709.

The manufacturer's current prices paid for articles made by only a few concerns and having no fixed general or market value, the prices for which varied from time to time with the market price of copper and

lead, is competent evidence of the value of the articles, and sufficient in the absence of any contradictory evidence: *Pacific Tel. etc. Co. v. Huetter*, 68 Wash. 442, 123 Pac. 607.

RES GESTAE—ACTS AND STATEMENTS ACCOMPANYING TRANSACTION: See 4 Remington's Digest, "Evidence," § 52; *Grant v. Oregon R. & Nav. Co.*, 54 Wash. 678, 25 L. R. A., N. S., 925, 103 Pac. 1126; *Britton v. Washington Water Power Co.*, 59 Wash. 440, 140 Am. St. Rep. 858, 33 L. R. A., N. S., 109, 110 Pac. 20; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795.

As to what included in the res gestae, see notes in 95 Am. Dec. 51; 16 Am. St. Rep. 407.

As to declarations of bystander at time of accident as part of res gestae, see note in Ann. Cas. 1912C, 319.

As to whether the fact that one was not a participant or actor in an accident or affray renders his statements or exclamations inadmissible as res gestae, see note in 20 L. R. A., N. S., 133.

AFTER TRANSACTION OR EVENT: See 4 Remington's Digest, "Evidence," § 53; *Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 42 L. R. A., N. S., 917, 108 Pac. 593; *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162.

ACTS AND STATEMENTS OF PERSON INJURED: See 4 Remington's Digest, "Evidence," § 55; *Britton v. Washington Water Power Co.*, 59 Wash. 440, 140 Am. St. Rep. 858, 33 L. R. A., N. S., 109, 110 Pac. 20.

COMPETENCY: See 4 Remington's Digest, "Evidence," §§ 61-1, 66-2; *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752; *Merrill v. Stevens & Co.*, 61 Wash. 28, Ann. Cas. 1912B, 1011, 112 Pac. 353.

BEST AND SECONDARY EVIDENCE: See 4 Remington's Digest, "Evidence," §§ 71-80; *Hull v. Seattle, Renton etc. R. Co.*, 60 Wash. 162, 110 Pac. 804; *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463; *Keenan v. Lauritzen Malt Co.*, 57 Wash. 367, 106 Pac. 1122; *Hull v. Seattle, Renton etc. R. Co.*, 60 Wash. 162, 110 Pac. 804.

Upon a prosecution for selling liquor to an Indian of the half blood, the Indian is competent to testify as to his parentage, even though his parents are living: *State v. Rackich*, 66 Wash. 390, Ann. Cas. 1913C, 312, 37 L. R. A., N. S., 760, 119 Pac. 843.

ADMISSIONS BY AGENTS: See 4 Remington's Digest, "Evidence," § 94; *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075.

As to admissibility of acts and declarations of agents, see note in 131 Am. St. Rep. 306.

SELF-SERVING DECLARATIONS:

See 4 Remington's Digest, "Evidence," §§ 99-100; Conner v. Seattle, Renton etc. R. Co., 56 Wash. 310, 134 Am. St. Rep. 1110, 25 L. R. A., N. S., 930, 105 Pac. 634; Dempsey v. Dempsey, 61 Wash. 632, 112 Pac. 755.

DECLARATIONS AGAINST INTEREST IN GENERAL: See 4 Remington's Digest, "Evidence," § 101; Corbett v. Weaver, 59 Wash. 248, 109 Pac. 803; Simons v. Cissna, 60 Wash. 141, 110 Pac. 1011; Dempsey v. Dempsey, 61 Wash. 632, 112 Pac. 755.

CROSS-EXAMINATION AND RE-EXAMINATION: See 4 Remington's Digest, "Witnesses," §§ 72-92; State v. Jones, 53 Wash. 142, 101 Pac. 708; Buckles v. Reynolds, 58 Wash. 485, 108 Pac. 1072; Bruce v. Bevis, 56 Wash. 547, 106 Pac. 129; Silver v. London Assurance Corp., 61 Wash. 593, 112 Pac. 666; Peacock v. Ratliff, 62 Wash. 653, 114 Pac. 507.

It is not an abuse of discretion to refuse unlimited repetition in cross-examination, after inquiry of sufficient length to elucidate the fact as far as the witness is able to detail it: State v. Blaine, 64 Wash. 122, 116 Pac. 660.

Where a matter has been fully gone into, it is not error to refuse to permit the witnesses to be further interrogated along the same lines: State v. Mallahan, 66 Wash. 21, 118 Pac. 898.

Upon cross-examination, it is proper to exclude documentary evidence which was no part of the cross-examination, even if it were admissible at some other time: Berens v. Cox, 70 Wash. 627, 127 Pac. 139.

Cross-examination of the plaintiff as to his carelessness in heeding a warning does not make him the defendant's witness so as to preclude other testimony contradicting him on that point: Allard v. Northwestern Contract Co., 64 Wash. 14, 116 Pac. 457.

Where the defendant testified that he had been acquitted in police court of any offense in connection with running down a pedestrian, it is proper, on cross-examination, to require him to state for what offense he was tried: Segerstrom v. Lawrence, 64 Wash. 245, 116 Pac. 876.

In an action for malicious prosecution, it is not proper cross-examination of the plaintiff to show that he was short in his accounts as affecting his reputation, where the plaintiff had offered no evidence of reputation: Finigan v. Sullivan, 65 Wash. 625, 118 Pac. 888.

Where the accused offered himself as a witness and testified that he had been looking for work and could not find it, it is not error to allow cross-examination showing that he had not had a steady job for some time before the commission of the crime: State v. King, 67 Wash. 651, 122 Pac. 323.

Error cannot be predicated upon allowing cross-examination of a party's own witness who was clearly hostile, nor where no exception was taken, the same being within the discretion of the trial court: Rommen v. Empire Furniture Mfg. Co., 66 Wash. 48, 118 Pac. 924.

Upon cross-examination it is not error to exclude a question relating to a subject upon which the witness had not testified: State v. Wilson, 68 Wash. 464, 123 Pac. 795.

It is not an abuse of discretion to curtail the cross-examination of witnesses as to matters amply covered by previous questions in the cross-examination: Cameron v. Stack-Gibbs Lumber Co., 68 Wash. 539, 123 Pac. 1001.

Where accused offers himself as a witness, he submits himself to cross-examination to impair his credit, the same as any other witness: State v. Peeples, 71 Wash. 451, 129 Pac. 108.

In a prosecution for forgery, where accused had sworn in his own behalf and detailed a state of facts favorable to himself, stating that he relied on the statements of one H. and that his desk had been rifled and papers taken away, it is proper on cross-examination, as testing his credit and impeaching his testimony, to ask if he and H. had not been engaged in passing off other spurious papers on the public, and if his confederates had not rifled his desk in order to do away with the papers: State v. Peeples, 71 Wash. 451, 129 Pac. 108.

As to cross-examination of accused in criminal prosecution, see notes in 38 Am. St. Rep. 895; 15 L. R. A. 669.

As to evidence admissible to show bias or credibility of witness, see note in 82 Am. St. Rep. 25.

As to limiting cross-examination to scope of direct examination, see note in 17 Ann. Cas. 4.

CREDIBILITY AND IMPEACHING:

See 4 Remington's Digest, "Witnesses," §§ 98-126; Murrilla v. Guis, 57 Wash. 564, 107 Pac. 378; Juul v. Kitsap Transp. Co., 55 Wash. 156, 104 Pac. 191; Anustasakas v. International Contract Co., 57 Wash. 453, 107 Pac. 342; Etheridge v. Gordon Const. Co., 62 Wash. 256, 113 Pac. 639; State v. McCormick, 56 Wash. 469, 105 Pac. 1037; Bennett v. Seattle Elec. Co., 56 Wash. 407, 105 Pac. 825; State v. Newcomb, 58 Wash. 414, 109 Pac. 355; Hackett v. Scott, 59 Wash. 390, 109 Pac. 1030; State v. Catsampas, 62 Wash. 70, 112 Pac. 1116; Norman v. Shipowners' Stevedore Co., 59 Wash. 244, 109 Pac. 1012; Anderson v. Globe Nav. Co., 57 Wash. 502, 107 Pac. 376; Wharton v. Tacoma Fir Door Co., 58 Wash. 124, 107 Pac. 1057; Kirk v. Seattle Elec. Co., 58 Wash. 283, 31 L. R. A., N. S., 991, 108 Pac. 604.

Where character is not in issue, a party is bound by the answer of a witness on that

subject as involving a collateral fact: *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888.

In a prosecution for placing a female in a house of prostitution, in which the defendant's wife testified as to the good character of the house, and denies on cross-examination that she had stated to a collector that she had two girls in the house, it is error to impeach her by the testimony of the collector that she had made the statement, but only after moving to another house; since it is error requiring a reversal to allow one of the witnesses for the defendant to be impeached upon a collateral matter, and by an impeaching question that did not correspond with the impeaching evidence, the matter not relating to the offense charged and being incompetent and extremely prejudicial: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

In an action for the death of a person run down by defendant's taxicab while the driver was on the way to his supper, where the plaintiff called the manager as a witness under the belief that he would testify that drivers were allowed to take their cars while going to their meals, and was surprised by his testimony that it was contrary to rules, it is competent for plaintiff to impeach the witness by the stenographer's evidence as to his testimony to the contrary given at the inquest: *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

Upon a prosecution for an assault upon a boy eleven years old with intent to commit sodomy, it is not error to refuse an offer to impeach the boy by showing that a physician had reported that he had syphilis and to inquire whether a blood test had been taken, there being no direct offer to prove that he did have the disease: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

A witness, having been impeached by his prior inconsistent evidence given before an investigating committee of the city council, may properly be allowed to explain that he at that time believed that the committee had no authority to put him under oath: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

As to credibility of witnesses, see note in 86 Am. Dec. 328.

As to inquiry into collateral and irrelevant matters for the purpose of discrediting witness, see note in 88 Am. Dec. 321.

As to evidence admissible to show bias or credibility of witness, see note in 82 Am. St. Rep. 25.

As to admissibility of previous statements by witness out of court consistent with his testimony, see note in 41 L. R. A., N. S., 858.

ORAL EVIDENCE AS TO WRITINGS—IN GENERAL.—Where a bill of goods was ordered prior to the parties entering into a written contract to sell goods on consignment, but was not delivered until

thereafter, oral evidence that the parties agreed that the bill be paid for under the terms of the contract does not vary the terms of the contract, and is admissible: *Passow & Sons v. Kirkwood Distillery Co.*, 54 Wash. 196, 103 Pac. 34.

A receipt for one thousand dollars, reciting that it was in part payment for certain land, does not preclude oral evidence of the actual contract of the parties where the same is consistent with the terms of the receipt: *Lazier v. Cady*, 44 Wash. 339, 87 Pac. 344.

A mere receipt for money paid is not a contract or conclusive, and parol evidence of overpayment is admissible without showing fraud, coercion or mutual mistake: *Gronning v. Elliott Bay Mill & Lumber Co.*, 61 Wash. 676, 112 Pac. 937.

Parol evidence is inadmissible to show an exception which would destroy a plain unambiguous covenant against encumbrances: *O'Connor v. Enas*, 56 Wash. 448, 105 Pac. 1039.

Oral evidence modifying and explaining certain letters is not inadmissible as varying a written contract, where the letters did not constitute the contract, which was oral, but only tended to show its nature and extent: *Wintermute v. Standard Furniture Co.*, 53 Wash. 539, 102 Pac. 443.

In an action for services performed, oral testimony as to negotiations prior to a written contract for services is proper, where part of the services were performed before the written contract was made: *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

That the plaintiffs in an action were the joint owners of an automobile, by reason of a conditional contract of sale in writing, is a collateral issue only, which may be proved by parol: *Hull v. Seattle, Renton etc. R. Co.*, 60 Wash. 162, 110 Pac. 804.

When a bill of sale of a stallion, taken in part payment of land, was merely collateral to an oral sale of the land, parol evidence is admissible that the stallion was represented to be a pedigreed horse, since the bill of sale did not purport to state all the terms of the contract and does not contradict the same: *Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184.

Where a mortgage provided that the mortgagor shall keep the buildings insured for the benefit of the mortgagee and deliver the policies of insurance to him, oral evidence that the mortgagee agreed to secure the insurance and that the mortgagor paid him \$30 and took a written receipt therefor at the time of the execution of the mortgage, is not inadmissible as varying the terms of the mortgage; and the mortgage and receipt should be construed as one instrument: *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463.

Parol evidence that a note made by one member of a partnership and another person was to be paid by the partnership in-

stead of the makers is inadmissible as varying the terms of the writing: *Aurora Land Co. v. Keewan*, 67 Wash. 305, 121 Pac. 469.

Where a bill of sale warrants only the title, evidence of an oral warranty of the good condition of the machine is inadmissible, as varying the terms of the writing: *Pacific Aviation Co. v. Philbrick*, 67 Wash. 414, 121 Pac. 864.

Where a warehouse receipt was signed by only one of the parties and mailed to the owner of the goods, oral evidence is admissible to prove an oral agreement as to the place where the goods should be stored and that the receipt did not express the agreement: *Gafford v. Globe Transfer & Storage Co.*, 71 Wash. 204, 128 Pac. 228.

Parol evidence is admissible to show that in entering into a written contract for the purchase of a lot, the parties knew that part of the lot had been taken for the widening of a street: *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

When the record of a board of public works consisted of a written notice stating that it had decided to revoke a permit to build a stable and fixed a date in the future for a hearing thereon, it cannot be contradicted by parol evidence that the board revoked the permit at the time of giving the notice: *State ex rel. Grimmer v. Spokane*, 64 Wash. 388, 116 Pac. 878.

Where a letter acknowledges receipt of an order for structural iron, and states the price, kind of material, manner of shipment, and terms of payment, but does not state the quantity of material or when it is to be delivered, the whole contract is not stated, and oral evidence as to the time when the iron was agreed to be delivered is admissible: *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470.

The state of an account and indebtedness to a bank may be shown by oral evidence of its officers, although the same had been evidenced by promissory notes, where the face of the notes did not represent the true relation of the parties: *Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602.

Where a county commissioners' record recited that the county claimed title to property by virtue of a tax deed, and that it would be for the county's best interest to relinquish all its right upon payment of the tax, parol evidence that there was a controversy as to the validity of the tax deed is admissible, as it does not contradict, but only supplements, the writing: *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999.

Testimony that a letter was properly addressed and mailed, with a return card, and that the letter was not returned, raises a presumption that it was received, and where its receipt was denied, the question is for the jury: *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005.

Where the character of a transaction depends upon the intention of a party, he may testify what his intent was, its weight being for the jury: *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005.

Proof of an oral promise by an accommodation indorser to pay the note and save another harmless is not inadmissible as varying the written obligation: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

Upon a sale of a stock of goods to a corporation, pursuant to a written offer and an acceptance in writing, by the specific terms of which the vendee was to pay for the goods by issuing its capital stock for thirty-three thousand dollars, it is inadmissible to show by oral evidence that the vendee assumed an indebtedness of the vendor on a note given for money loaned and used in the business: *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225.

In an action for damages for breach of a stipulation in a right of way deed to move a barn to a location "to be mutually agreed upon," oral evidence that at the time the deed was made the parties had orally agreed upon the location does not vary the terms of the writing, and it is admissible for the purpose of showing full performance of the agreement, since the writing did not contain the whole agreement of the parties: *Cerini v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 310, 128 Pac. 666.

Title to personal property may be shown by parol evidence: *United Iron Works v. Hurley Mason Co.*, 71 Wash. 275, 128 Pac. 209.

— FRAUD.—Parol evidence is admissible to show that a written agreement for the sale of corporate stock did not express the true contract between the parties, where part of the shares were only assigned temporarily for voting purposes, in fraud of the rights of one of the owners, who was not notified and was thereby deprived of their use, although the purchaser intended no ultimate fraud and was willing to reassign the stock: *Miner v. Paulson*, 60 Wash. 150, 110 Pac. 994.

Where a clause in a warranty deed gave the grantee the right to collect all rents due under a certain lease, parol evidence is admissible, as between the original parties, to show that it was inserted on the express stipulation that it should not be treated as a warranty, not to vary the terms of the deed, but to prevent its fraudulent use: *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116.

As to the parol to vary writings, see note in 56 Am. St. Rep. 659.

As to parol evidence of conditions in bills and notes, see note in 128 Am. St. Rep. 609.

As to admissibility of parol to show that an instrument was executed on day other than that on which it bears date, see note in Ann. Cas. 1913A, 495.

As to admissibility of parol to show when an indorsement was made on a note, see note in Ann. Cas. 1913A, 882.

PRIOR AND CONTEMPORANEOUS COLLATERAL AGREEMENTS.—Where, by the terms of a contract to purchase land, a cash payment of nineteen thousand dollars is to be made in ninety days, time is made of the essence, an abstract of title is to be furnished and five days allowed for examination, and if the title is not good or cannot be made good within sixty days the contract is to be void and earnest-money refunded, parol evidence is inadmissible to show an understanding that one-ninth of the title was held by minor heirs whose interest was to be acquired by probate proceedings, and that the abstract was not to be furnished until such title was acquired, as the contract cannot be varied by parol, and there is no such ambiguity in the contract as to permit parol evidence to explain it: *Sandstone Brick & Lime Co. v. Lawler*, 53 Wash. 10, 101 Pac. 360.

Under an agreement for the delivery of a three-year lease of premises then in course of construction, which lease did not specify when the term was to commence, evidence is admissible to show a contemporaneous oral agreement whereby the lease was not to go into effect and the rent was not to commence until the building was completed: *Manvell v. Weaver*, 53 Wash. 408, 102 Pac. 36.

Where a written subcontract for railroad construction fixed a price of ninety cents per cubic yard for "solid rock excavation," evidence of a contemporaneous oral agreement to the effect that solid rock excavation was to be classified according to the principal contract not then at hand, and solid rock excavation "under three feet" to be paid for at a rate of three cents less than the rate of the principal contract, or one dollar and twenty-two cents per cubic yard, is inadmissible as varying the terms of the writing: *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180.

Parol evidence is inadmissible to show that a written contract is not complete by reason of a collateral oral agreement that part was intentionally omitted from the written contract and was to be incorporated later, where the written contract, by the voluntary act of the parties, included a complete contract on the subject matter: *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180.

An unambiguous franchise limiting the fare that may be charged by a street railway company for a continuous passage between points within the city limits cannot be varied or explained by parol evidence of a contemporaneous agreement that the limitation should not apply to territory that might thereafter be annexed to the city: *State ex rel. Dennison v. Seattle, Renton & Southern R. Co.*, 64 Wash. 167, 116 Pac. 638.

Where a contract employing an agent to take charge of specified property was plain and explicit in defining the agent's duties.

parol evidence that he in addition at the time agreed to pay certain rents for the employer is inadmissible as varying the terms of the writing: *Amherst Investment Co. v. Meacham*, 69 Wash. 284, 124 Pac. 682.

In an action for the price of a motor, a written contract for its sale, agreeing to telegraph the order to the factory and use all means to insure prompt delivery, cannot be varied by evidence of a contemporaneous parol agreement to make delivery within four weeks, and cannot be rescinded by the buyer if delivery is made within a reasonable time; especially where defendant's answer alleged that delivery was to be made within a reasonable time, and opportunity was given defendant to show what constituted a reasonable time: *Hoffman v. Tribune Publishing Co.*, 65 Wash. 467, 118 Pac. 306.

Evidence of verbal warranties alleged to have been made prior to the execution of a written contract of sale are inadmissible as contradicting the terms of the writing: *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023.

Where a written agreement for subletting railroad contract work contained nothing respecting advances, in an action between the parties for advances made by plaintiff to defendants under an oral agreement, in which the defendants also pleaded an oral agreement limiting their liability for the advances to the contract price, oral evidence as to the agreement between the parties is admissible, since it was conceded that the written contract did not contain the entire agreement: *Boynton v. Johnson*, 68 Wash. 370, 123 Pac. 522.

Where a lease, complete in itself, requires the tenant to make any desired alterations, it cannot be varied by evidence of an oral contemporaneous agreement that the landlord should make certain alterations and improvements: *Rockwell v. Eiler's Music House*, 67 Wash. 478, 39 L. R. A., N. S., 894, 122 Pac. 12.

As to subsequent parol agreement to vary writing, see note in 56 Am. St. Rep. 659.

As to admissibility of parol to show conditional delivery of release, see notes in Ann. Cas. 1912D, 1308; 36 L. R. A., N. S., 1147.

As to parol evidence to show agreement by landlord to repair, see note in Ann. Cas. 1913A, 37.

— AMBIGUITIES AND EXPLANATIONS.—Parol evidence is admissible to explain the expression "terms—cash with documents attached," used in a contract for the sale of goods to be shipped by the seller: *Phoenix Packing Co. v. Humphrey-Ball Co.*, 58 Wash. 396, 108 Pac. 952.

A contract for the sale of land is ambiguous so as to admit parol evidence of circumstances to show whether the price was one hundred and fifty dollars per acre, or that sum plus certain mortgages on the land, where it fixed the price at one hundred and fifty dollars per acre and recited that there

were certain mortgages on part of the land, to be released on the payment of specified sums, and provided that the purchasers were to pay all the taxes and interests and the mortgage or mortgages as they became due, and if not so paid, the agreement to be inoperative as to the lands covered by the mortgage or mortgages, which was to revert to the vendor: *Whipple v. Lee*, 58 Wash. 253, 108 Pac. 601.

A lease of premises "for the purpose of conducting a bakery therein" is not ambiguous so as to permit oral evidence to explain that the clause was intended as a restriction preventing the use of the premises for any other purposes: *Noon v. Mironski*, 58 Wash. 453, 108 Pac. 1069.

In an action upon a contract for the sale by a fish dealer of "my entire catch" of dog salmon, parol evidence is admissible to show that the words "my entire catch" referred to dog salmon which the dealer was compelled to purchase of fishermen in buying silverside salmon and that he did not personally engage in fishing, both parties being familiar with the facts and having operated under a similar contract the year before, since "catch" has not such a definite and fixed meaning as not to admit of explanation under any circumstances: *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

Receipts for advances, given by general agents to an insurance solicitor, are not so clear and certain as to exclude oral evidence of the real intention of the parties as to the solicitor's personal liability thereon, where they provided that the sum with interest shall constitute a lien upon and be repaid from "commissions and percentage allowances accruing to me," and that "any balance outstanding upon the termination of my contract arrangements shall thereupon become immediately due and payable by me in cash," the solicitor having been arbitrarily discharged without cause assigned within one year, the percentages accruing from twelve years if policies were kept up that long: *Allenberg v. Wainwright*, 62 Wash. 234, 113 Pac. 585.

The same is also true of similar receipts, providing for repayment in cash of the sum received, with interest, on a date left blank, and that the "advance shall constitute a lien upon and be repaid" from the commissions and percentages, as in the other case: *Allenberg v. Wainwright*, 62 Wash. 234, 113 Pac. 585.

A written contract for the sale of a steam shovel f. o. b. at Toledo, Ohio, to be set up, demonstrated and guaranteed, at Seattle, Washington, which provided that the buyer was to pay all expenses of unloading, installing and operating the shovel for demonstration, except the expenses of an engineer, and that if the shovel was not up to guaranty, the seller would refund whatever payment it had received, is not clear and certain as to which party was to pay the cost of freight if the shovel was not as guaranteed;

and accordingly it is admissible to show that, before the parties signed the contract, the seller wrote a letter to its agents, which was shown to the buyer, representing that the freight charges would be refunded in case the shovel was not as guaranteed: *Steenstrup v. Toledo Foundry & Machine Co.*, 66 Wash. 101, Ann. Cas. 1913C, 427, 119 Pac. 16.

Parol evidence is admissible to explain the intent and purpose of the parties in making interlineations and material alterations in a written contract prior to its execution, even though it contradicts the written contract: *Titus v. Titus*, 66 Wash. 345, Ann. Cas. 1913C, 343, 119 Pac. 813.

A written contract of sale requiring the vendor to defend the water right title to meadow lands and to convey one cubic foot of water per second for each hundred acres of meadow lands, there being two hundred and thirty acres, is not so uncertain as to permit of evidence of an oral contemporaneous understanding to the effect that the grantors were not required to furnish that amount of water; and failure in this respect would be a breach of the contract: *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713.

A contract to pay attorneys ten per cent of any sum collected "in case of a compromise" and not to exceed two hundred dollars "in case of a settlement by sale or exchange of stock," is not so ambiguous as to admit of explanation by what the client said at the time such clause was added as an amendment to the original contract: *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

Oral evidence to define and explain the term "Northern Pacific Scrip," issued under a specified act of Congress, does not vary the terms of a written contract for the sale thereof: *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co.*, 56 Wash. 529, 106 Pac. 207.

Where a deed granted blocks and lots designated in an upland plat which overlapped tide lands belonging to and afterward platted by the state, there is a doubt or ambiguity in the deed as to the grantor's intent to include the tide land portion of the blocks and lots mentioned, since the upland plat was void as to such portions; and extrinsic evidence of the circumstances is admissible to show the intent: *Cook v. Hensler*, 57 Wash. 392, 107 Pac. 178.

In an action upon a contract subletting railroad construction work, in which defendants claimed fraud in misrepresenting the "classification" or character of the work and the "haul" or distance that the earth was to be moved, and that the contract had been modified by a subsequent oral agreement whereby plaintiff was to pay defendants for extra work in moving rock and cement gravel instead of earth, and for the extra distance of over one thousand feet, as an overhaul, oral evidence is admissible as to the meaning of the words "classification" and "haul" in

the contract, and as to the character of the work and distance the earth was to be moved: *Boynton v. Johnson*, 68 Wash. 370, 123 Pac. 522.

The fact that plans and specifications were by reference made a part of a subcontract for railroad construction work does not preclude oral evidence as to the character of the work to be done, when the same was misrepresented to the defendants, who were thereby prevented from seeing the plans and inspecting the work: *Boynton v. Johnson*, 68 Wash. 370, 123 Pac. 522.

SHOWING DISCHARGE OR PERFORMANCE.—Evidence to show that a contract had been partly performed, and part payment made before it was reduced to writing, is not inadmissible as varying by parol the terms of a written agreement: *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741.

A contract requiring the vendor of a restaurant business to deliver a lease of premises then in course of construction, which provided that the kitchen partition, dumb-waiter shafts, together with all necessary plumbing, piping, and wiring shall be done by the landlord without expense to the vendee, is ambiguous as to the cost of ventilating shafts required by law for kitchens, and oral evidence is admissible to show that the actual agreement contemplated a full equipment as a kitchen including the required ventilating system: *Manvell v. Weaver*, 53 Wash. 408, 102 Pac. 36.

CONCLUSIONS AND OPINIONS OF WITNESSES.—The statement by plaintiff and his expert witness that in their opinion a head sawyer in a mill was in full charge of all the workmen, negated by the facts detailed, is a mere conclusion and of no probative force: *Larsen v. Covington Lumber Co.*, 53 Wash. 146, 101 Pac. 717.

The opinion of a witness that brokers could have earned all their commissions on the sale of bonds is inadmissible as a conclusion as to the probable results, and which must be drawn by the jury: *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 137 Am. St. Rep. 1059, 108 Pac. 596, 109 Pac. 113.

In an action for assault, in the ejection of a passenger from a street-car, evidence of expressions of sympathy on the part of his fellow-passengers is incompetent and inadmissible as opinion evidence: *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 31 L. R. A., N. S., 991, 108 Pac. 604.

In an action upon the admitted contract of a married man, it is not error to sustain an objection to a question whether the defendant had ever incurred any indebtedness for the benefit of the community, the same being a mere conclusion of the witness: *Peacock v. Ratliff*, 62 Wash. 653, 114 Pac. 507.

The feeling or apparent mental attitude of people who are in frequent association may be shown by the opinions of acquaintances who had opportunity to observe and

measure their emotions: *State v. George*, 58 Wash. 681, 109 Pac. 114.

Nonexpert witnesses, who have an opportunity for observation in the case at hand, may give their opinions as to the rate of speed at which a street-car approached a street crossing and collided with a team: *Tecklenburg v. Everett R. L. & W. Co.*, 59 Wash. 384, 34 L. R. A., N. S., 784, 109 Pac. 1036.

In an action for assault, it is error to allow the plaintiff to give his opinion of the monetary extent of his damages: *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 31 L. R. A., N. S., 991, 108 Pac. 604.

As to when opinions of nonexperts are admissible, see note in 30 Am. St. Rep. 38.

As to competency of nonexpert to testify as to speed of train or street-car, see note in Ann. Cas. 1913A, 187.

EXPERTS.—In a personal injury case, it is inadmissible to allow expert witnesses to give their opinion as to the competency of a fellow-servant employed as a powder-man, based upon observing his conduct, or knowledge of his experience, since the jury is as capable as the witnesses of drawing the proper inferences from the facts: *Johnson v. Caughren*, 55 Wash. 125, 19 Ann. Cas. 1148, 104 Pac. 170.

It is not error to allow physicians, who made an examination of plaintiff's condition, to express opinions based upon subjective symptoms, where they were not permitted to testify to any statements made by the plaintiff or as to any of his acts within the control of his will power: *Myhra v. Chicago, M. & P. S. R. Co.*, 62 Wash. 1, 112 Pac. 939.

It is error to permit a witness to give his opinion as to the competency of a person to drive an automobile, as the jury is capable of drawing the proper inferences from a statement of the facts: *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629.

Opinion evidence is inadmissible to prove negligent construction where twenty-five bents, fourteen to twenty-seven feet high, unsupported by braces, collapsed, when hauled from end to end by a team on a block and tackle, since the matters were within common knowledge: *Christensen v. Hawley*, 61 Wash. 14, 111 Pac. 1061.

The opinion of a barrister in British Columbia that certain machinery on mining property was a fixture in that province is not controlling, where he did not testify to any statute or judicial decision, especially where he erroneously assumed that the machinery was used in working a mine, and where, from decisions cited, it should be presumed that the general rule there was the same as our own: *Gasaway v. Thomas*, 56 Wash. 77, 20 Ann. Cas. 1337, 105 Pac. 168.

Evidence of the value of property is not objectionable as based upon what land was offered for, where the witness stated that he

based his opinion on not only property he had for sale there, but other properties in the vicinity and in a general way, the witness having duly qualified: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

A witness is not qualified to give an opinion as to the value of real estate along a certain street from the fact that he had lived in the city eight years and had been in the real estate business, where it was not shown that he had bought or sold property along the street or was otherwise familiar with values there or elsewhere in the city: *In re Western Avenue*, 57 Wash. 290, 106 Pac. 901.

Upon an issue as to the value of certain city real estate, the competency of a real estate broker is shown, and it is error to exclude his testimony, where it appears that he had been engaged in the real estate business in the city for nineteen years, had bought and sold property for himself and others, and was acquainted with city real estate values, and based his knowledge partly upon recorded prices, including sales made by one of the parties, and of other sales in the vicinity known to him, and had appraised other property one block distant: *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060.

Objections going to the weight rather than the competency of expert evidence are properly overruled: *In re Mercer Street*, 55 Wash. 116, 104 Pac. 133.

A hypothetical question to a medical expert may embody the very fact ultimately to be found, where the inference from the facts proven involved a question of medical science on which the expert's opinion was proper: *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626.

Hypothetical questions based upon facts which the evidence tended to prove are admissible: *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149.

It may not be an abuse of discretion to permit physicians to answer hypothetical questions although some of the facts assumed are based upon meager evidence: *State v. Peacock*, 58 Wash. 41, 27 L. R. A., N. S., 702, 107 Pac. 1022.

Upon an issue as to negligence in the construction of a platform, experts may be permitted to answer a hypothetical question as to whether it was properly constructed: *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208.

Upon an issue as to the value of a lot used for the storage of oil, which business could not be carried on within the fire limits, it is proper on cross-examination to ask a hypothetical question as to the value that would be added by use of the lot under specified conditions for a "profitable oil business" where there was evidence that there was no other location in the city for the carrying on the business "with equal profit," it being discretionary to allow great latitude on cross-examination of witnesses as to

values: *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515.

The fact that a disputed signature is lost does not exclude the testimony of an expert who had compared it with an admitted signature, especially where the opposite party was presumably in possession of the lost writing and did not account for its loss: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

It is proper to refuse to instruct that a jury may not resort to a comparison of any writing not admitted by the defendant to be genuine, with any other writings not admitted by him, for the purpose of determining the genuineness of any or either of such writings: *State v. Simmons*, 52 Wash. 132, 100 Pac. 269.

Upon an issue as to whether a deed was a forgery, it was error, warranting the grant of a new trial, to exclude evidence of a witness who was familiar with the grantor's handwriting and had examined the disputed signature and believed that it was not genuine, and to exclude a proven signature for comparison by experts who had seen the forgery: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

As to probative effect on issue of genuineness of handwriting of similarities or dissimilarities in manner of writing words or letters, see note in *Ann. Cas.* 1913B, 1317.

As to competency of opinion as to handwriting of last instrument based upon comparison with admittedly genuine handwriting, see note in 41 L. R. A., N. S., 391.

An inference from established facts that a spark had been thrown from a locomotive engine, and set fire to a house eighty-five to one hundred feet from the track, may properly be made the basis of a question to an expert as to whether the spark-arrester was in good condition: *Overacker v. Northern Pac. R. Co.*, 64 Wash. 491, 117 Pac. 403.

Employees in the county auditor's office are qualified as experts to compare signatures and give an opinion as to whether they were written by the same person, where one of them had had experience in inspecting instruments and signatures thereto offered for record, and the other was a clerk and bookkeeper who had been a receiving and paying teller in a bank: *O'Brien v. McKelvey*, 66 Wash. 18, 118 Pac. 885.

An expert chemist may testify as to his analysis of beer, and state his opinion as to whether it was intoxicating: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

Upon an issue as to the amount of damages sustained in a railway collision by a passenger who was thrown to the floor and suffered traumatic neurasthenia, evidence of shock from the sight of mangled and bleeding passengers while plaintiff was being conveyed to the city in a street-car, medical experts testifying that such sight might contribute to plaintiff's injuries, is admissible as a direct or proximate result of the accident and part of the *res gestae*, where it was

only a repetition or continuation of what plaintiff had seen or experienced to a greater degree on the wrecked train: *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889.

In an action for injuries sustained by a lineman in the work of replacing old telephone poles, an experienced lineman may, after describing the defective condition of a corner and an adjoining pole which fell, give his opinion as an expert, in an answer to hypothetical questions, that the corner pole should have been guyed before the adjoining pole was ascended: *Murphy v. Pacific Telephone etc. Co.*, 68 Wash. 643, 124 Pac. 114.

As to who are experts, and when their testimony may be received, see note in 66 Am. Dec. 228.

As to admissibility of opinion evidence on competency of employee, see note in 19 Ann. Cas. 151.

As to competency of expert to say whether construction work was properly done, see note in Ann. Cas. 1912D, 903.

As to competency of opinion as to handwriting of lost instrument based upon comparison with handwriting admittedly genuine, see note in 41 L. R. A., N. S., 391.

§ 340.

QUESTIONS OF LAW OR FACT: See 4 Remington's Digest, "Trial," §§ 53-65; *Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834; *Anderson v. Pacific National Lumber Co.*, 50 Wash. 415, 111 Pac. 337; *Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 Pac. 794; *O'Connor v. Force*, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014; *Easterly v. Mills*, 54 Wash. 356, 28 L. R. A., N. S., 952, 103 Pac. 475; *Hull v. Seattle, Renton etc. R. Co.*, 60 Wash. 162, 110 Pac. 804; *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915.

Upon a motion for a nonsuit, the evidence must be construed most favorably to the plaintiff: *King v. Page Lumber Co.*, 66 Wash. 123, 119 Pac. 180.

In passing on a motion for a nonsuit, where plaintiff's evidence was vague, the court is justified in taking into consideration expert evidence that plaintiff's mind had been affected by the accident: *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534.

Where plaintiff's prima facie case, sufficient on motion for a nonsuit, is so fully explained and controverted as to leave no substantial conflict, the case should be taken from the jury: *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870.

Upon motion for a nonsuit, the court must consider all justifiable inferences from the evidence that are favorable to the plaintiff:

Young v. Aloha Lumber Co., 63 Wash. 600, 116 Pac. 4.

Upon an issue as to whether a contract had been altered after it was signed by defendant's agent, the credibility of the evidence of the agent is for the jury: *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 38 L. R. A., N. S., 1135, 115 Pac. 841.

As to time of alteration of written instrument as question for the jury, see note in 39 L. R. A., N. S., 100.

In an action for personal injuries to an employee, the opening statement of plaintiff's counsel does not admit that the negligence of a superintendent doing the work on a percentage basis was that of an independent contractor, where it was stated that it would be shown that all the men were paid by the defendant and that the superintendent was only a foreman: *James v. Pearson*, 64 Wash. 263, 116 Pac. 852.

As to the right to direct verdict or enter nonsuit on the opening statement of counsel, see note in 29 L. R. A., N. S., 218.

Where the competent evidence is all in writing, and the issues presented only a construction of the writings, the court should take the case from the jury: *Citizens' Nat. Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

As to when construction of a writing is a question for the court, and when for the jury, see note in 69 Am. Dec. 454.

As to invasion by the court of the province of the jury, see note in 14 Am. St. Rep. 36.

Where there is no evidence upon which the jury could rest a verdict, and there is nothing to submit to the jury, it is the duty of the court to so hold: *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131.

Where the only dispute between parties to a written contract for digging a well was as to who breached the contract, resulting in a discontinuance of the work, and the jury found that the defendant was in default, the court may, upon a general verdict for the plaintiff, enter judgment for the proper amount, where it was a mere matter of computation: *Buffington v. Henton*, 70 Wash. 44, 126 Pac. 58.

As to the power of court to add interest to the jury's verdict, see note in 10 Ann. Cas. 753; also note in 25 L. R. A., N. S., 311.

Whether there is any evidence of a fact in issue is a question for the court: *Girocamo v. Tribble*, 70 Wash. 25, 126 Pac. 67.

Where on a former appeal, on substantially the same evidence, the supreme court upheld the sufficiency of the evidence to sustain a recovery, the fact that the testimony of one witness in the second trial varied on immaterial issues from his former testimony does not warrant a nonsuit, where the contradictions merely affected his credibility, and it was for the jury to determine the credit to be given to his testimony: *Delaski v. Northwestern Imp. Co.*, 70 Wash. 143, 126 Pac. 421.

§ 344.

This section, making it discretionary with the court to order a view of premises, applies to condemnation proceedings: *Sedro-Woolley v. Willard*, 71 Wash. 646, 129 Pac. 372.

As to view by jury, see note in 92 Am. Dec. 342; also note in 42 L. R. A., N. S., 569.

As to the court's discretion to order the view, see note in 18 Ann. Cas. 730.

As to court's right to view in case before it without a jury, see note in 19 Ann. Cas. 578.

§ 346.

Repealed. See L. '11, p. 318, § 9.

§ 351.

The inadvertent presence of depositions in the jury-room prohibited by this section is not prejudicial error as ground for a new trial, where the jury did not consult them or know of their presence: *Wintermute v. Standard Furniture Co.*, 53 Wash. 539, 102 Pac. 443.

§ 362.

VERDICT, CONSTRUCTION AND OPERATION: See 4 Remington's Digest, "Trial," §§ 123-134; *Nelson v. Bromley*, 55 Wash. 256, 104 Pac. 251; *O'Brien v. American Casualty Co.*, 58 Wash. 477, 109 Pac. 52.

The language of a verdict or special finding is to be liberally construed with a view of arriving at the intent of the jury: *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001.

In an action for damages to property by blasting, a verdict exonerating a codefendant does not relieve the other defendants, where it appears that such codefendant, a contractor, had nothing to do with the work, but simply loaned men to the other defendants to take charge of the blasting: *Norwegian Danish Methodist Episcopal Church v. Home Telephone Co.*, 66 Wash. 511, 119 Pac. 834.

ADVISORY VERDICT.—In an action for damages from flooding land, and for an injunction, it is not error to submit the issue of damages to a jury for an advisory verdict: *Dalton v. Union Gap Irrigation Co.*, 69 Wash. 303, 124 Pac. 1128.

Where objection to title, evidenced by an abstract, involves only the question of the lien of mortgages, as appears from their face, a question of law is presented, and the advisory verdict of a jury is no proper guide to the decision: *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034.

§ 364.

SPECIAL FINDINGS.—The refusal to submit special interrogatories to the jury

is discretionary and will not be reviewed except for manifest abuse of discretion: *Sudden & Christenson v. Morse*, 55 Wash. 372, 104 Pac. 645; *Keane v. Seattle*, 55 Wash. 622, 104 Pac. 819; *Butler v. Supreme Court of Forresters*, 60 Wash. 171, 110 Pac. 1007; *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89.

Where answers to special interrogatories are conflicting and irreconcilable with the general verdict, it is the duty of the court to resubmit them to the jury: *Loy v. Northern Pac. R. Co.*, 68 Wash. 33, 122 Pac. 372.

As to the sufficiency of special verdicts, see note in 1 L. R. A. 303. And see 24 L. R. A., N. S., 1.

The statement of the foreman of the jury, before discharge and in the presence of the jury, may be received by the court to explain the intent of the jury in answering special interrogatories: *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001.

Under the rule that a special verdict should be given a construction that will support the general verdict, in an action on the joint contract of a corporation and two of its officers, a general verdict against all the defendants is not necessarily inconsistent with negative answers to special interrogatories asking whether the plaintiff entered into the contract intending at the time to contract with the officers individually, where the foreman of the jury explained that the questions were answered "no" in order to hold the officers individually responsible with the company, and it was evident that they understood that an affirmative answer would have held them solely responsible: *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001.

In an action by a passenger for an assault by a street-car conductor, where an interrogatory was submitted as to whether plaintiff had alighted when first struck, an answer that he was on the car when first struck is not too indefinite: *Johnson v. Washington Water Power Co.*, 62 Wash. 619, 114 Pac. 453.

§ 365.

SPECIAL FINDINGS — INCONSISTENCY: See 4 Remington's Digest, "Trial," § 141; *Sudden & Christenson v. Morse*, 55 Wash. 372, 104 Pac. 645; *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 28 L. R. A., N. S., 455, 108 Pac. 1095; *O'Brien v. American Casualty Co.*, 58 Wash. 477, 109 Pac. 52; *Olmstead v. Olympia*, 59 Wash. 147, 109 Pac. 602; *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

A special finding that brackets were too light to sustain a wire, when there was no evidence on the subject, is a mere conjecture and not controlling: *Scarpelli v. Washing-*

ton Water Power Co., 63 Wash. 18, 114 Pac. 870.

A special finding by a jury that a wire was not thrown down by a certain accident cannot be sustained where it disregards the uncontradicted evidence in the case: *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870.

A verdict for injuries sustained by a pedestrian, run down by an automobile on a dark, rainy morning, cannot be sustained where there was evidence tending to show that the horn was sounded and the muffler cut out, although the plaintiff testified that he did not hear or see the machine, having an umbrella well down over his head, and the jury, to an interrogatory as to whether the plaintiff could in the exercise of his ordinary faculties have heard the horn or seen the lights by glancing in that direction, answered "we do not know," since the issue as to contributory negligence was undetermined: *Minor v. Stevens*, 65 Wash. 423, 42 L. R. A., N. S., 1178, 118 Pac. 313.

An answer to a special interrogatory does not require a directed verdict where it did not present the actual issue in the case: *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330.

§ 367.

Findings of fact are not essential to support a decree in an equity case: *Schlossmacher v. Beacon Place Co.*, 52 Wash. 588, 100 Pac. 1013; *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449.

Upon trial of an action at law before the court, findings of fact are not necessary to support a judgment of nonsuit, granted for failure of plaintiff to prove sufficient facts, under this section, since the court merely decided the insufficiency of the evidence as a matter of law: *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837.

Notice of the findings and entry of judgment need not be given, as exceptions may be taken until five days after notice is received: *Lindsay v. Scott*, 56 Wash. 206, 105 Pac. 462.

A finding that plaintiff did not know that defendants were claiming under a lease is a conclusion of law, and is controlled by facts showing constructive notice: *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 36 L. R. A., N. S., 488, 118 Pac. 329.

Findings of fact are not necessary on denying an application to modify a decree of divorce respecting the custody of children, especially where none were requested and no exception was taken to the failure to make findings: *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634.

§ 370.

REFERENCE: See 4 Remington's Digest, "Reference"; *Poultry Producers' Union v. Williams*, 58 Wash. 64, 137 Am. St. Rep.

1041, 107 Pac. 1040; *Lindley v. McGlauffin*, 57 Wash. 581, 107 Pac. 355.

On breach of a contract to purchase plaintiff's pack of salmon, whereupon plaintiff, after giving notice, resold the same on the open market, paying expenses of freight, insurance, cartage, storage, commissions, etc., there is no such trust or fiduciary relation as to make the case exclusively one for an accounting: *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

As to resale by seller, after default in payment, and the right thereupon of the other party to an accounting, see note in 133 Am. St. Rep. 563.

An action is for an accounting and not one of interpleader, where the plaintiffs brought into court a balance admitted to be due and claimed by defendants and their creditors, without first having had an accounting as provided for by the contract, and prayed that the plaintiffs be allowed the sum deducted, and it appeared that the amount was in dispute and was less than the sum found to be due by the court upon an accounting: *Braeger v. Bolster & Barnes*, 60 Wash. 579, 111 Pac. 797.

As to general principles of interpleader, and when it is maintainable, see note in 35 Am. Dec. 695; also 91 Am. St. Rep. 695.

As to interpleader where the original relation is contractual, see note in 10 L. R. A., N. S., 748.

§ 374.

A referee to take an account being obliged to receive all the evidence offered, which is returned to the court with the objections and exceptions, the affirmance of a report of the referee, who allowed an amendment to the pleadings, amounts to an allowance of the necessary amendment to admit the proofs received: *Walsh Lumber Co. v. Chaney*, 67 Wash. 583, 122 Pac. 10.

A referee to take an account and hear the case on the merits may allow amendments to the pleadings, subject to review for abuse of discretion only: *Walsh Lumber Co. v. Chaney*, 67 Wash. 583, 122 Pac. 10.

As to amendments to pleadings, before an arbitrator, see note in 20 Ann. Cas. 603.

§ 382.

A motion to set aside findings and judgment shows actual notice of the filing of the findings, and exceptions filed more than five days thereafter are not within time and should be struck out: *Cornthwaite v. Barrington Trans. Co.*, 55 Wash. 389, 104 Pac. 609.

An exception to the direction of a verdict is sufficiently shown where the statement of facts shows the making and granting of the motion, and the clerk's journal entry recites that the motion was granted and exception allowed: *Gottstein v. Simmons*, 59 Wash. 178, 109 Pac. 596.

Under this section it is not necessary to take an exception to the direction of a verdict where the order was embodied in a written journal entry: *Gottstein v. Simmons*, 59 Wash. 178, 109 Pac. 596.

Defects in a mechanic's lien which are amendable under the statute cannot be first raised in the supreme court: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

Error cannot be assigned on the judge's comment on the evidence, where the remarks were addressed to counsel during the trial and no exceptions were taken: *Peyser v. Western Dry Goods Co.*, 53 Wash. 633, 102 Pac. 750.

Findings of fact not being necessary in equity, the omission to find a precedent tender of taxes paid does not vitiate a decree for the recovery of land sold for taxes: *Thompson v. Emerson*, 55 Wash. 138, 104 Pac. 201.

Where the trial court, in dismissing an equitable action, refused to make specific findings of fact and conclusions of law, it is not necessary, in order to secure a review on appeal, to take exceptions to an oral opinion rendered at some length, which the court stated could be written out by the stenographer and considered as findings, where it contained only informal statements that did not cover the controversy: *McIntyre v. Johnston*, 63 Wash. 323, 115 Pac. 509.

As to the conclusiveness of documentary evidence against the party introducing it, see note in 7 Ann. Cas. 381.

But as to when the transcript shows no exception save such as appears from the clerk's minutes, see note in 8 L. R. A. 608 (611).

As to the right to question sufficiency of complaint for the first time on appeal, see note in 3 Ann. Cas. 545.

As to improper statements, etc., of the court as matter of appeal, see note in 46 L. R. A. 648.

§ 383.

A general exception to a specific finding is sufficient without any specification of the reasons therefor: *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255.

One general exception to separate findings given, some of which are correct, and to requests for separate findings refused, is insufficient to secure a review of the evidence; and the statement of facts will be considered only as to the rulings of the court on the admission and exclusion of the evidence: *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73.

Affidavits used on motion for a new trial cannot be considered on appeal unless made part of the record by bill of exceptions or statement of facts: *Gazzam v. Zimmer*, 68 Wash. 41, 122 Pac. 366.

Under this section general exceptions to the report of a referee are sufficiently defi-

nite and specific where it is specified that the party excepts to each and every finding as contrary to the evidence and the law and that the conclusions are not supported by the findings of fact: *Pederson v. Parke*, 68 Wash. 482, 123 Pac. 777.

Where the trial court has acted upon exceptions to the findings of a referee, the technical sufficiency of the exceptions is immaterial: *Pederson v. Parke*, 68 Wash. 482, 123 Pac. 777.

General exceptions to findings of fact, stated to the judge at the time of filing the findings, noted by the judge at the foot of the findings specifying the finding excepted to by number, are sufficient to obtain a review of the findings; and in the absence of any showing to the contrary, it will be presumed that the notation of the exceptions was made by the judge: *Hallidie Co. v. Washington Brick, Lime & Mfg. Co.*, 70 Wash. 80, 126 Pac. 96.

Exceptions to the conclusions of law or to the judgment are not necessary to obtain a review of the findings and judgment: *Hallidie Co. v. Washington Brick, Lime & Mfg. Co.*, 70 Wash. 80, 126 Pac. 96.

Findings in an equity case, to be reviewed, must be excepted to; but failure to except is not ground for striking the statement of facts where the error assigned is in the rejection of evidence: *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189.

As to the sufficiency of general exceptions, see note in 6 L. R. A. 608.

§ 384.

Section 339 merely changed the time for making the same and not the method; and exceptions not stated to the trial judge and noted in the minutes or embodied in the record, as required by this section, but merely filed in writing without being called to the court's attention, are unavailing and cannot be considered on appeal: *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202.

An oral request for qualification of instructions about to be given, and argument thereon wherein appellant's counsel claimed that it would be error to refuse the request, cannot take the place of exceptions, and error cannot be assigned thereon when no exceptions were taken to the action of the court: *Gerber v. Aetna Indemnity Co.*, 61 Wash. 184, 112 Pac. 272.

Exceptions to instructions, not taken at the trial but filed in writing with the clerk thereafter, are not taken in time, and error cannot be assigned thereon: *Gerber v. Aetna Indemnity Co.*, 61 Wash. 184, 112 Pac. 272.

Written exceptions to instructions filed with the clerk and not in any way considered by the court are insufficient: *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502.

The evidence cannot be reviewed in the absence of exceptions to the findings of fact:

Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26.

Where an exception to an instruction that a street railway company owes the highest degree of care to avoid injury to one who is about to become a passenger is excepted to because it "did not leave to the jury the question whether the plaintiff presented herself at the proper time and place," error cannot be assigned thereon for the reason that the company owes such degree of care only to persons who had already become passengers, notwithstanding that it was unnecessary to state the reasons for the exception under this section: *Harkins v. Seattle Elec. Co.*, 53 Wash. 184, 101 Pac. 836.

An objection that an instruction as to negligence of the driver of an automobile in any of the respects provided in the city ordinances "or otherwise" is outside the allegations of the complaint, and is unavailing, in view of the rule that the complaint may be deemed amended, there being no objection that it goes beyond the evidence: *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

As to its being essential to object in the court below in order to have the objectionable matter considered on appeal, see notes in 5 L. R. A. 591, and 8 L. R. A. 608.

An exception to an order denying a motion for a new trial cannot be deemed an exception to findings of fact, within the meaning of this section: *Fender v. McDonauld*, 54 Wash. 130, 102 Pac. 1026.

One general exception to each and every one and every part of all the instructions is insufficient, under this section, to secure a review of the instructions on appeal: *Carroll v. Washington Water Power Co.*, 56 Wash. 467, 105 Pac. 1026; *State v. Malla-han*, 66 Wash. 21, 118 Pac. 898; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *State v. Counort*, 69 Wash. 361, 41 L. R. A., N. S., 95, 124 Pac. 910.

As to what the bill of exceptions must show, see note in 8 L. R. A. 611.

§ 387.

Findings of a referee which are not excepted to import verity: *In re Commercial Bank of Snohomish County*, 57 Wash. 381, 106 Pac. 1124.

Error cannot be assigned upon the offering of incompetent evidence and improper conduct of counsel, where no exceptions are reserved, in the absence of a positive showing of prejudice or a verdict contrary to the clear preponderance of the evidence: *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651.

Findings not excepted to will be presumed to be supported by the evidence: *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538.

In the absence of a statement of facts and of exceptions to the findings of fact, the objection that the evidence does not

sustain the findings is not available on appeal: *Purcell Safe Co. v. Barnhart*, 67 Wash. 205, 121 Pac. 53.

An objection that evidence should have been struck out cannot be urged on appeal where no motion to strike was made below: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

A motion to strike out all the evidence of a witness is properly denied where part of it was relevant: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Error cannot be predicated upon the reception of evidence to which no objection was made below: *State v. Downer*, 68 Wash. 672, 123 Pac. 1073.

Error cannot be predicated upon a variance where no objection was made to the admission of the evidence and the point was not suggested below: *Klain v. Kaufman*, 69 Wash. 35, 124 Pac. 213.

One general exception to the refusal of appellant's proposed findings is insufficient to obtain a review of the evidence to determine whether findings unexcepted to are supported: *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125.

INSTRUCTIONS, AND FAILURE OR REFUSAL TO GIVE INSTRUCTIONS.—

An instruction not excepted to that a brakeman on an interurban electric railway, sent ahead by a conductor to flag another train, is a fellow-servant of the conductor, becomes the law of the case: *Sipes v. Puget Sound Elec. R.*, 54 Wash. 47, 102 Pac. 1057.

In an action upon a fire insurance policy, error cannot be predicated on the denial of a new trial because the evidence showed an increase in the hazards, in violation of the policy, where no exception was reserved to the instruction submitting that question to the jury: *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 104 Pac. 185.

Error in instructions cannot be urged where no exceptions appear in the record: *Ankeny v. Young Bros.*, 58 Wash. 634, 109 Pac. 109.

Instructions, not excepted to, become the law of the case: *Sexsmith v. Brown*, 61 Wash. 164, 112 Pac. 337.

In the absence of exceptions to instructions, they will not be reviewed on appeal: *State v. Garland*, 65 Wash. 666, 118 Pac. 907.

Error cannot be predicated upon instructions where no exceptions were taken: *Morrisey v. Schultz*, 68 Wash. 237, 122 Pac. 1065; *Dalton v. Union Gap Irr. Co.*, 69 Wash. 303, 124 Pac. 1128.

Instructions cannot be reviewed on appeal where no exceptions were taken, even where accused is defended by counsel appointed by the court: *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102.

NECESSITY FOR EXCEPTIONS TO DECISION OR FINDINGS IN GENERAL: See 4 Remington's Digest, "Appeal and Error," §§ 145-150; *Okanogan Valley*

Bank v. Evans, 59 Wash. 267, 109 Pac. 795; **Craver v. Mossbach**, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016; **Fender v. McDonald**, 54 Wash. 130, 102 Pac. 1026; **Yakima Grocery Co. v. Benoit**, 56 Wash. 208, 105 Pac. 476; **Wiemann v. Jackman R. Co.**, 57 Wash. 682, 107 Pac. 844; **Pease v. Clayton**, 62 Wash. 26, 112 Pac. 943; **Pack v. Peabody**, 58 Wash. 76, 107 Pac. 839; **Snohomish River Boom Co. v. Great Northern R. Co.**, 57 Wash. 693, 107 Pac. 848.

The absence of exceptions to the findings does not preclude inquiry as to whether the findings and admitted facts sustain the judgment: **Smith v. Hurley-Mason Co.**, 67 Wash. 683, 122 Pac. 361.

Error cannot be predicated upon the exclusion of evidence on a point in issue where no exceptions were taken to findings of fact establishing the facts thereon: **State ex rel. Warehouse & Realty Co. v. Spokane**, 65 Wash. 385, 118 Pac. 321.

In the absence of the evidence or exceptions, the findings are conclusive, and the appellant, being satisfied therewith, waives no right by failing to move for a new trial, but is entitled to a proper judgment on the findings: **Peterson v. Lone Lake Lumber Co.**, 58 Wash. 72, 107 Pac. 857.

An appeal will be dismissed as presenting no issues, where the appellant states that findings were made, no exceptions thereto appear in the record, and the record fails to show the findings or the final judgment: **Yatsuyanagi v. Shimamura**, 57 Wash. 42, 106 Pac. 503.

Upon striking a statement of facts for want of any exceptions to the findings, the appeal will be dismissed, when no questions are raised outside of the statement: **Yakima Grocery Co. v. Benoit**, 56 Wash. 208, 105 Pac. 476.

A statement of facts not filed within the time limited by statute will be struck out on motion, and the judgment affirmed where the errors assigned cannot be reviewed without the aid of the statement: **McDonald v. Van Houten**, 59 Wash. 593, 110 Pac. 428.

As to the requirement that the appellant must have objected in the lower court in order to have the point considered on appeal, see notes in 5 L. R. A. 591, and 8 L. R. A. 608.

§ 388.

The appellant has a right to file a statement of facts in narrative form, but the burden is upon him to furnish a sufficient statement to show the facts upon which error is predicated: **State ex rel. Hofstetter v. Sheeks**, 63 Wash. 408, 115 Pac. 859.

As to what the record on appeal must show, see note in 8 L. R. A. 611.

Upon a question as to breach of covenant in a deed of certain lots, the contention that part of the lots are claimed by a city as a street cannot be considered on appeal, in the absence of the evidence on the subject, or

any finding thereon by the trial judge: **Cameron v. Burke**, 61 Wash. 203, 112 Pac. 252.

An assignment of error in the admission of evidence varying the terms of a written contract will not be considered on appeal where the evidence is not brought up in the record by bill of exceptions or statement of facts, and the judgment might have been sustained by other competent evidence: **Rehlow v. Schmitt**, 63 Wash. 666, 116 Pac. 267.

The allowance for receiver's fees cannot be reviewed on appeal in the absence of a statement of facts or bill of exceptions containing the evidence upon which the court based the allowance, it being presumed that the court did not abuse its discretion: **Lohman v. Claussen**, 55 Wash. 408, 104 Pac. 624.

AFFIDAVITS: See 4 Remington's Digest, "Appeal and Error," § 272; **State v. Lee Wing Wah**, 53 Wash. 294, 101 Pac. 873; **Haines & Spencer v. Kelley**, 57 Wash. 219, 106 Pac. 776; **Rehmke v. Fogarty**, 57 Wash. 412, 107 Pac. 184; **Swanson v. Pacific Shipping Co.**, 60 Wash. 87, 110 Pac. 795.

The denial of a new trial will not be reviewed on appeal where the affidavits on which the motion was made are not brought up by bill of exceptions or statement of facts: **State v. Stapp**, 65 Wash. 438, 118 Pac. 337.

As to the seeking of reversal of order for new trial, see note in 28 L. R. A., N. S., 130.

Affidavits on motion for a new trial, not made a part of the record by bill of exceptions or statement of facts, cannot be considered on appeal: **State v. Moran**, 66 Wash. 588, 120 Pac. 86.

Upon appeal from an order granting a new trial, affidavits not brought up by statement of facts cannot be considered, and it is not sufficient to have them attached as exhibits without identification by the judge's certificate: **Hale v. City Cab, Carriage & Transfer Co.**, 66 Wash. 459, 119 Pac. 837.

An appeal from an order denying a motion to vacate a default judgment, which appears to have been heard on affidavits, will be dismissed where the affidavits were not brought up by a bill of exceptions or statement of facts; and it is not sufficient that the defendant's affidavit was attached to and made a part of the motion, where the transcript shows that there was at least one other counter-affidavit considered: **Sakai v. Keeley**, 66 Wash. 172, 119 Pac. 190.

As to right of plaintiff to appeal from a voluntary judgment of nonsuit, see note in 9 Ann. Cas. 631.

The decision of the trial court on an issue as to the defendant's residence, on motion for a change of venue, cannot be disturbed on appeal where the evidence on the hearing is not brought up on appeal by bill of exceptions or statement of facts: **Critler v.**

Jacobson & Lindstrom, 66 Wash. 322, 119 Pac. 819.

Affidavits annexed to a motion to vacate a judgment and by reference made a part of the motion cannot be made a part of the record by the certificate of the clerk, and will not be considered on appeal in the absence of any statement of facts or bill of exceptions: Hayworth v. McDonald, 67 Wash. 496, 121 Pac. 984.

EXHIBITS.—Error cannot be predicated upon the admission in evidence of an exhibit which is not in the record on appeal: Staats v. Pioneer Ins. Assn., 55 Wash. 51, 104 Pac. 185.

Unless incorporated in a bill of exceptions or statement of facts, affidavits and exhibits cannot be certified to the supreme court by the trial judge or considered on appeal: Kennedy Drug Co. v. Keyes Drug Co., 58 Wash. 499, 109 Pac. 56.

INCORPORATING INSTRUCTIONS REFUSED.—Error cannot be assigned on an exception to the refusal to give a requested instruction, where the transcript does not show that a request therefor was made in writing and filed as required by Ballinger's Code, section 5064: Northern Pac. R. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

Error cannot be predicated on the refusal to give requested instructions when the instructions given are not brought up in the record: State v. Newcomb, 58 Wash. 414, 109 Pac. 355.

FORM, ARRANGEMENT AND PURPOSE.—Where two cases are tried together and one judgment entered, thus treating the cases as actually consolidated, but one statement of facts is necessary on appeal: Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822.

§ 389.

NECESSITY OF FILING BEFORE SERVICE.—It is not ground for the dismissal of an appeal that a proposed statement of facts, filed without service, was withdrawn, refiled, and served under an order of court, within the time for proposing the same: Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822.

Under this section the filing must precede the service or the statement will be struck out: State ex rel. Palmer Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

CERTIFICATE: See 4 Remington's Digest, "Appeal and Error," §§ 313-317; Stelter v. Fowler, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; Delaski v. Northwestern Imp. Co., 61 Wash. 255, 112 Pac. 341.

Proposed amendments to a statement of facts in narrative form cannot require the substitution of the stenographer's minutes, and are insufficient if they do not point out

wherein the statement is erroneous: State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

§ 390.

Certificates, receipts and exhibits inserted in the statement of facts, which the trial judge refused to certify, certifying that they were no part of the evidence introduced at the trial, cannot be considered on appeal: North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 63 Wash. 376, 115 Pac. 855.

§ 391.

Where the return of the trial judge shows that a proposed statement of facts in narrative form is untrue, an unqualified mandate to compel him to certify to the same will not issue, but he will be directed to specify his objections and give appellant opportunity to comply with his demands: State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

As to the resort to mandamus to compel the signing of a bill of exceptions, etc., see note in 98 Am. St. Rep. 902.

Where, upon the settlement of a proposed statement of facts, to which no amendments were proposed, an issue of fact arises between the judge and counsel as to what occurred at the trial, the supreme court will order a reference to another judge to take evidence and report his findings: Heath v. Seattle Taxicab Co., 69 Wash. 69, 124 Pac. 217.

§ 392.

This section authorizes the settlement of a statement of facts, after the death of the judge who tried the case, by his successor in office; and if the judgment was rendered by a visiting judge in another county than that of his residence, his successor in office may certify the statement of facts while presiding as a visiting judge in such county: Gray's Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

As to the right to new trial of party who has lost benefit of his exceptions from causes beyond his control, see note in 12 Ann. Cas. 1056. And see note in 21 Ann. Cas. 262.

The trial judge cannot require that the entire transcript of the reporter's minutes be embodied in a statement of facts to which no amendments are proposed, because of his inability to decide upon its accuracy without a complete transcript of the reporter's minutes, since it is a duty devolving upon him to examine the statement and determine from his own judgment whether it contains "all the material facts, matters and proceedings" theretofore occurring in the cause and not a part of the record, and if it does not, to require their insertion:

State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631.

COMPELLING ALLOWANCE OR SETTLEMENT.—The supreme court can by mandate require the trial judge to settle and certify the statement of facts when the time arrives for the performance of such statutory duty: State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631.

As to mandamus to compel judge to sign bills of exception after expiration of the term, see note in 36 L. R. A., N. S., 1087. And see generally note in 98 Am. St. Rep. 902.

§ 393.

PROPOSING STATEMENT OF FACTS OR BILL OF EXCEPTIONS: See 4 Remington's Digest, "Appeal and Error," §§ 285-291; Lindsay v. Scott, 56 Wash. 206, 105 Pac. 462; Mercer v. Lloyd Transfer Co., 59 Wash. 560, 110 Pac. 389; Delaski v. Northwestern Imp. Co., 61 Wash. 255, 112 Pac. 341; Russell v. Mitchell, 61 Wash. 178, 112 Pac. 250.

On appeal from a judgment entered January 7th, the mailing of a proposed statement of facts on February 6th in ample time to reach its destination on the same day is a sufficient service within the thirty days limited by law: Northern Pac. R. Co. v. Smith, 68 Wash. 269, 122 Pac. 1057.

A statement of facts which was not filed until more than four months after entry of the judgment is too late, and will be struck out on motion: Williams v. Spokane, 67 Wash. 368, 121 Pac. 836.

As to time in which notice of appeal may be filed, see note in 9 Ann. Cas. 731.

§ 395.

Under this section written instructions and requests for instructions are part of the record without being embodied in the statement of facts or bill of exceptions: State v. Phillips, 59 Wash. 252, 109 Pac. 1047.

§ 399.

RIGHT TO: See 4 Remington's Digest, "New Trial," §§ 3-5; O'Brien v. American Casualty Co., 57 Wash. 598, 107 Pac. 519; Kincaid v. Walla Walla Valley Traction Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918.

GROUND: See 4 Remington's Digest, "New Trial," §§ 10-40; Merritt v. Hibbard, 61 Wash. 368, 112 Pac. 350; Pealer v. Gray's Harbor Boom Co., 54 Wash. 415, 103 Pac. 451; Haggard v. Seattle, 61 Wash. 499, 112 Pac. 503; Faben v. Muir, 59 Wash. 250, 109 Pac. 798; Money v. Seattle, Renton & S. R. Co., 59 Wash. 120, 109 Pac. 307; In re Westlake Avenue, 60 Wash. 549, 111 Pac. 780; Kincaid v. Walla Walla Val-

ley Traction Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; In re Renton, 61 Wash. 330, 112 Pac. 348; Winningham v. Philbrick, 56 Wash. 38, 105 Pac. 144; Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636.

Where, after trial, findings and judgment were entered without notice to the opposite party, an order denying a motion for a new trial on all grounds except as to the irregularity for want of notice, and vacating the judgment for the purpose of allowing proposed findings to be made and exceptions taken, is not an order granting a new trial; and upon further proceedings for entry of judgment, it is not error to refuse a further trial on new evidence: Easterday v. Center, 65 Wash. 392, 118 Pac. 327.

Where it is not an abuse of discretion to refuse a continuance on account of the absence of a party, it is not an abuse of discretion to refuse a new trial asked on the same grounds, the showing of a meritorious defense not being alone sufficient: Nye v. Manley, 69 Wash. 631, 125 Pac. 1009.

A new trial should not be granted for failure to give an instruction which was not specifically requested: Grant v. Huschke, 70 Wash. 174, 126 Pac. 416.

The denial of a new trial, with expressions indicating that the trial judge would have arrived at a different conclusion, is not error, where the court did not indicate that the verdict was not sustained by the evidence, but only that he was in doubt about it: Naslund v. Svea Ins. Co., 64 Wash. 520, 117 Pac. 264.

A verdict for five hundred dollars for a wrongful ejection from a train, where the plaintiff was entitled to only nominal damages, is the result of passion or prejudice, and should be set aside and a new trial granted: Leek v. Northern Pac. R. Co., 65 Wash. 453, 118 Pac. 345.

As to failure to give nominal damages as reversible error, see note in 5 Ann. Cas. 225.

It is not an abuse of discretion in a prosecution for receiving deposits in an insolvent bank to refuse a new trial on the ground of prejudice of a juror, shown by the affidavit of two persons that the juror, before the trial, had stated that he had lost money through the insolvency of the bank, where the juror denied the statement, but recalled a conversation with such persons in which he had stated that another had lost money, and that the conversation had made so little impression that he had forgotten it at the time of the trial: State v. Welty, 65 Wash. 244, 118 Pac. 9.

Abuse of discretion in refusing a new trial on the ground of the insanity of a juror will not be found, where it appears that eight years had elapsed since the juror had been discharged as cured and adjudged sane, and his examination on his

voir dire was not brought up on appeal; and an attack of insanity some months after the trial would not show that the juror was insane at the time of the trial: *State v. Welty*, 65 Wash. 244, 118 Pac. 9.

As to new trial, on the ground of misconduct of juror, as vesting in the discretion of the court, see note in *Ann. Cas.* 1912D, 1018.

A quotient verdict will not be set aside as arrived at by lot or chance where it was not shown that there was an agreement to abide by the result, and there was no attempt to make the impeachment of the verdict complete: *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810.

The denial of a new trial for misconduct of a juror is warranted, although four witnesses testified that the juror stated that he would hang the defendant if called as a juror, where the juror and one witness contradicted their testimony, the juror claiming that the conversation related to another crime: *State v. Moretti*, 66 Wash. 537, 120 Pac. 102.

As to the invalidity of quotient or chance verdicts, see note in 134 Am. St. Rep. 1061; also note in 11 L. R. A. 706.

As to new trial on the ground of misconduct of juror, see note in *Ann. Cas.* 1912D, 1018.

It is an abuse of discretion to refuse to grant a new trial where the special interrogatories are conflicting and irreconcilable with the general verdict: *Loy v. Northern Pac. R. Co.*, 68 Wash. 33, 122 Pac. 372.

ARGUMENTS AND CONDUCT OF COUNSEL.—It is not misconduct of counsel entitling a party to a new trial that in argument to the jury counsel quoted the testimony of witnesses from the notes of the stenographer, no claim being made that they were incorrectly quoted: *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28.

It is not an abuse of discretion to refuse a new trial, asked because of a conversation held by respondent's counsel with a juror, in a public place, in the presence of appellant's counsel, no reference to the case being made in the conversation: *Deighton v. Hover*, 58 Wash. 12, 137 Am. St. Rep. 1035, 21 Ann. Cas. 860, 107 Pac. 853.

As to misconduct of counsel in arguments as ground for new trial, see notes in 97 Am. Dec. 630; 40 Am. Rep. 642; 50 Am. St. Rep. 572.

As to remarks or conduct of counsel, other than during argument, as ground for new trial, see note in 100 Am. St. Rep. 696.

It is not an abuse of discretion to grant a new trial for misconduct of counsel who misstated the ruling of the supreme court upon similar facts, placed before the jury the finding of the court in such case upon similar facts, improperly discussed the legal effect of answers to certain findings upon special interrogatories and their legal effect

upon the general verdict, where the court had a well-founded doubt, from the cumulative effect of these and other indiscretions, whether a fair trial had been had: *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88.

It is not an abuse of discretion to grant a new trial for misconduct of counsel, where instructions to disregard various acts and misconduct complained of did not adequately cover some of the instances, and left one of them wholly unwarranted: *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88.

The refusal of a new trial for misconduct of counsel in argument to the jury is largely in the discretion of the trial court, and it is not an abuse of discretion to deny a new trial, where, in an action for injuries sustained in a railway wreck through the admitted negligence of the railway company, the only issue being the amount of the damages, counsel for plaintiff commented on the gross negligence of the defendant in an improper and inflammatory manner, and upon exceptions taken, the court ruled that the question of negligence had been eliminated and was not within the issues, especially where the trial court reduced the amount of the verdict rendered: *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889.

SURPRISE, ACCIDENT, INADVERTENCE OR MISTAKE: *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476; *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184; *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059.

A new trial for surprise in that the accident was shown to have occurred seventeen feet from the place alleged should not be granted after trial and verdict, when no objection was made at the time and no continuance requested: *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211.

As to surprise as a ground for a new trial, see note in 78 Am. Dec. 518.

Where, on the opening of a condemnation trial, which lasted several days, defendant's counsel gave notice of a claim for damages by reason of additional expense in shipping shingle bolts on the land, which was only twenty miles away, the relator cannot after verdict claim surprise from such a claim entitling it to a new trial, no claim of surprise or continuance being asked at the time notice was given: *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*, 65 Wash. 402, 118 Pac. 318.

NEWLY DISCOVERED EVIDENCE—DILIGENCE: See 4 Remington's Digest, "New Trial," § 35; *Schoening v. Young*, 55 Wash. 90, 104 Pac. 132; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac.

643; *Anderson v. Woolley*, 61 Wash. 236, 112 Pac. 271.

A new trial for newly discovered evidence as to the kind of glasses worn by the plaintiff on a dark night is properly denied, since it probably would not, and certainly should not, have changed the verdict: *Harris v. Seattle, Renton & Southern R. Co.*, 65 Wash. 27, 117 Pac. 601.

In an action for personal injuries, it is not an abuse of discretion to refuse a new trial for newly discovered evidence as to general observations of neighbors regarding plaintiff's health, where it was not of such force as to be likely to change the result: *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211.

In a condemnation case, a new trial for newly discovered evidence as to the damages to land not taken is properly denied for want of diligence, where the relator's engineers had visited and examined the land and should have advised themselves as to the situation before the trial: *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*, 65 Wash. 402, 118 Pac. 318.

As to forgotten facts as newly discovered evidence, see note in 17 Ann. Cas. 317.

An order granting a new trial for newly discovered evidence will not be disturbed on appeal where no abuse of discretion is shown, but, on the contrary, it appears that due diligence was used to discover the only eye-witness to the accident, and her whereabouts was not ascertained until too late to produce her at the trial, when a continuance was immediately requested: *Walgraf v. Wilkeson Coal & Coke Co.*, 65 Wash. 464, 118 Pac. 343.

A new trial for newly discovered evidence should not be granted where the evidence would not affect the result: *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347.

A motion for a new trial on the ground of newly discovered evidence of a witness in a distant state, who was telegraphed to a day or two after the trial, is properly denied for want of a showing of diligence, where the circumstances showing diligence were not stated and it was not shown how or from whom the information was obtained: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

As to new trial for newly discovered evidence in case where a witness' disability removed since trial had, see note in 17 Ann. Cas. 1165.

A new trial for newly discovered evidence is properly denied, where it was based upon hearsay as to what two witnesses would testify to, and their affidavits were not produced, and no diligence in securing the evidence was shown: *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810.

It is an abuse of discretion to refuse a new trial for insufficiency of the evidence to sustain the verdict where the evidence as a whole is insufficient, although there is some slight evidence, which, standing alone,

might sustain the verdict: *Koenig v. Whatcom Falls Mill Co.*, 67 Wash. 632, 122 Pac. 16.

A new trial for newly discovered evidence consisting of a letter in the party's possession is properly denied where no excuse was shown for failing to produce the letter: *Citizens' Nat. Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

Where a new trial was granted because the evidence was insufficient to sustain a verdict for the defendant, and the order was affirmed on appeal, upon a retrial of the same case upon substantially the same evidence, which was conflicting, it is an abuse of discretion to set aside a verdict for the plaintiff as not sustained by the evidence: *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62.

A new trial for newly discovered evidence is properly refused where there was no request for a continuance and no showing of diligence in procuring a witness who was found within a very few days after the trial: *Spokane Portland Cement Co. v. Larson*, 71 Wash. 301, 128 Pac. 641.

It is not an abuse of discretion to refuse a new trial on the ground of the newly discovered evidence of a witness who would testify, in contradiction of several witnesses, that plaintiff had told him several years before that he was ruptured and unable to do hard work, where the same was contradicted by counter-affidavits, and it is not probable that the evidence would change the result: *Hazlett v. Seattle Elec. Co.*, 71 Wash. 377, 128 Pac. 677.

It is not error to refuse plaintiff a new trial for newly discovered evidence as to defendant's negligence, when the case was properly dismissed because of plaintiff's contributory negligence: *Armstrong v. Spokane & Inland Empire R. Co.*, 71 Wash. 624, 129 Pac. 379.

As to newly discovered evidence, as ground for new trial, same bearing on contradictory statements of witness, see note in Ann. Cas. 1912D, 1856.

CUMULATIVE EVIDENCE: See 4 Remington's Digest, "New Trial," § 37; *Galena Nat. Bank v. Ripley*, 55 Wash. 615, 26 L. R. A., N. S., 993, 104 Pac. 807; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; *In re Wells*, 60 Wash. 518, 111 Pac. 778; *State v. Gray*, 61 Wash. 549, 112 Pac. 641; *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059.

A new trial should not be granted for newly discovered evidence as to the place of an accident, where the same was only cumulative: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

As to what is cumulative evidence in this connection, see note in 14 L. R. A. 609.

A new trial should not be granted for newly discovered evidence that was merely cumulative or impeaching and no excuse was

offered for not producing the witnesses at the first trial: *Stewart v. Bowen*, 70 Wash. 195, 126 Pac. 414.

IMPEACHMENT OF WITNESS.—A new trial for newly discovered evidence is properly refused where the evidence merely tended in a slight degree to impeach the evidence of the prosecuting witness: *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817; *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 27 L. R. A., N. S., 884, 108 Pac. 140.

A new trial for newly discovered evidence is properly refused where the new evidence is merely impeaching and could or should have had but small probative value, and should not have changed the result: *State v. Kincaid*, 69 Wash. 273, 124 Pac. 684.

§ 402.

PROCEEDINGS TO PROCURE NEW TRIAL: See 4 Remington's Digest, "New Trial," §§ 43-58; *O'Brien v. American Casualty Co.*, 57 Wash. 598, 107 Pac. 519; *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414; *Meza v. Pfister Co.*, 54 Wash. 7, 102 Pac. 871; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476; *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28; *Sexsmith v. Brown*, 61 Wash. 164, 112 Pac. 337.

Where an order for a new trial is made conditional upon payment of costs within a limited time, a motion to extend the time made after default is too late, as it would be in effect granting permission to interpose a second motion for a new trial: *Green v. Russell*, 71 Wash. 379, 128 Pac. 645.

§ 404.

CONCLUSIVENESS IN GENERAL.—An appeal from a judgment does not suspend its effect as *res judicata*: *Kaufman v. Klain*, 69 Wash. 113, 124 Pac. 391.

As to the effect of appeal or right of appeal, upon judgment as *res adjudicata*, see note in 37 Am. St. Rep. 29-32.

Matters determined on a former appeal are *res judicata* in an action by defendants against the plaintiffs and their surety on an injunction bond given in the former action: *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185.

As to conclusiveness of judgments in other actions involving the same question, see note in 38 Am. Rep. 778.

As to the persons and matters concluded by a judgment generally, see note in 15 Am. St. Rep. 142; also in 1 L. R. A. 527; 3 L. R. A. 142; 7 L. R. A. 577; 11 L. R. A. 155.

A default judgment entered upon false proof of service cannot be set aside for want of jurisdiction, where it appears that there

was a further valid service of process, although no proof thereof was made before judgment; and the burden of proof is upon the defendant to show that no valid service was made: *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018.

As to collateral attack upon judgment on the ground of a false return of process, see note in 19 Am. Dec. 139; also note in 124 Am. St. Rep. 768.

Where, in an action against a bank, an order of default mentions a return of the sheriff showing that service was duly made, and that the defendant had appeared by attorneys, and there was on record an affidavit by one M. that he had served the summons and complaint on B., vice-president, and K., a trustee of the defendant, the affidavit of B. that he had never qualified and had refused to accept the office of vice-president, and was not an officer, is insufficient to overcome recitals in the judgment that the defendant had been duly served with a summons and complaint, such affidavit not being conclusive, and it not appearing that it was not contradicted by other evidence, or that the sheriff did not make any return: *Silvain v. Benson*, 68 Wash. 286, 123 Pac. 457.

As to grounds, effective or otherwise, for setting aside a judgment, see, generally, note in 23 Am. St. Rep. 104.

JUDGMENT ON DEMURRER.—Where a demurrer to the merits of a petition in intervention is sustained and the complaint dismissed, the judgment is final and a bar to any recovery on the grounds stated: *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

As to judgments or decree on merits rendered on demurrer as constituting former adjudication, see note in Ann. Cas. 1913A, 541.

A judgment sustaining a demurrer and dismissing an action brought by a citizen and taxpayer against a city clerk to enjoin the holding of a local option election on the ground that the petition therefor was insufficient is *res judicata* and a bar to a similar action brought for the same purpose by another citizen and taxpayer alleging his special interest as a retail liquor dealer, where it is not shown that the former suit was fictitious or collusive: *State ex rel. Forgues v. Superior Court*, 70 Wash. 670, 127 Pac. 313.

DECISION OR FINDINGS OF COURT WITHOUT JUDGMENT.—An answer pleading that another action between the same parties involving the same subject matter had been tried and decided in favor of the defendant, and that findings were being prepared, is bad as a plea in bar, since no final judgment therein had been entered: *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 Pac. 281.

As to the necessity of entry of the judgment to make it effective, see note in 129

Am. St. Rep. 745. And see note in 87 Am. St. Rep. 665, and 28 L. R. A. 621.

PENDENCY OR DENIAL OF MOTION TO OPEN OR VACATE JUDGMENT: See 4 Remington's Digest, "Judgment," § 191; Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874; Meisenheimer v. Meisenheimer, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159; Flueck v. Pedigo, 55 Wash. 646, 104 Pac. 1119; Newell v. Young, 59 Wash. 286, 109 Pac. 801; Boylan v. Bock, 60 Wash. 423, 111 Pac. 454.

The denial of a motion to vacate the appointment of a receiver of a corporation, entered in a collusive suit through ex parte proceedings, is not *res judicata* or a bar to a subsequent suit by the corporation to vacate the receivership and set aside the sales made therein: Goodale Phonograph Co. v. Valentine, 69 Wash. 263, 124 Pac. 691.

As to a judgment as a bar generally when made upon a mere collateral issue, see note in 11 L. R. A. 310.

As to what is required to make a judgment a bar, see note in 14 Am. St. Rep. 250.

JUDGMENT OF DISMISSAL: See 4 Remington's Digest, "Judgment," §§ 187-189; Krug v. Hendricks, 54 Wash. 209, 102 Pac. 1049; McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 Pac. 237; Nunn v. Mather, 60 Wash. 484, 111 Pac. 566; McKim v. Porter, 60 Wash. 270, 110 Pac. 1073.

A judgment dismissing an action for divorce, based on the ground of cruelty, is *res judicata* and a bar to another action based upon acts of cruelty that occurred prior to the time of the trial: Stay v. Stay, 53 Wash. 534, 102 Pac. 420.

As to a decree against plaintiff in a divorce suit, as a bar to a similar suit by him subsequently on the same grounds, see note in 26 L. R. A. 577.

A judgment in an equity case, after trial, dismissing the action on defendant's motion for the reason that the plaintiffs failed to prove any of the material facts necessary to a recovery, is a judgment on the merits, and a bar to another action, regardless of whether it was called a dismissal or a nonsuit: Michel v. White, 64 Wash. 341, 116 Pac. 860.

As to the effect of a nonsuit as *res adjudicata*, see note in 49 Am. St. Rep. 831.

Findings are not necessary to sustain a judgment of dismissal: Lamar v. Anderson, 71 Wash. 314, 128 Pac. 672.

As to dismissal of action by agreement as *res judicata*, see note in 13 Ann. Cas. 655.

PERSONS CONCLUDED: See 4 Remington's Digest, "Judgment," §§ 154-212; Wick v. Rea, 54 Wash. 424, 103 Pac. 462; Holly v. Munro, 55 Wash. 311, 133 Am. St. Rep. 2028, 104 Pac. 508; Merz v. Mehner, 57 Wash. 324, 106 Pac. 1118; McLiesh v. Ball,

58 Wash. 690, 137 Am. St. Rep. 1087, 109 Pac. 209; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426; Bevan v. Muir, 53 Wash. 54, 32 L. R. A., N. S., 588, 101 Pac. 485; Bradley Eng. & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; State ex rel. McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57.

Where a wife was living separate and apart from her husband, after her action for a divorce had been denied on the merits, and their community property was condemned, she cannot, in the condemnation suit, seek the adjudication of her community rights or her right to separate maintenance, as she is bound by the former adjudication that she is not justifiably living separate and apart from her husband: Stay v. Stay, 59 Wash. 651, 101 Pac. 549.

As to effect of divorce suit upon community property in the absence of adjudication, see note in 11 L. R. A. 103.

An order discharging a guardian of an insane person by a court having general jurisdiction will be presumed to have been regularly made until the contrary appears, and is conclusive on collateral attack: Jorgenson v. Winter, 69 Wash. 573, 125 Pac. 957.

As to the conclusiveness of decrees of courts having exclusive jurisdiction of estates of decedents and incompetent persons, see note in 106 Am. St. Rep. 642.

A judgment against the holder of a contract for the purchase of land from the state, determining his right to the waters of a stream, is conclusive upon one deriving his title through the grantee of the state, to whom the contract holder assigned the contract: State ex rel. Olding v. Stampfly, 69 Wash. 368, 125 Pac. 148.

As to the effect of a judgment, enjoining the use of real property in a certain manner, upon the right of a subsequent holder to use the property in the same manner, see note in 13 L. R. A., N. S., 462.

A defendant is estopped by laches and by a restraining order, unappealed from, from attacking a judgment on the ground of fraud, where, on his appeal from an order refusing to vacate the judgment on his petition, the appeal was dismissed because he had failed to obtain permission of the supreme court to attack the judgment, and for three years thereafter neglected to obtain such permission, and was meanwhile restrained from bringing any action affecting plaintiff's title to the land which was the subject of the former suit: Kath v. Brown, 69 Wash. 306, 124 Pac. 900.

As to vacating of judgment on ground of fraud, see note in 14 Am. Dec. 636.

As to negligence as bar to relief in a proceeding to vacate judgment, see note in 53 Am. St. Rep. 444.

In an action by grantees acting merely as trustees of judgment debtors, brought against the purchasers of the property at execution sale to set aside the judgment and sale as fraudulent and void, a judgment quieting the title of the purchasers is *res judicata* as far as the title to the property is concerned, and bars a subsequent action by the judgment debtors against the judgment creditors to set aside the judgment, which was satisfied by the execution sale: *Peterson v. Wheeler*, 66 Wash. 519, 120 Pac. 83.

An order in probate setting aside a homestead to a widow is *res adjudicata*, if the court had jurisdiction and the administrator appeared or had sufficient notice to appear and try out the question: *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81.

As to suit to remove cloud from title, by purchaser at execution sale, see note in 12 L. R. A., N. S., 66.

As to effect of an order of probate court setting aside homestead to a widow, see note in 129 Am. St. Rep. 794.

A judgment against part of the makers of a note, obtained by a bank as transferee, is not conclusive on the other makers that the bank was a holder in due course, in a subsequent action against them for contribution: *Peterson v. Nichols*, 71 Wash. 656, 129 Pac. 373.

As to the conclusiveness of a judgment against persons not parties to the action, see note in 2 Am. St. Rep. 876.

As to a judgment's conclusiveness upon matters not within the issues of the case determined, see note in 8 Am. St. Rep. 229. See, also, notes in 6 Ann. Cas. 104, and 38 L. R. A., N. S., 1023.

BAR AND MATTERS CONCLUDED:
See 4 Remington's Digest, "Judgment," §§ 213-236; *Bradley Engineering & Mach. Co. v. Muzzy*, 54 Wash. 227, 18 Ann. Cas. 1072, 103 Pac. 37; *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 434, 105 Pac. 846; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039; *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741; *Struntz v. Hood*, 57 Wash. 578, 107 Pac. 352; *McPherson Bros. Co. v. Okanogan County*, 61 Wash. 239, 112 Pac. 267; *Savage v. Tacoma*, 61 Wash. 1, 112 Pac. 78; *Gladden v. Jacobowski*, 61 Wash. 242, 112 Pac. 268; *Martin v. Barger*, 62 Wash. 672, 114 Pac. 505; *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

As to conclusiveness of judgments generally, see notes in 1 L. R. A. 572; 3 L. R. A. 142; 7 L. R. A. 577; 11 L. R. A. 155.

Where a wife left her home and at once brought action for divorce on the ground of cruelty, dismissal of the action on the merits and a finding that the defendant was not at fault, is *res judicata* and a bar to an action for a divorce on the grounds of constructive abandonment by reason of cruelty and of failure to support since the former action, in the absence of any showing that the wife

attempted to return and receive support at home: *Stay v. Stay*, 53 Wash. 534, 102 Pac. 420.

As to the effect of a judgment as a bar to an action, subsequently brought upon virtually the same facts, see notes in 38 Am. Rep. 778. See, also, note in 15 Am. St. Rep. 142; also notes in 9 Ann. Cas. 187, and Ann. Cas. 1913A, 466.

As to dismissal of action on the merits, as bar to subsequent suit in another jurisdiction, see note in 19 Ann. Cas. 1016.

As to effect of decree against plaintiff in a divorce suit as bar to similar suit subsequently, see note in 26 L. R. A., N. S., 577.

Where a lower riparian owner brought an action claiming forty inches of the flow of a creek, and was adjudged the prior right to use but nine inches, as the "reasonable portion" of the waters belonging to him, the judgment is *res judicata* and a bar to a second action brought against the same parties to determine his rights to the waters as a riparian owner: *Farwell v. Brisson*, 66 Wash. 305, 119 Pac. 814.

In an action to foreclose mortgages a plea of former adjudication is established where plaintiff admitted that in a former action brought against him by the defendant for wages, he (the plaintiff) had set up in defense an indebtedness to him for advances made which he sought to recover and which was represented in part by the mortgages, and the case was submitted to a jury with directions to bring in a verdict in favor of the party to whom any balance was due; and it is immaterial that the parties were not all the same in both actions, the other persons not being primarily interested and merely proper parties: *Kaufman v. Klain*, 69 Wash. 113, 124 Pac. 391.

As to the effect, upon a mortgage as a lien, of an adjudication in respect of the indebtedness alleged to be secured by it, see note in 24 L. R. A., N. S., 1095.

In an action for breach of covenant against encumbrances, where the plaintiff failed to allege either an eviction or a discharge of the encumbrances, and the court instructed the jury that they could award nominal damages only, and refused leave to file a supplemental complaint showing an eviction subsequent to the commencement of the action because it was not timely made, judgment for nominal damages is *res judicata* and a bar to a subsequent action for substantial damages by reason of the eviction, where plaintiff, instead of dismissing the former action before the judgment for nominal damages, appealed therefrom to the supreme court and sought its reversal: *International Development Co. v. Clemans*, 66 Wash. 620, 120 Pac. 79.

An adjudication that a lot was subject to a party-wall lien as against defendants, who acquired title by mesne conveyances from a party to the party-wall agreement, is not conclusive in a subsequent action that the

lien still exists or was enforceable as against the plaintiffs acquiring the title from the defendants: *Hoffman v. Dickson*, 65 Wash. 556, Ann. Cas. 1913B, 869, 39 L. R. A., N. S., 67, 118 Pac. 737.

A judgment quieting title against claims by infants alleging want of jurisdiction to render judgment of foreclosure is *res judicata* and a bar to a subsequent action seeking to quiet title to the same lands by reason of defendants' collusive agreement with a judgment creditor as to redemption and failure to redeem from the foreclosure sale for plaintiff's benefit: *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893.

Where a contractor had turned over his work as completed, refused further performance, and the only issue was whether there had been a substantial performance, the other party claiming that the work was worthless and a damage, a judgment dismissing an action to foreclose his lien, after a trial on the merits, is *res judicata* and a bar to another action to recover on the same contract in which the plaintiff offered to show that subsequently to the former judgment he had tendered full performance involving only a nominal expense of twelve dollars, and that the tender was refused: *Thompson v. Washington Nat. Bank*, 68 Wash. 42, 39 L. R. A., N. S., 972, 122 Pac. 606.

An injunction against the diversion of water from a creek until riparian rights are condemned and awarding damages for past diversions is not an adjudication that the taking of twenty-two cubic feet of water thirteen miles above appellant's property would amount to a loss of that much water at the point of appellant's property: *Walla Walla v. Dement Brothers Co.*, 67 Wash. 186, 121 Pac. 63.

A judgment in an action for an accounting, brought by the receiver of a copartnership against a bank, is conclusive on any issue as to whether the bank had in its possession funds belonging to the partnership: *Aurora Land Co. v. Keewan*, 67 Wash. 305, 121 Pac. 469.

In an action for the price of butter sold and delivered, a judgment in a proceeding in rem condemning the butter as "renovated" butter is not, as a matter of law, final and conclusive upon the plaintiff as to the status and condition of the butter at the time it was sold to the defendant three and one-half months before its seizure, where the facts were all in dispute: *Makins Produce Co. v. Callison*, 67 Wash. 434, 121 Pac. 837.

Where a holder of warrants brought a suit in equity setting out three warrants and alleging that he and others held other similar warrants, and that he brought the suit for the benefit of all to avoid a multiplicity of suits, seeking the affirmance of a principle upon which all of his warrants and others might be validated, and on appeal a decree established the validity of the three warrants in question, and remanded the case for

the purpose of taking testimony to determine the validity of plaintiff's other warrants, opening the door of equity for plaintiff to establish the validity of all his warrants, whereupon he presented part of his warrants but withheld others, a final decree establishing the validity of the warrants presented by the plaintiff may be pleaded as an estoppel against a subsequent action prosecuted by plaintiff to establish other similar warrants held by him at the time but not presented in the first suit, since the same might have been litigated in the former action: *State ex rel. Gladwin v. Cheney*, 67 Wash. 151, 121 Pac. 48.

In an action for the price of butter sold and delivered, which defendant rejected because in bad condition and not according to sample, a judgment in a proceeding in rem by the state inspector condemning the butter as "renovated" butter, the sale of which was prohibited, is admissible in evidence to prove the condition of the butter at the time it was seized: *Makins Produce Co. v. Callison*, 67 Wash. 434, 121 Pac. 837.

A judgment for nominal damages for breach of a covenant against encumbrances, recovered before the encumbrances have been discharged by the grantee, is not *res judicata* or a bar to a subsequent action to recover substantial damages suffered by the grantee in subsequently paying off and discharging the encumbrances: *Harsin v. Oman*, 68 Wash. 281, 123 Pac. 1.

Where disputes arose between parties to a contract, and one of them brought an action against the other for injunctive relief, damages and general relief, the judgment is *res judicata* and a bar to another action upon the contract as to all matters in dispute that arose prior to the commencement of the first action: *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661.

As to the conclusiveness of a judgment, in an action of accounts, as a bar to subsequent actions for items omitted, see note in 78 Am. Dec. 769.

§ 406.

See notes to § 1140.

§ 408.

Under this section the plaintiff has an absolute right to a voluntary nonsuit, even though the action is tried before the court without a jury, at any time before submission of the case; and the case is not submitted where the plaintiff asked the nonsuit before resting because of the absence of necessary witnesses: *McPherson v. Seattle Elec. Co.*, 53 Wash. 358, 101 Pac. 1084.

An agreement between the parties to an action for a dismissal, without costs, is effective as a settlement without a formal order of dismissal, since the parties may settle and satisfy the debt pending entry of the judg-

ment: *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742.

It is not an abuse of discretion to refuse a voluntary dismissal of an action to quiet title after it had been consolidated with another suit in which defendants asked affirmative relief: *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367.

As to what constitutes "final submission" of cause so as to preclude voluntary dismissal, see note in 4 Ann. Cas. 510.

No abuse of discretion appears in the dismissal of an action for want of prosecution, where more than six years elapsed after the filing of answers before any steps were taken, and plaintiff only then moved for judgment on the pleadings after defendants' motion to dismiss: *Rehmke v. Fogarty*, 57 Wash. 412, 107 Pac. 184.

As to dismissal of bill for want of prosecution, see note in 96 Am. Dec. 778.

As to dismissal for delay in bringing case to trial, see 95 Am. Dec. 215.

An action to determine the right to the waters of a stream cannot be dismissed on plaintiff's refusal to bring in new parties, after other parties had by leave of court intervened and asked affirmative relief: *In re Clerf*, 55 Wash. 465, 104 Pac. 622.

The successful impeachment for fraud of an architect's certificate as to the amount due, which was to be conclusive and a prerequisite to action on the contract, does not entitle the defendant to a final dismissal on the merits, but only to a dismissal without prejudice to another action: *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787.

As to compulsory nonsuit, see note in 64 Am. Dec. 631.

As to the circumstances under which a compulsory nonsuit should be granted, see note in 24 Am. Dec. 620.

A judgment at the close of plaintiff's case upon defendant's motion for a nonsuit, expressly granting a nonsuit, and for defendant's costs, is not a bar to another action under the provisions of sections 408-410, and its plain recitals cannot be controverted by a showing that it was in fact on the merits: *Alberg v. Campbell Lumber Co.*, 60 Wash. 533, 111 Pac. 775.

As to judgment for defendant, for failure or insufficiency of plaintiff's proof, as bar to subsequent suit on same cause of action, see note in 9 Ann. Cas. 187.

Under this section it is not an abuse of discretion to grant plaintiff a nonsuit without prejudice after argument upon defendant's challenge to the sufficiency of plaintiff's evidence and after the court had indicated its view that the evidence was insufficient and had denied plaintiff's request to reopen the case for further evidence: *Williams v. Spokane*, 64 Wash. 484, 117 Pac. 251.

As to the court's jurisdiction to enter final judgment upon dismissal or nonsuit, see note in 26 L. R. A., N. S., 914.

Prior to judgment, the plaintiff may elect to dismiss one of several joint tort-feasors

without releasing the others: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

§ 411.

A demand for a bill of particulars, made after defendant is in default and while a motion for a default is pending, comes too late and does not prevent judgment by default: *General Lith. & Print. Co. v. American Trust Co.*, 55 Wash. 401, 104 Pac. 608.

After entry of default for failure to appear and answer in time, the defendant is not entitled, by reason of later appearance, to notice of application for judgment, under this section, entitling him to five days' notice of proceedings if he gives notice of appearance before the time for answering expires: *General Lith. & Print. Co. v. American Trust Co.*, 55 Wash. 401, 104 Pac. 608.

A default cannot be taken against non-appearing defendants for a sum greater than that demanded in the complaint: *In re Sixth Avenue West*, Seattle, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

A party has a right to presume that the plaintiff will not take a different default judgment than the facts alleged warrant: *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777.

As to default judgments beyond the scope of the relief asked, see notes in 11 L. R. A., N. S., 807, and 11 Ann. Cas. 353.

The filing of a motion for default, within the rule of court that a default shall be deemed claimed whenever the motion is filed, is for the convenience of the court, and may be waived, and is not essential to the validity of a default judgment entered upon affidavits claiming the same: *Swasey v. Mikkelsen*, 65 Wash. 411, 118 Pac. 308.

An answer filed after a default had been entered, without leave of court, and not served on the plaintiff, does not constitute an appearance preventing a judgment by default: *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984.

A default judgment on a bond for the amount of the penalty, and four hundred dollars additional as attorneys' fees and for costs, is not void for want of jurisdiction as exceeding the penalty of the bond, but merely erroneous to be corrected by appeal or statutory proceeding; and the objection cannot be first raised on appeal from an order refusing to vacate the judgment on a motion based on other grounds: *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984.

A default judgment beyond the purport and scope of the pleadings is irregularly obtained, rather than erroneous, and may be set aside on motion: *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340.

As to statutes authorizing vacation of judgments by default, see note in 58 Am. Dec. 395.

A decree is not void as going beyond the specific relief prayed for in the complaint,

where the complaint prayed for both specific and general relief, and the decree was within the allegations and prayer for general relief: *Nelson v. Nelson*, 56 Wash. 571, 106 Pac. 138, 107 Pac. 195.

§ 415.

In the absence of statute, one partner cannot, in an action of replevin arising in tort, confess by stipulation a judgment enforceable against partnership property, without his copartner's consent, this section, for the confession of judgments by a partner, being confined to actions on contract: *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045.

As to the necessity of strict compliance with the statute authorizing judgment by confession, see note in 65 Am. Dec. 522. See, also, note in 99 Am. Dec. 522.

§ 424.

Under this section, providing the grounds for exceptions to an award, and section 430, providing that judgment on the award shall stand upon the footing of other judgments and be reviewed in the same way, a judgment on an award, unappealed from, is conclusive on a party to the arbitration, and cannot be attacked by a motion to vacate: *McElroy v. Hooper*, 70 Wash. 347, 126 Pac. 925.

As to causes for impeaching an award, see note in 14 Am. Dec. 754.

§ 426.

Since a submission to arbitration made a rule of court cannot be revoked by one of the parties without an order of court, one of the parties cannot revoke a submission in which the award was vacated because of irregularities and the matter resubmitted by order of court: *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 128 Pac. 663.

As to the effect on the cause of action of a submission or agreement to submit it to arbitration, see note in 56 Am. Dec. 381.

Where no bias or prejudice is found, it is proper to refuse to vacate an award by arbitration: *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 128 Pac. 663.

§ 430.

See notes to § 424.

§ 431.

A motion for judgment non obstante veredicto does not operate as a stay preventing the entry of a judgment when it was not treated or considered as a motion for a new trial: *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434.

Where a judgment was not immediately entered by the clerk in conformity to a ver-

dict against joint tort-feasors, as required by this section, plaintiff's nolle prosequi as to one of the defendants, pending a motion for a new trial, does not operate as a satisfaction of judgment and release as to all the other joint tort-feasors, no judgment having actually been entered until the motion for a new trial was passed upon: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

After announcing an oral decision and causing the same to be entered upon the minutes, it is error to enter a decree contrary to the first decision, twenty-nine days later, on an ex parte application: *Schultz v. Schultz*, 71 Wash. 327, 128 Pac. 660.

Where no formal judgment was entered at the time the plaintiff took a voluntary dismissal, a formal judgment may later be entered nunc pro tunc: *Furman v. Bon Marche*, 71 Wash. 238, 128 Pac. 210.

§ 434.

See notes to §§ 707, 711.

In an action of replevin to recover property sold conditionally, upon which plaintiff claimed a default and a balance due, the court, upon finding a sum due less than the amount claimed, has jurisdiction to decree the usual judgment in replevin in favor of the plaintiff, unless the defendant, within ten days, pays the amount found to be due, with costs and attorneys' fees, although the payments made and the balance found did not equal the contract price of the goods sold, especially where the real controversy was over the amount due, if any, and whether the property sold had all been delivered, since property sold conditionally is held only for security, and the relief granted was equitable, and the court may grant any relief consistent with the case made by the pleadings: *Standard Furniture House v. Burrows*, 59 Wash. 455, 110 Pac. 13.

As to waiver of right, in conditional sales, to recover property in specie after bringing action for purchase price, see note in 23 L. R. A., N. S., 144.

§ 435.

The failure of the clerk of a foreign court to perform the clerical duty of recording a judgment of divorce, as required by statute to make the judgment effective, does not affect its validity, and a certificate of the clerk that it was not recorded, contradicting a former certificate that it was recorded, is therefore properly disregarded: *Douglas v. Teller*, 53 Wash. 695, 102 Pac. 761.

As to the necessity for entry of judgment in order to have it receivable in evidence in support of a proceeding taken under it, see note in 129 Am. St. Rep. 745.

As to foreign divorce decrees, see note in 109 Am. St. Rep. 254.

The clerk's minute entry of a judgment cannot disturb the judgment: *Michel v. White*, 64 Wash. 341, 116 Pac. 860.

§ 445.

See notes to § 459.

This section and section 458, providing that in case of appeal to the supreme court the date of the final judgment in the supreme court shall be the time from which said five years shall commence to run, are impliedly repealed by sections 459—461, providing that after the expiration of six years from the rendition of any judgment, it shall cease to be a lien and shall not be extended or continued in force for a period longer than six years from the date of the entry of the "original" judgment, the original judgment being that of the trial court in case of an appeal to the supreme court: *Seattle Brewing & Malting Co. v. Donofrio*, 59 Wash. 98, 109 Pac. 335.

The lien of a judgment attaches from the date of entry, notwithstanding the pendency of a motion for a new trial; and the lien cannot thereafter be impaired by a voluntary conveyance by the judgment debtors, nor the title acquired under execution sale questioned by vendees of the judgment creditors who had notice of the judgment and failed to redeem: *Konnerup v. Milspaugh*, 70 Wash. 415, 126 Pac. 939.

As to when the lien of a judgment begins to run, see note in 133 Am. St. Rep. 72.

§ 457.

A decree of divorce, directing the husband to pay the wife a stated sum as her proportionate part of the community property and attorneys' fees is a judgment within this section, which draws interest from date, the code procedure recognizing no distinctions between judgments and decrees: *Smith v. Smith*, 63 Wash. 288, 115 Pac. 166.

§ 458.

See notes to § 459.

§ 459.

This and the next two sections, limiting the lien of the judgment to six years from its date, and providing that no action can be had upon a judgment after the judgment lien has expired, is constitutional as to limiting the time for the commencement and duration of the lien of judgments upon contracts subsequently arising: *Seattle Brewing & Malting Co. v. Donofrio*, 59 Wash. 98, 109 Pac. 335.

§ 460.

See notes to § 459.

§ 461.

See notes to § 459.

§ 464.

See notes to §§ 404, 806.

DEFAULT JUDGMENTS: See 4 Remington's Digest, "Judgments," §§ 36—48; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229; *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159; *General Lith. & Print. Co. v. American Trust Co.*, 55 Wash. 401, 104 Pac. 608; *Graham v. Graham*, 54 Wash. 70, 18 Ann. Cas. 999, 102 Pac. 891; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

It is discretionary to open a default judgment against a corporation, where the papers were served upon an officer who was unfamiliar with legal proceedings and mislaid and lost the papers until after entry of the judgment, and the motion was made with diligence: *Spoar v. Spokane Turnverein*, 64 Wash. 208, 116 Pac. 627.

As to relief from default judgment when service of process was constructive, also where such was personal, see note in 26 L. R. A., N. S., 1063.

A petition to vacate a judgment for fraud, under this section, where there was no personal service on the defendant, under section 235, is limited to one year after entry of the judgment, and cannot be entertained after that time, although an independent suit in equity to vacate for fraud might be maintained after the expiration of two years: *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 121 Pac. 981.

A motion to vacate a judgment, entered on the nonappearance of the defendant and his counsel at the trial is properly denied, where it appears that both defendant and his attorney were neglectful, the defendant going east for several weeks without making inquiry about the case or keeping in touch with his attorney so that he did not get notice of the time set and the attorney's withdrawal from the case until after the trial: *Green v. Russell*, 71 Wash. 379, 128 Pac. 645.

As to the effect of laches in making application for opening and vacating judgment, see note in 52 Am. St. Rep. 795.

After an alternative order refusing to vacate a judgment and grant a new trial unless costs are paid has become final and effective by defendants' failure to pay the costs within the time fixed, the trial court is without jurisdiction to entertain a second motion to vacate the judgment: *Green v. Russell*, 71 Wash. 379, 128 Pac. 645.

As to payment of costs as condition precedent to the availing, by the party concerned, of an order opening and vacating a default judgment and granting a new trial, see note in Ann. Cas. 1912B, 249.

OPENING OR VACATING—NATURE AND GROUNDS OF REMEDY: See 4 Remington's Digest "Judgments," §§ 99-113; Malloy v. Union Transfer etc. Co., 60 Wash. 331, 111 Pac. 160; Stark Brothers v. Royce, 44 Wash. 287, 87 Pac. 340; National Bank of Commerce v. Kilsheimer & Co., 59 Wash. 460, 110 Pac. 15; Meisenheimer v. Meisenheimer, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

After entry of final judgment in a cause, the court is without power to enter another until the first is regularly canceled or set aside; and the first judgment is not vacated by a second judgment making no mention of the first: Wagner v. Northern Life Ins. Co., 70 Wash. 210, 126 Pac. 434.

The failure of arbitrators to determine all the questions involved is error of law that can be corrected only by appeal from the judgment, and not by motion to vacate the judgment: McElroy v. Hooper, 70 Wash. 347, 126 Pac. 925.

The fact that the wife was not a party to a judgment against a husband on a community debt, and that the same may be enforced against community property, is not ground for vacating the judgment: McElroy v. Hooper, 70 Wash. 347, 126 Pac. 925.

As to the power of a court to vacate a judgment after the time specified by statute for granting relief therefrom, see note in 52 Am. St. Rep. 795; also note in 23 Am. St. Rep. 105.

EQUITABLE RELIEF: See 4 Remington's Digest, "Judgments," §§ 137-142; Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874; Washington Dredg. & Imp. Co. v. State, 53 Wash. 346, 101 Pac. 884; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777.

COLLATERAL ATTACK: See 4 Remington's Digest, "Judgments," §§ 154-163; Seattle & Northern B. Co. v. Bowman, 53 Wash. 416, 102 Pac. 27; Gould v. White, 54 Wash. 394, 103 Pac. 460; Hembree v. McFarland, 55 Wash. 605, 104 Pac. 837; Craver v. Mossbach, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016; Merz v. Mehner, 57 Wash. 324, 106 Pac. 1118; Holly v. Monroe, 55 Wash. 311, 133 Am. St. Rep. 1028, 104 Pac. 508; State ex rel. Nicomen Boom Co. v. North Shore etc. Co., 55 Wash. 1, 103 Pac. 426; McLiesh v. Ball, 58 Wash. 690, 137 Am. St. Rep. 1087, 109 Pac. 209.

A foreign decree of divorce, valid on its face, by a court of general jurisdiction, adjudicating a valid service of summons, is conclusive on collateral attack and cannot be impeached for fraud: Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945.

As to vacating of judgment for fraud, see note in 14 Am. Dec. 636.

As to power of court to vacate divorce decree for fraud, see note in 18 Ann. Cas. 1002.

As to foreign divorce decrees, see note in 109 Am. St. Rep. 254.

§ 466.

See notes to §§ 303, 464, 806.

§ 467.

See notes to §§ 404, 466.

§ 468.

PROCEEDINGS AND RELIEF: See 4 Remington's Digest, "Judgments," §§ 117-131; Molloy v. Union Transfer, Moving & Storage Co., 60 Wash. 331, 111 Pac. 160; State ex rel. McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57; Nelson v. Nelson, 56 Wash. 571, 106 Pac. 138, 107 Pac. 195; Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785.

Where property was attached and sold under a judgment alleged to be fraudulent and void, the purchasers at the sale are indispensable parties to an equitable action to set aside and vacate the judgment: Peterson v. Wheeler, 66 Wash. 519, 120 Pac. 83.

As to grounds for and proceedings in an equitable action to set aside and vacate a judgment for alleged fraud, see note in 23 Am. St. Rep. 104.

§ 469.

It is not an abuse of discretion to vacate a void default judgment against a corporation, where the claim of estoppel to dispute the judgment was met by counter-affidavits: Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785.

Upon a motion to vacate a default judgment, for the reason that no service was had upon the defendant, an affidavit of merits is not necessary: Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785.

As to the absolute right of a defendant not personally served to have a default judgment opened and to defend the action, see note in 12 Ann. Cas. 992.

A motion to vacate a judgment void for want of jurisdiction need not be supported by an affidavit of merits: Sakai v. Keeley, 66 Wash. 172, 119 Pac. 190.

§ 474.

See notes to §§ 136, 988.

Where one of the heirs interested in property knows of and sanctions the employment of an attorney on behalf of all the heirs to recover property, she is liable for her share of the reasonable value of his services and disbursements, but not for the amount agreed to be paid him, where she had no knowledge of the particular contract under which he was employed: Abel v. Hansen, 62 Wash. 492, 114 Pac. 182.

As to agreements with counsel for the latter's compensation, see note in 1 Ann. Cas. 299.

As to right of attorney to recover compensation, see note in 127 Am. St. Rep. 841.

A contract for the employment of an attorney is void as against public policy and sound morals, where the attorney was to secure evidence to coerce from a husband the largest possible share of his separate property for the benefit of the wife, and if necessary to begin an action for a divorce for that purpose, when in fact the wife had no grounds for a divorce; and the invalidity of the contract is not affected by the provisions of this section, which leaves the compensation of attorneys to the agreement of the parties, or by the fact that parties to a divorce suit may agree upon a division of their property: *Delbridge v. Beach*, 66 Wash. 416, 119 Pac. 856.

As to contracts of client with attorney inducing breach of official duty, see note in 13 Am. St. Rep. 297; also note in 83 Am. St. Rep. 182.

The evidence sustains findings that attorneys did not overreach a client in entering into a contract whereby half of his stock in a mining corporation was turned over to the attorneys in consideration of their raising the funds to pay off the indebtedness and finance the concern, the other half of his stock to be held under a pooling agreement, where the client owned the majority of the stock, the concern was in the hands of a receiver, there was no market for the stock and no other way to pay off the indebtedness, and the client made the proposition with full knowledge of the facts and was fully competent to attend to business: *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A., N. S., 63, 114 Pac. 908.

COMPENSATION — CONSTRUCTION AND OPERATION OF CONTRACTS: See 4 Remington's Digest, "Attorney and Client," § 40; *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130; *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182.

An attorney cannot recover on a contract of employment wherein it was agreed that he would conduct a contest of a certain homestead claim for the sum of six hundred dollars, to be paid on the successful termination of the contest, and that the client was to have sixty days within which to have the land cruised by a certain cruiser, and if the cruise did not show at least ten million feet of timber on the land, the employment was to be discontinued, where the client rescinded the contract two days after it was executed and it appeared that there was no timber on the land, although no cruise was made, since there was a mutual mistake as to the supposed subject matter of the contract, which in fact had no existence: *Kelsey v. Mackay*, 65 Wash. 116, 117 Pac. 714.

Where plaintiff, as lawyer and financial agent, entered into a written agreement to negotiate a sale of bonds for a specified remuneration, to prepare certain papers in

respect thereto for two hundred dollars, and for fifty dollars to go to Portland to arrange a temporary loan, and after accepting the fifty dollars, did not go to Portland or attempt to arrange the temporary loan, but tried to deceive the defendant, the defendant had a right to rescind the contract before any further performance by the plaintiff, and plaintiff could claim no rights thereunder and was liable for the fifty dollars received: *Rosenbaum v. Syverson Lumber & Shingle Co.*, 65 Wash. 459, 118 Pac. 625.

An attorney's charges of fifty dollars each for appearing in numerous cases in justice court in trivial matters are excessive and exorbitant: *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816.

An attorney's charges of three hundred and seventy-five dollars for making up the issues in a simple ejectment suit is an unreasonable fee: *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816.

An attorney's charge of seventy-five dollars for writing a few letters concerning the price of a jack is unreasonable: *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816.

An attorney's charges of two hundred dollars a year for general legal services, so mystical and indefinite that they cannot be itemized, no real legal questions being involved, are excessive: *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816.

An agreement to pay attorneys a contingent fee for the prosecution of a claim does not act as an assignment of a part of the claim, which is necessary to create an interest in a future recovery: *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 31 L. R. A., N. S., 1215, 110 Pac. 989.

As to contracts of attorney with client for a contingent fee, see note in 13 Am. St. Rep. 299.

In an action for attorney's services rendered to an estate, the defendant cannot offset the negligence of the plaintiff resulting in defendant's payment of an improper inheritance tax, where it appears from an inventory verified by the defendant that the tax was a proper charge against the estate, and there was no evidence to the contrary except plaintiff's opinion, given to the defendant, that it was not a proper charge: *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620.

EVIDENCE AS TO COMPENSATION: See 4 Remington's Digest, "Attorney and Client," § 4; *McKay v. Atkinson & Co.*, 55 Wash. 591, 104 Pac. 806; *Kiefer v. Lara*, 56 Wash. 43, 104 Pac. 1102; *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816; *Murray v. Trumbull & Trumbull*, 62 Wash. 336, 113 Pac. 769.

§ 475.

Under this section, limiting the amount which a mortgagee may collect as an attor-

ney's fee to a reasonable sum, the mortgagee, on collecting a fee, is estopped to assert, as against his attorney, that the sum collected was unreasonable: *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625.

As to the validity and enforceability of provision in mortgage fixing attorneys' fees on foreclosure, see note in 19 Ann. Cas. 1068.

§ 476.

In mandamus by a county officer to secure a salary warrant, attorneys' fees incurred in prosecuting the action cannot be allowed as damages, nor except as statutory taxable costs: *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

As to allowance of costs in proceedings for mandamus, see note in 30 Am. St. Rep. 561.

In an action in the nature of an interpleader, but in fact for an accounting, in which the amount was in dispute, costs may be awarded against the plaintiffs instead of against the amount paid into court by plaintiffs, where the court found a greater sum to be due from the plaintiffs: *Braeger v. Bolster & Barnes*, 60 Wash. 579, 111 Pac. 797.

As to discretion of court in the allowance of costs in equity, see note in 16 Am. Dec. 405.

Where it appears that one hundred dollars was actually expended in taking depositions, an allowance of forty dollars costs therefor will not be disturbed on appeal: *Roebeling's Sons Co. v. Washington Alaska Bank*, 56 Wash. 102, 105 Pac. 174.

A successful litigant cannot maintain a subsequent action to recover from his losing adversary the costs and expenses of the litigation, but must resort to his statutory right to have items thereof taxed as costs in the first action: *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661.

The plaintiff, as prevailing party, is entitled to costs, under this section, although one of its three causes of action failed and defendant secured therein an offset against the amount due on the other causes of action, there being no statute authorizing apportionment of costs in such cases: *Empire State Surety Co. v. Moran Brothers Co.*, 71 Wash. 171, 127 Pac. 1104.

In dismissing an action without prejudice, it is discretionary for the court to allow costs to neither party; and the ruling will not be reversed except for manifest abuse of discretion: *Van Alstine v. Gray*, 71 Wash. 607, 129 Pac. 106.

§ 481.

Where a note and chattel mortgage provided for the payment of "_____ dollars attorney's fees," it is not error to allow an attorney's fee in a sum admitted by opposite counsel at the trial to be a reasonable

attorney's fee: *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492.

Upon the successful jury trial of a case, after a reversal on appeal, the plaintiff is entitled to tax but one statutory attorney's fee, under this section, which has reference only to the final judgment in the case: *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825.

As to charges recoverable by prevailing party as costs, see note in 88 Am. Dec. 181.

Costs and attorney's fees for contesting the probate of a will are not confined to the costs allowed by this section, but are governed by the special statute, section 1313, in which no limitation is fixed: *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433.

§ 482.

Under this section, costs may be taxed for the notary's fees, although he failed to indorse the same on the deposition; and also for depositions taken on stipulation containing no provision for such taxation: *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

Upon judgment for the defendant, costs may be taxed for the witness fees of his wife, although she was a competent party defendant and might have been joined as such: *Noon v. Mironski*, 58 Wash. 453, 108 Pac. 1069.

Costs are properly allowed for a witness who attended at the request of the prevailing party without subpoena, although not called to testify because the course of the trial rendered the testimony unimportant: *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009.

Under this section, witness fees may be taxed for witnesses, who were not subpoenaed or called, where they were in attendance at the trial, but not used because the course of the trial made their use unnecessary: *Hofstetter v. Sound Trustee Co.*, 67 Wash. 537, 122 Pac. 6.

Mileage for witnesses may be first claimed in the cost bill, although the witnesses did not claim the same in reporting their daily attendance to the court: *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

Under this section costs may be taxed for mileage and one day's attendance, for witnesses who reported their attendance and mileage through the bailiff to the clerk on the last day of the trial: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

The reasonable fees of an interpreter are properly allowed as disbursements, when necessarily incurred: *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

§ 485.

The rule at law that a tender must be kept good or paid into court does not apply in equity, as a willingness to pay may alone be sufficient, irrespective of this and the next section, providing that money may be paid

into court and thus arrest interest and costs: *Murray v. O'Brien*, 56 Wash. 361, 28 L. R. A., N. S., 998, 105 Pac. 840.

§ 491.

Costs cannot be allowed in a proceeding against a delinquent child and her parent contributing to the delinquency, entitled "In re the welfare of R.," as they are not authorized by this section, nor by section 2225, authorizing costs in proceedings before a committing magistrate, nor by the statutes giving every person accused of crime the right to the compulsory attendance of witnesses: *Pierce County v. Magnuson*, 70 Wash. 639, 127 Pac. 302.

§ 495.

A proceeding against an administrator by citation, to secure allowance of costs for contesting the probate of a will, is but a continuation of the probate contest, and a bond for security for costs by nonresident contestants cannot be required: *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433.

§ 528.

Under this section, defining a homestead, and section 552, providing that lands and tenements, not exceeding in value two thousand dollars, actually intended and used exclusively for a home may be selected, a homestead may consist of lots in one block upon which the dwelling is situated, and lots in an adjoining block, separated from the dwelling and by an alley, used as a garden, orchard, and chicken-run: *Morse v. Morris*, 57 Wash. 43, 135 Am. St. Rep. 968, 106 Pac. 468.

As to what may be exempt as homestead, see note in 70 Am. Dec. 344.

§ 532.

Under this and the next section, an execution sale cannot be had upon a judgment entered upon unsecured promissory notes, where prior to the issuance of the execution, a declaration of homestead had been filed, although the judgment was entered prior to the filing of the declaration and became a lien subject to be defeated by such filing: *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3.

As to time of acquisition of homestead, and divestiture of judgment lien by actual occupation as homestead, see note in Ann. Cas. 1913B, 1147.

§ 552.

See notes to § 528.

The lien of a judgment is superseded and rendered unenforceable where, prior to execution, the judgment debtor files a declara-

tion of homestead: *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 392.

Where a judgment creditor claims a lien superior to a homestead claim, and stands upon his contention without asking an appraisal, he cannot on appeal allege that the claim exceeded two thousand dollars in value, and allege error in the court's failing to direct steps to subject the excess to sale: *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 392.

§ 563.

Under a liberal construction of this section, allowing exemptions to a farmer of a team, harness and wagon, "also farming utensils actually used about the farm," a team, harness and wagon need not be actually used about the farm or by the farmer living thereon; it is sufficient if farming has been his principal occupation for years, that he had recently moved to town, sold or traded his homestead, and made arrangements to rent a ranch, intending to go upon and farm it: *State ex rel. McKee v. McNeill*, 58 Wash. 47, 137 Am. St. Rep. 1038, 107 Pac. 1028.

As to what are exempt as farming implements, see note in 123 Am. St. Rep. 142.

§ 569.

See notes to § 6158.

The exemption of life insurance from the debts of the deceased by this section is not affected by the insolvency of the deceased: *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326.

As to exemption of life insurance money from liability, see note, 25 L. R. A., N. S., 722.

§ 570.

Where the wife's personal earnings are community property, this section does not exempt them from execution upon a judgment against the community: *Marsh v. Fisher*, 69 Wash. 570, 125 Pac. 951.

As to the earnings of husband and wife respectively as community property, see note in 123 Am. St. Rep. 115.

§ 571.

Whether a debtor has forfeited his right to exemptions by reason of the fact that he was about to leave the state with intent to defraud his creditors presents only a question of fact: *State ex rel. McKee v. McNeill*, 58 Wash. 47, 137 Am. St. Rep. 1038, 107 Pac. 1028.

§ 572.

Under this section, a creditor who waives the appraisal and directs the sheriff to

hold the property is precluded from raising any question as to the value of the property as stated in the debtor's claim of exemption: *State ex rel. McKee v. McNeill*, 58 Wash. 47, 137 Am. St. Rep. 1038, 107 Pac. 1038.

§ 573.

See notes to § 4003.

§ 578.

Execution cannot be issued by the superior court of one county upon the transcript of a judgment rendered by the superior court of another county, and any sale under such an execution would be void: *Bramel v. Ratliff*, 54 Wash. 581, 103 Pac. 817.

Under sections 578 and 652, requiring personal property capable of manual delivery to be levied upon by taking it into custody, a levy upon a growing crop of wheat made by posting notices of sale and delivering a copy of the execution and notices to the judgment debtors is not valid as to subsequent purchasers from the debtors: *Cupples v. Level*, 54 Wash. 299, 23 L. R. A., N. S., 519, 103 Pac. 430.

As to the sufficiency of levy upon a standing crop, see note in 15 Ann Cas. 884.

A party whose property is seized on an invalid writ of execution has his choice of remedies, and the fact that he has a remedy at law to quash the execution or recover the property, will not bar his remedy in equity by injunction, since it is more speedy and efficacious to obviate a lien pending trial on the merits: *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 107 Pac. 724.

As to injunction to restrain proceedings in execution, see note in 30 L. R. A. 99.

As to injunction against sale of personal property under execution, see note in 111 Am. St. Rep. 97.

Where a judgment was assigned in good faith, free from an attorney's lien, the judgment debtor is entitled to injunctive relief against the issuance of execution at the instance of the assignor's attorneys to satisfy the lien claimed: *Humptulips Driving Co. v. Cross*, 65 Wash. 636, 37 L. R. A., N. S., 226, 118 Pac. 827.

OPENING OR VACATING—INADEQUACY OF PRICE IN CONNECTION WITH OTHER OBJECTIONS: See *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072.

Slight attending circumstances indicating unfairness are sufficient to sustain the discretion of the court in setting aside a sale for a great inadequacy of price: *Roger v. Whitham*, 56 Wash. 190, 134 Am. St. Rep. 1106, 21 Ann. Cas. 272, 105 Pac. 628.

As to setting aside an execution sale for inadequacy of price, see note in 9 L. R. A. 731.

An execution sale of property of the value of one thousand dollars, to satisfy a judg-

ment of one hundred and ninety-five dollars and fifty cents, will not be set aside on the sole ground of inadequacy of price, the sale having been made at public auction on due notice and no fiduciary relation existing or circumstances proven showing unfairness: *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22.

An execution creditor purchasing at his own sale is not a bona fide purchaser, and takes only the actual interest of the judgment debtor; so that, upon the equitable substitution, as between the parties, of an old mortgage, consideration for the release of which had failed through defects in the execution of a renewal mortgage by the judgment debtor, the lien of the old mortgage is restored, taking its former priority over the lien of the judgment: *American Savings Bank & Trust Co. v. Helgesen*, 67 Wash. 572, Ann. Cas. 1913A, 390, 122 Pac. 26.

As to the title acquired by a plaintiff purchasing at the execution sale, see note in 79 Am. St. Rep. 947.

Where land was sold under execution in an action against a defendant who had no title or interest in the property, the purchaser acquired no interest by virtue of the sale: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

The interest of heirs in real property cannot be levied upon and sold under execution against the heirs, where, prior to the levy, the land was sold at administrator's sale and the money paid into court, although the sale was not confirmed until afterward, since the confirmation relates back to the time of the sale: *Cunningham v. Richardson*, 68 Wash. 24, 122 Pac. 368.

As to the order of confirmation in the respect that it relates back to the date of sale, see note in 29 Am. St. Rep. 497.

The purchaser of a sheriff's certificate of sale under execution is not a bona fide purchaser as to defects in process on which the judgment was founded: *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

As to who is a bona fide purchaser, see note in 21 L. R. A. 33.

§ 582.

An execution sale will not be set aside two years after the sale on the allegations of want of personal notice and fraud where it appears that the judgment debtor had notice that the plaintiff intended to and would issue execution and sell the property if the judgment was not paid, and the alteration which took place shows that there could have been no deception, personal notice of the sale not being required by this section: *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22.

As to what is a proper and sufficient notice of sale, see note in 75 Am. Dec. 704.

§ 583.

A city attorney cannot bid in property at a public sale conducted by him, and assert equitable defenses against the owner: *Roger v. Whitham*, 56 Wash. 190, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272, 105 Pac. 628.

The attorney for the adversary may bid in property of the judgment debtor upon execution sale the same as though he were a stranger: *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22.

An execution sale by a sheriff to himself is such a fraud on the rights of the owner as to be voidable if challenged within a reasonable time by a suit to redeem the property, notwithstanding the confirmation of the sale, which only cures irregularities that go to the record, and does not bar a suit by one who was defrauded: *Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906.

Where an execution sale by a sheriff to himself deters another purchaser from bidding, the sale operated as a direct fraud upon the owner, especially where there was a great inadequacy of price; and it is immaterial that the sheriff finally allowed the property to go to the other bidder: *Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906.

Upon redemption from an illegal execution sale, the purchaser is not entitled to fifteen per cent interest upon taxes and assessments paid on the property, but only interest at the legal rate: *Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906.

As to what persons are incapacitated to purchase at a judicial sale, see note in 136 Am. St. Rep. 789. And as to sale made under execution as judicial sale, see note in Ann. Cas. 1913A, 1217.

SALE IN PARCELS: See 4 Remington's Digest, "Mortgages," § 208; *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848.

§ 590.

Under this section the announcement at a sale, advertised to be for cash, that the sheriff would not take checks or anything of that kind is not unfair as preventing competitive bids: *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848.

§ 591.

CONFIRMATION—EFFECT OF ORDER.—After payment of a judgment to the plaintiff's authorized agent, a sale on execution thereunder is void, and the lack of jurisdiction to sell is not cured by an order confirming the sale: *McLiesh v. Ball*, 58 Wash. 690, 137 Am. St. Rep. 1087, 109 Pac. 209.

The order confirming an execution sale, without objection made, cures any defects in the matter of publishing notice of the sale: *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018.

As to the effect and conclusiveness of an order confirming an execution sale, see 29 Am. St. Rep. 495.

The purchaser at a receiver's sale made under order of court submits himself to the jurisdiction of the court, and may be compelled to comply with his bid by rule in the original case: *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66.

§ 594.

There is a constructive redemption, which inures to the benefit of cotenants, where a widower, occupying community property as tenant in common with his children, allowed a mortgage to be foreclosed and contracted to purchase the same from the purchaser at the foreclosure sale: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

As to redemption by one joint owner of mortgaged premises, see note in 21 Am. St. Rep. 248.

Tenants in common, who joined in a mortgage, are equally entitled to redeem from the foreclosure sale, and redemption by one inures to the benefit of the other, subject to reimbursement, and their priority in demanding redemption from the sheriff is immaterial; hence neither can maintain an action to restrain the issuance of a certificate to the other: *McSorley v. Lindsay*, 62 Wash. 203, 113 Pac. 267.

Since a mortgagor cannot in his mortgage renounce his right of redemption, a stipulation to that effect in a deed intended as a mortgage is of no effect: *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682.

The fact that a tenant in common of community property paid for a redemption from taxes out of her separate estate does not militate against the rule that the redemption inured to the benefit of her cotenants: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

The purchasers of the whole title from a purchaser at a foreclosure sale are not tenants in common of parties to the suit who claimed the right of redemption or an interest which was cut off by the foreclosure sale subject to redemption, and such parties cannot recover an interest as tenants in common, having made no redemption: *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893.

Under this section and sections 1127 and 1128, providing for sales in parcels or as a whole, and that in case of sales in parcels the judgment shall remain and be enforced upon any subsequent default, after final decree an order may be entered directing a sale to satisfy installments that have since become due; and the fact that the defendant had paid the amount due on the judgment does not prevent further proceedings in the case in the nature of a second judgment, directing sale for subsequent installments, the judgment being conclusive as to the validity of the mortgages and all defenses except those accruing subsequent to the decree, which may be set up on appli-

cation for subsequent executions: *Naden v. Christopher*, 67 Wash. 578, 122 Pac. 2.

As to decree reserving the right to sue for other installments yet to fall due, see note in 37 L. R. A. 745.

A redemption by one who is not a tenant in common or co-owner does not inure to the benefit of others claiming an interest which was sold subject to redemption: *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893.

A redemption from a mortgage foreclosure will be decreed in favor of heirs owning a half interest in the land, where the purchaser at the foreclosure sale had agreed to assign the sheriff's certificate of sale upon payment of the judgment and to make a quitclaim to one of the heirs, to enable him to negotiate a loan on the property on behalf of minor heirs in order to effect the redemption; and after permitting the time for a regular redemption to expire, the purchaser is estopped to repudiate the agreement upon tender of the sum due, although proceedings to redeem were not taken in the manner required by statute: *Mohney v. Ellis*, 69 Wash. 643, 125 Pac. 1031.

As to right of redemption in heirs and devisees, see note in 21 Am. St. Rep. 248.

§ 602.

A statute relative to mortgage foreclosure sales is unconstitutional as to existing mortgages as impairing the obligation of the contract, in so far as it requires the sheriff to postpone the sale for one year and gives the mortgagor possession of the premises during that time, when the former law gave the mortgagee the right to an immediate sale with the right of possession during the period of redemption; but the law is valid in changing the requirements as to the notices of sale, since that merely affects the remedy and not the obligation of the contract: *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

Upon the issuance of a certificate of sale on foreclosure, a writ of assistance may issue against one in possession as receiver in bankruptcy of the estate of the defendant, appointed pending the suit, although he was not made a party to the action, on the theory that the proceeding is in rem and he is bound as in privity with the mortgagor: *State ex rel. Biddle v. Superior Court*, 63 Wash. 312, 115 Pac. 307.

§ 620.

In supplemental proceedings, where money is disclosed applicable to the judgment, it is not prejudicial error that the order required its payment to the clerk of court rather than to the sheriff: *Belknap v. Platter*, 54 Wash. 1, 132 Am. St. Rep. 1097, 103 Pac. 432.

Objection to the validity of proceedings supplementary to execution for the examination of the wife of a defendant cannot be

urged where the case was tried on its merits, the appellant asked that the status of money deposited in bank in the name of the wife examined be determined, and she stated that she was ready to turn over money on the order of the court if it belonged to the defendant: *Breschli v. Kubilus*, 36 Wash. 541, 106 Pac. 1135.

§ 647.

An attachment is an ancillary proceeding only in cases where jurisdiction of the person is acquired in the main action; and in cases of service by publication the jurisdiction extends only to the property attached: *Clifford v. Pateros Transfer Co.*, 71 Wash. 665, 129 Pac. 369.

As to the jurisdiction obtained by attachment process, see note in 10 L. R. A. 505.

§ 648.

There is sufficient evidence to support an attachment on the ground that the debtors had disposed of their property with intent to defraud their creditors, where it appears that the debtors were insolvent and owed four principal creditors thirty-four thousand dollars, that they had property of the value of twenty-four thousand dollars to thirty thousand dollars, all of which they transferred by absolute conveyances to a creditor whose claim was five thousand dollars, who made inconsistent statements and claimed at first, according to several witnesses, that he took the property as security for his claim and a surety claim of six thousand dollars and afterward offered to pay off other creditors who were not consulted; and there was evidence that the debtors' purpose was to prevent the attaching creditor from carrying out threats to enforce its claim by suit, the fact that they intended to prefer a creditor, as claimed by them, not being sufficient to warrant a dissolution of the attachment, where it appears that they also intended to hinder and delay other creditors and that the preferred creditor aided therein: *Holt Mfg. Co. v. Thomas*, 69 Wash. 488, 125 Pac. 772.

As to fraudulent sale or conveyance of property as ground for attachment, see note in 5 Ann. Cas. 618; also note in 30 L. R. A. 476.

§ 649.

The acceptance of promissory notes for the amount of open accounts suspends the right of action on the accounts until the maturity of the notes, even though they were not taken in payment; and action on the accounts as past due is premature, notwithstanding a reply setting up fraudulent acts of the defendants that would have authorized attachments, under this section, in case the complaint had alleged that the

debt was not due and that nothing but time was wanting to fix an absolute indebtedness: *Otto v. Griffin*, 54 Wash. 506, 103 Pac. 789.

§ 652.

See notes to § 578.

On motion to dissolve an attachment erroneously issued without a bond, leave to file a bond is properly denied, the statute making the filing of a bond a condition precedent to an attachment: *Wentworth v. Moore*, 64 Wash. 451, 117 Pac. 251.

As to motion, and grounds thereof, for dissolution of attachment, and proceedings therefor, see note in 123 Am. St. Rep. 1030.

Under the statute providing for a liberal construction of the attachment law, and permitting amendments of any defect in the papers or bond, the failure to condition the bond for the payment of "all costs," as required by this section, is amendable, not being a jurisdictional defect; and the remedy is by motion to amend the bond and not to quash the writ: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

§ 654.

Defendant's retaking of attached property upon a redelivery bond, without moving against the writ waives the right of action for wrongful attachment upon the attachment bond: *Gutter v. Joiner*, 56 Wash. 202, 105 Pac. 457.

As to the bar, effected by the giving of statutory bond to dissolve, to motion to quash, see note in 12 Ann. Cas. 170.

As to termination of attachment proceedings as condition to maintenance of action for wrongful attachment, see note in Ann. Cas. 1912A, 445.

§ 659.

Failure to publish notice of a mortgage foreclosure sale in the exact manner required by law is an irregularity only, and does not render the sale so far void that it is not curable by the order of confirmation: *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

§ 667.

Upon the attachment of property of a nonresident, a judgment in form both against the person and property attached is not for that reason void, although enforceable only against the property attached: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

§ 668.

This section applies only where a personal judgment has been rendered which can be satisfied by general execution: *Clifford v. Pateros Transfer Co.*, 71 Wash. 665, 129 Pac. 369.

§ 673.

The levy of a writ of attachment, valid when made, is not invalidated by an amendment to the complaint doubling the amount of the demand: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

Where an attachment is not void for want of jurisdiction, a party cannot take advantage of defects and errors without appearing generally: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

— EVIDENCE AND EFFECT OF AFFIDAVITS: See 4 Remington's Digest, "Attachment," § 39-1; *Nicholson v. Erickson*, 56 Wash. 419, 105 Pac. 836; *Watson v. Shelton*, 56 Wash. 426, 105 Pac. 850; *Gordon v. Gillespie*, 58 Wash. 627, 109 Pac. 109.

§ 680.

The plaintiff in garnishment acquires no better right to the debt than his debtor has: *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

§ 705.

In view of this section and section 809, authorizing an action to quiet title without including specific relief for the recovery of possession, the provision of section 806, authorizing the vacation of a default judgment in actions to recover possession of real property, where service was by publication, at any time within two years after entry of judgment, has no application to a judgment in an action to quiet title to vacant and unoccupied land the title to which was alleged to be in the plaintiffs, the complaint not seeking recovery of possession, but only the adjudication of adverse claims made by the defendants, since actions to quiet title and to recover possession are not essentially the same under our statutes: *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 121 Pac. 981.

§ 707.

Replevin does not lie for the product of sawlogs cut into lumber and commingled by an innocent purchaser with its own property, without notice that the vendor had trespassed and cut the logs on plaintiff's land: *Meyers v. Gerhart*, 54 Wash. 657, 103 Pac. 1114.

As to the sort of property generally that is subject to replevin, see note in 80 Am. St. Rep. 756.

Where the owner of converted logs stood by without making any claim until after they were manufactured into lumber and sold by an innocent purchaser, he cannot maintain replevin for the product, or for a like quantity of other product: *Meyers v. Gerhart*, 54 Wash. 657, 103 Pac. 1114.

As to replevin in case of commingled goods, plaintiff being in fault, see note in 37 L. R. A., N. S., 270.

In replevin an affirmative answer of ownership in the defendant is nothing more than a denial of plaintiff's allegation of ownership, and the burden of proof is upon the plaintiff to show title in himself or right to possession: *Moore v. Marsh*, 59 Wash. 151, 109 Pac. 606.

An action of replevin must fail when the plaintiff fails to show that the property is wrongfully detained by the defendant, and incidental relief cannot be given upon showing a conversion, as that would be a fatal variance: *Meyers v. Gerhart*, 54 Wash. 657, 103 Pac. 1114.

As to when and against whom replevin is sustainable, see note in 80 Am. St. Rep. 741.

In an action to recover machinery or its value, sold under a conditional bill of sale, where there was evidence that it was worth its price, if it had been up to specifications, but that defendant had been damaged by defects and delay in installing it, the proper measure of its value to the plaintiff is the balance due on the contract price less proper credits to the buyer: *Hallidie Mach. Co. v. Whidby Island Sand etc. Co.*, 62 Wash. 604, 114 Pac. 457.

As to measure of damages in cases of replevin, see note in 22 Am. Rep. 285.

A judgment in replevin for the return of two span of mules and harness and wire fencing, or their value, cannot be sustained where the proof failed to show that defendant was in possession of the harness or wire fencing, and there was no evidence of the value of the mules disassociated from the harness: *Fries v. Lockwood*, 64 Wash. 221, 116 Pac. 640.

As to pleading, proof and practice in replevin, see note in 80 Am. St. Rep. 766.

§ 709.

In replevin, service of the affidavit is not sufficient service of process in lieu of the summons and complaint: *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045.

Under a replevin bond conditioned, pursuant to statute, for the prosecution of the action, the return of the property to the defendant if return thereof be adjudged, and for the payment of such sum as may be recovered against the plaintiff, there can be no liability on the bond in excess of the costs adjudged, where the replevin suit was prosecuted to judgment on the merits, and the action was dismissed with costs, without adjudging a return of the property or entering judgment for its value: *Ihrig v. Bussell*, 68 Wash. 70, 122 Pac. 608.

As to the elements of damages recoverable in an action on a replevin bond, see note in 30 L. R. A., N. S., 367.

§ 711.

Where defendant in replevin was entitled, upon dismissal of the action on the merits, to a judgment decreeing a return of the property, or for its value, but acquiesced in a judgment of dismissal without appealing therefrom, she cannot, in an action on the replevin bond, recover judgment as for a conversion of the property: *Ihrig v. Bussell*, 68 Wash. 70, 122 Pac. 608.

§ 716.

Under the claim and delivery statute, which makes ample provision for the indemnity of both parties to the action and the sheriff, but makes no provision for the security of a third party claiming ownership, and provides that where a third party makes claim by affidavit and serving a notice of his title on the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff unless indemnified, a third party may maintain an action of conversion against a sheriff in possession in a claim and delivery suit, where the sheriff refused to surrender the property upon demand and notice by affidavit as provided by the statute: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

As to replevin against an officer who has wrongfully taken possession of plaintiff's personal property, see note in 80 Am. St. Rep. 759.

§ 719.

PRIVATE NUISANCES.—A tuberculosis sanitarium maintained in a residential section of the city will be enjoined as a nuisance, where the fear and dread of the disease is such that it depreciates the value of adjacent property to an extent of one-third or one-half, and interferes with the comfortable enjoyment thereof, disturbing the minds, nerves and sleep of the occupants, especially in view of Rem. & Bal. Code, section 8309, defining a nuisance as any act that either annoys or endangers the comfort or repose of others: *Everett v. Paschall*, 61 Wash. 47, Ann. Cas. 1912B, 1128, 31 L. R. A., N. S., 827, 111 Pac. 879.

As to nuisance, as contemplating hospitals, etc., among other things, see note in 107 Am. St. Rep. 232. And see, also, notes in Ann. Cas. 1912B, 1131, and 29 L. R. A., N. S., 49.

The maintenance of an undertaking establishment in the residence section of a city, within a few feet of residences, while not a nuisance per se, may be enjoined as a nuisance, where it appears that, although maintained with every sanitary precaution, noxious odors and gases will permeate the near-by residences, and that there is danger of infection and contagion; and notwithstanding the fact that the owner intends to occupy the second story of the building as

a residence: *Densmore v. Evergreen Camp* No. 147, W. O. W., 61 Wash. 230, Ann. Cas. 1912B, 1206, 31 L. R. A., N. S., 608, 112 Pac. 255.

As to undertaking establishment considered in the light of a nuisance, see note in Ann. Cas. 1912B, 1208.

PUBLIC NUISANCES.—A prima facie case of a nuisance is made out by evidence that charcoal kilns within the city gave out quantities of smoke and at times poisonous gases: *Richards v. Seattle*, 62 Wash. 684, 114 Pac. 896.

As to buildings, etc., emitting noxious fumes, as nuisance, see note in 107 Am. St. Rep. 237.

As to burning soft coal, as a nuisance, see note in 12 Ann. Cas. 846; also noted in Ann. Cas. 1912B, 1036, and 13 L. R. A., N. S., 465.

As to brick and lime kilns as nuisances, see note in 38 L. R. A. 654; also note in 2 L. R. A., N. S., 92.

As to gas plant as nuisance, see note in 20 L. R. A., N. S., 466.

TRESPASS.—An action for an injunction to restrain trespass upon land is properly dismissed where it appears that the issue to be tried is the right to possession under an unacknowledged lease, and whether notice was duly given to terminate the tenancy, since plaintiff had adequate remedies at law: *Reeves v. Flath*, 59 Wash. 299, 109 Pac. 796.

As to the rule that the applicant for injunction must have no adequate remedy at law, see note in 99 Am. St. Rep. 742. See, also, notes in 16 Ann. Cas. 730; 1 L. R. A. 745, and 22 L. R. A. 235.

In an action between cotenants the evidence fails to show such substantial or irreparable injury as to warrant an injunction to restrain the partitioning of a common entrance to a building, where the area or recess in the building would have been divided so as to give defendant a four-foot passageway to a stairway and the plaintiff a six-foot entrance to the back door of its saloon, without any appreciable interference with light, since injunction will rarely be granted in favor of a cotenant except in case of insolvency or partial destruction of the estate: *Tift Co. v. State Medical Institute*, 53 Wash. 365, 101 Pac. 1081.

Injunction will not lie to restrain a trespass upon lands by persons who were tenants at will, under claim of entry and possession with the knowledge and consent of the plaintiffs, since the plaintiffs have an adequate remedy by action of forcible entry and detainer: *Cogswell v. Cogswell*, 70 Wash. 184, 126 Pac. 433.

Injunction to restrain trespass does not lie on the ground of preventing a multiplicity of suits, where there is but one trespass by one and the same person claiming the right to possession: *Cogswell v. Cogswell*, 70 Wash. 184, 126 Pac. 433.

As to prevention of a multiplicity of suits as ground for injunction, see note in 131 Am. St. Rep. 30; also note in 22 L. R. A. 232.

Injunction will lie to prevent trespass and protect possession of a railroad right of way actually used and in possession of the company under a claim of title, where the adjoining owner had notified plaintiff's telegraph construction foreman to keep off his land, and just prior to the suit had told an employee of a telegraph company, licensed by the plaintiff, not to trespass on his land, and that it would not be safe for him to go there and erect wire, the defendant's objections being made to work on the plaintiff's right of way: *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.

As to injunction to restrain threatened trespass on real property, see notes in 1 L. R. A. 744; 3 L. R. A. 612; 11 L. R. A. 207.

The complaint in an action for an injunction shows that the injury cannot be compensated in damages, and there is no adequate remedy at law, where it appears that the lessor of the five top stories of an office building with a hallway for ingress and egress has lost subtenants and that other subtenants are threatening to vacate because the hallway is blocked by the lease of a cigar-stand, where crowds congregate to indulge in games of chance, inconveniencing and driving away the clientage of tenants in the building; hence an action lies to enjoin the maintenance of the cigar-stand in the hall, to avoid a multiplicity of suits from the continuing wrong: *Silver v. Washington Investment Co.*, 65 Wash. 541, 118 Pac. 748.

As to when it is that the remedy at law is inadequate, see note in 22 L. R. A. 235.

An injunction against the canvassing of returns of an illegal city election for the annexation of territory involves property rights, and a court of equity will not refuse jurisdiction on the ground that only a political question is involved: *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386.

Breach of a contract to give defendant's personal services in a school of music for a term of years will not be enjoined where the services were not so special or extraordinary that they could not be supplied elsewhere, and another teacher was found to take defendant's place without materially impairing the efficiency of the school: *Columbia College of Music v. Tunberg*, 64 Wash. 19, 116 Pac. 280.

Where a teacher of music was employed to teach in a school for a specified term and agreed not to teach elsewhere and to devote his best efforts to promoting the school, he will be enjoined from soliciting clients of the school and invading its goodwill during the term, upon his leaving the school and setting up business for himself: *Colum-*

bia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280.

As to injunction to restrain violation of contract for personal services, see note in 6 L. R. A. 654.

Equity has no jurisdiction to review the judgment of a criminal court or to restrain execution of a criminal sentence, where no property rights will be affected by the enforcement of a void statute: *Brown v. State*, 59 Wash. 195, 109 Pac. 802.

As to injunctions against crimes and criminal prosecutions, see note in 35 Am. St. Rep. 449.

There is no adequate remedy at law and injunction lies to prevent the city from violating the eight-hour day law, where it employed many teamsters and required them to work in excess of eight hours a day or "quit the job," the employment being mutually satisfactory and agreeable; and the city is not prejudiced by the form of the decree, even if there is a remedy by mandamus: *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

As to the test of inadequacy of legal remedy where one applies for injunction, see note in 22 L. R. A. 235.

§ 720.

This section must be strictly construed in order to avoid the violation of property rights, and therefore does not apply to a building described in the complaint as a "public garage plant" which evidently enhances the value and enjoyment of the land and is not a nuisance, regardless of the motives of the owner and his intent to annoy his neighbor: *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166.

§ 722.

A temporary restraining order until the hearing is not continued in force by an order at the hearing to the effect that all orders theretofore made in the case be held in "obeyance" during the pendency of the action, the word used evidently being an error for "abeyance," suspending all previous orders, and not intended in the sense that the orders were to be "obeyed": *Drainage Dist. No. 1 v. Costello*, 53 Wash. 67, 101 Pac. 497.

§ 725.

In an action on an injunction bond, to indemnify plaintiffs from damages by reason of a temporary restraining order, until the hearing could be had, returnable May 15th, it is not error to allow the plaintiff to show damages suffered up to May 22d, at which time the hearing was had and the order dissolved, where it appeared that the plaintiff required that additional time in order to prepare for the hearing: *Maughlin*

Mill Co. v. Hamilton, 61 Wash. 66, 111 Pac. 1067.

As to rights to enforce injunction bond upon dissolution of temporary injunction, see note in 15 Ann. Cas. 731.

Recovery on an injunction bond obligating the plaintiffs and surety to pay all costs and damages that may accrue to the defendants by reason of continuing the injunction in force cannot be objected to as subjecting the surety to a greater liability than that of the principal, since the statute makes the assumption of the liability by the principal a condition precedent to the continuance of the injunction: *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185.

In an action upon an injunction bond, the proceedings leading up to the injunction and judgment in the former action are relevant and may be pleaded in the complaint: *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185.

Where a temporary injunction was issued restraining the defendants from performing a city contract assigned to them by the plaintiffs, and an injunction bond was given by plaintiffs on appeal to keep the injunction in force, which bond obligated the plaintiffs to pay all costs and damages that may accrue to the defendants by reason of continuing the temporary injunction in force during the pendency of the appeal, it must be held that the parties contemplated any loss of profits and any damages to defendants that might accrue by reason of subcontracts, then in existence and known to the parties by which defendants had sublet the work, such profits not being too remote or speculative; hence, in a subsequent action on the injunction bond, the jury is properly instructed that it may take the subcontracts into consideration as tending to prove damages by loss of profits that could have been made on the contract: *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185.

Failure to move to discharge a wrongful injunction does not limit the recovery to nominal damages, where the injunction was not ancillary to the main issue, but was of the essence of the controversy, and plaintiff tried the case on its merits instead of moving to dissolve the injunction: *Stone v. Hunter Tract Improvement Co.*, 68 Wash. 28, 39 L. R. A., N. S., 180, 122 Pac. 370.

As to liability for wrongful injunction by municipalities and also by private persons, see note in Ann. Cas. 1912A, 212.

The measure of damages for a wrongful injunction restraining the completion of a house, which plaintiffs were in the act of building, is the rental value of the premises with the improvements as designed, although the house as designed was never completed, a smaller one being erected for the same purpose after dissolution of the injunction: *Stone v. Hunter Tract Improvement Co.*, 68 Wash. 28, 39 L. R. A., N. S., 180, 122 Pac. 370.

§ 729.

See notes to § 1049.

§ 741.

A temporary receiver should be appointed for a corporation, though solvent and prosperous, where two persons at bitter enmity with one another each held one-half of the stock, and through a deadlock and inability to elect officers, one of them, as a hold-over trustee, with two subservient dummies, seized complete control of the corporation, excluded his rival from all participation in the business, refused him an inspection of the books, and illegally increased his own salary, and it appears that a new board cannot be elected, and there is no prospect of adjusting the differences; and the receivership will be made permanent in case the differences cannot be adjusted within a time limited: *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

As to the circumstances that justify the appointment of a receiver, see note in 72 Am. St. Rep. 29.

As to appointment of receiver for a company where the officers disagree as to management, see note in 20 Ann. Cas. 213.

It is error to appoint a temporary receiver of a realty and investment company, at the suit of a few subscribers, where the evidence shows solvency, careful and capable business management and no probable loss to subscribers that can be avoided by a receivership: *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 107 Pac. 1029.

The wrongful payment of commissions by a realty and investment company to one of its trustees is not ground for the appointment of a receiver, where the subscriber has a remedy at law without the aid of a receivership: *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 107 Pac. 1029.

A receiver is properly appointed for a corporation where it appears that a promoter, through fraudulent representations, obtained a drug business and property of the other stockholders of the value of thirty-three thousand dollars, and conveyed the same to the corporation in full payment of stock of the par value of one hundred thousand dollars, two-thirds of which he issued to himself without paying anything therefor, and in violation of his agreement to sell the same for the benefit of the corporation, by means of which he absolutely controls the corporation, and secured heavy profits to himself for which he refuses to account, and that he is about to bond the company, and threatens the corporation with insolvency by ill management: *Kennedy Drug Co. v. Keyes*, 60 Wash. 337, 111 Pac. 175.

Where there are no creditors of a corporation and a receiver is appointed to wind up its affairs, and sues on claims, representing the rights of a faction of the stockholders, an estoppel against such stockhold-

ers operates against the receiver: *Weymouth v. Oudin*, 56 Wash. 315, 105 Pac. 1027.

Mismanagement of a corporation, entitling stockholders to the appointment of a receiver, is not shown by the fact that a director was allowed a salary as manager (the by-laws only prohibiting the payment of compensation to directors as such), that his traveling expenses were allowed, that for convenience the books were removed to another state where all the property was located, that a small bona fide debt to the wife of the president was not shown in all the semi-annual statements (it appearing on the books), or that stockholders inquiring at the main office were not furnished all the information desired; since absolute necessity must be shown by clear evidence, and mere carelessness, mistakes or bad policy honestly pursued is not sufficient: *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 17 Ann. Cas. 914, 102 Pac. 654.

As to receivership consequent upon mismanagement of the company's affairs, see note in 20 Ann. Cas. 214.

A complaint by a minority stockholder of a corporation states a sufficient cause of action for a receivership, especially when liberally construed on demurrer ore tenus, where it alleges that one-third of its assets and capital, of the value of twenty-seven thousand dollars, were dissipated through maladministration and incompetence in 1908, which will continue during 1909; that it is about to lose its mill site of the value of four thousand dollars or five thousand dollars, and suffer irreparable injury by requiring a removal, through the same causes, and that the managers have illegally voted salaries to themselves to pay for stock purchased to control the company; and it is error to confine the proof to the last allegation, as that simply goes to other charges of maladministration alleged in the complaint: *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

Where an action is brought by one of two equal stockholders of a corporation, the plaintiff alleging his exclusion from control, and mismanagement and failure to account by the defendant, and a receivership and accounting is asked, it is error to order a receiver's sale of all the assets of the corporation, consisting of real estate and mining machinery, before the accounting is had and the rights and equities of the parties are adjudicated, where there appears no probable depreciation in the value of the property, especially where the defendant is indebted to the corporation, and has not made payments ordered by the court, and the plaintiff would be at a disadvantage in bidding at the sale until the purposes of the receivership have been accomplished: *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 116 Pac. 269.

In an application for the appointment of a receiver, a corporation is conclusively shown to be solvent where it appears that

its mines had cost forty thousand dollars and were worth fifty thousand dollars and were producing seven tons of ore per day at a net profit of four dollars per ton, and the total indebtedness of the company was about four thousand dollars: *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 17 Ann. Cas. 914, 102 Pac. 654.

That an insurance company became insolvent nine months after a policy was issued, and in insurance reports its conditions was rated as very weak, does not show that it was insolvent when the policy was issued: *Beckman v. Edwards*, 59 Wash. 411, Ann. Cas. 1912B, 40, 110 Pac. 6.

As to a corporation's insolvency as ground for the appointment of a receiver, see note in 72 Am. St. Rep. 72.

Findings that a mortgage was given by a corporation after insolvency and is fraudulent as to creditors are sustained where there was some evidence tending to show that fact and the mortgage covered practically all of its property and was given to a trustee as a preference to secure certain antecedent creditors: *Bohling v. Hendron*, 56 Wash. 687, 106 Pac. 205.

Findings that a corporation, which was adjudged insolvent about a year after giving a mortgage for eight thousand three hundred and seventy-five dollars, to secure an antecedent debt to a local bank, was not insolvent at that time, and that the mortgage was not an unlawful preference, are sustained where it appears that it was engaged in the retail meat business, that its total liabilities at that time did not exceed fifteen thousand dollars, and its assets were valued by various witnesses at from fifteen thousand dollars to twenty-two thousand dollars, none of its creditors had manifested an intent to enforce collections by legal proceedings, it was paying its obligations in due course, and did about twenty-two thousand dollars' worth of business before it was closed up, and the mortgage covered only about one-half in value of its entire property: *Hadley v. Bank of Ellensburg*, 67 Wash. 680, 122 Pac. 321.

A complaint by a corporation to vacate a receivership and set aside sales made by the receiver states a cause of action, where it appears that the assets of the corporation were of the value of five million dollars, its indebtedness inconsequential, that the defendants owned one million five hundred thousand dollars of the capital stock, on which they had paid only eighteen hundred dollars, and were solvent, and that they prosecuted a collusive suit for the appointment of a receiver and secured a sale of all the assets for five hundred dollars, all the proceedings being *ex parte* and while the president and secretary of the company were absent from the state on the business of the company: *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691.

An *ex parte* order fixing the amount necessary to pay the debts of an insolvent

corporation, and directing the receiver to recover the same from stockholders on their unpaid stock subscriptions, is not binding upon stockholders as to the amount or validity of the claims of the creditors; and in the receiver's following action upon an unpaid stock subscription to recover such sum, the stockholder is entitled to dispute the claims of creditors, and reduce the amount of his liability accordingly: *Grady v. Graham*, 64 Wash. 436, 36 L. R. A., N. S., 177, 116 Pac. 1098.

As to stockholders' liability for corporation's debts, see note in 3 Am. St. Rep. 806.

Where a temporary receiver of a corporation has been procured upon the false allegations that the corporation was insolvent and that plaintiff was a stockholder and had been wrongfully excluded from participation in corporate business, upon decreeing an accounting, the costs of the temporary receivership should be charged to the plaintiff, and not against the corporation: *Hall v. Wilson*, 65 Wash. 137, 118 Pac. 16.

As to expenses of receivership and liability therefor of party at whose instance appointment was made, see note in 13 Ann. Cas. 1161; also note in Ann. Cas. 1913B, 538.

The objection that leave of court to sue a receiver was not first obtained is waived if not raised by the receiver upon filing a general appearance, and cannot thereafter be raised by other parties: *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691.

As to suits against receivers prosecuted without leave of court, see note in 74 Am. St. Rep. 285.

Where the appointment of a receiver was prayed for, all the issues had been submitted, and the matter taken under advisement, the court had power to appoint a receiver without notice, after announcement of findings and some delay in order to enable the parties to make an amicable adjustment, where such appointment was necessary to preserve the property in suit from total loss by reversion: *Rice v. Ahlman*, 70 Wash. 6, 126 Pac. 64.

Where the gross receipts in a receivership were fourteen thousand seven hundred and seventy-nine dollars, an allowance of three thousand six hundred dollars for receiver's and attorneys' fees will not be disturbed on appeal, where the evidence was conflicting and the allowance appears to be just: *In re Spokane-Columbia River R. & Nav. Co.*, 70 Wash. 142, 126 Pac. 418.

As to the power of a court of equity to appoint a receiver without notice first given, see note in 72 Am. St. Rep. 35.

§ 743.

Where an insolvent held property under a conditional sale agreement, the vendor may file a claim for the property with the re-

ceiver, and is entitled to have the matter heard in the receivership and the property restored to its possession without beginning an action or obtaining leave of court; and such claim is not a waiver of any rights under the contract: *Sumner Iron Works v. Wolten*, 61 Wash. 689, 112 Pac. 1109.

As to existing lien upon property coming into the receiver's hands, see note in 71 Am. St. Rep. 361.

After a receiver's sale of personal property under an order of court in the receivership, it is error to allow a mortgagee to prosecute an action to foreclose a mortgage thereon and allow attorneys' fees provided in the mortgage, since the mortgage lien could have been established in the receivership, and after the receiver's sale becomes a lien to be allowed against the proceeds without the penalty for attorneys' fees and unnecessary costs of the independent action: *Pickering v. Richardson*, 57 Wash. 117, 106 Pac. 614.

As to foreclosure of chattel mortgage where, after execution of the instrument, the property came into hands of an assignee for the benefit of the creditors of the mortgagor, see note in 96 Am. St. Rep. 693.

Where an order for a receiver's sale provided that the purchaser should receive credit proportionately to the total value of the goods originally listed which had been disposed of between the filing of the inventory and the sale, an order of confirmation giving him credit for the total value at list prices of all goods now in the store (except those purchased by the receiver since the inventory), is clearly a mistake and it is the duty of the trial court to correct the same so that he will receive credit only for those not now in the store: *National Bank of Commerce v. Kilsheimer & Co.*, 59 Wash. 460, 110 Pac. 15.

Upon motion to correct an order of confirmation of a receiver's sale, a person recited in the order of confirmation to be the assignee of the purchasers stands in the place of the purchasers: *National Bank of Commerce v. Kilsheimer & Co.*, 59 Wash. 460, 110 Pac. 15.

A sale made by a receiver to his business associate, confirmed by the court, will not be vacated for fraud and inadequacy of price where it appears from the petition that the applicants knew of the business relationship of the purchaser and the inadequacy of price at the time of the sale and confirmation, and did not file their petition within one year as required by Rem. & Bal. Code, section 466, but waited several years until sued for unpaid stock subscriptions: *Dibble v. Washington Food Co.*, 57 Wash. 176, 106 Pac. 760.

As to purchasers by, or in the interest of, receivers, assignees, etc., see note in 136 Am. St. Rep. 812.

An order for a receiver's final sale of assets embracing "all books, accounts, bills, claims, lumber, logs, and all other personal property owned or claimed by said receiver," does not include cash on hand or items of money or property that the receiver took without authority for his private use or wrongfully advanced to a company in which he was interested, not carried on the books or reported to the court, and the existence of which was not known to the court or creditors at the time of the sale; and the receiver is therefore properly required to account for the same as cash on hand: *Seattle Hardware Co. v. Waugh*, 56 Wash. 478, 106 Pac. 471.

The court has jurisdiction, in a proper case, to charge against the plaintiff the compensation of a receiver appointed at plaintiff's instance to take charge of property, especially where most of the property was adjudged to belong to defendants claiming the same in litigation waged by the plaintiff pending the receivership: *Lohman v. Claussen*, 55 Wash. 408, 104 Pac. 624.

As to expenses of receivership, and liability therefor of person instituting the proceedings, see note in 13 Ann. Cas. 1161; also note in Ann. Cas. 1913B, 538.

§ 768.

A bond to indemnify bail furnished by a person convicted in a federal court is not governed by federal laws merely because the United States might have refused to accept bailors who had agreed to take indemnity, where the bailors were accepted by the United States and the bond was executed within, and between citizens of, this state: *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998.

Under the statutes of this state, authorizing a prisoner to deposit money in lieu of bail, a bond to indemnify sureties on a bail bond is not void as against public policy in that it removes the inducement for vigilance, especially where the indemnifying bond increased the number of persons interested in securing the presence of the prisoner: *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998.

A bond to indemnify the sureties on a bail bond is not void for want of consideration because executed after the giving of the bail, the recital showing that it was given to induce the continuance of the bail: *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998.

As to indemnity bonds in connection with the giving of bail, see note in 42 Am. St. Rep. 191.

§ 785. Who may Maintain.

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court. [L. '11, p. 383, § 1.]

In an action of ejectment plaintiff must recover on the strength of his own title rather than on the weakness of the defendant's: *Seymour v. Dufur*, 53 Wash. 646, 102 Pac. 756; *Gauthier v. Morrison*, 62 Wash. 572, 114 Pac. 501.

As to the general rule that plaintiff in ejectment must recover, if at all, on the strength of his own title, see note in 18 L. B. A. 813.

In a suit to quiet title, the plaintiff must prevail, if at all, on the strength of her own title: *Brown v. Bremerton*, 69 Wash. 474, 125 Pac. 785.

As to who may maintain an action to quiet title, see note in 18 Ann. Cas. 861.

The legal title through a patent from the government is sufficient to support ejectment: *Northern Pac. R. Co. v. George*, 51 Wash. 303, 98 Pac. 1126.

As plaintiffs in ejectment relying on a tax title must recover on the strength of their own title, their actions must fail where the proof shows that the tax deed as filed with the county auditor and adopted as part of the records in his office did not include, or in any manner refer to, the premises in controversy, a description of which was interlined by some unknown person subsequent to its execution and filing: *Stockand v. Hall*, 54 Wash. 106, 102 Pac. 1037.

The plaintiff in ejectment cannot recover on the strength of a deed from a common grantor, whose prior deed of the same property to one P. was already on record when plaintiff's deed was made, P. having subsequently conveyed the record title to the defendants; and it is not incumbent on the defendants to explain their record title, or allowable for the court to indulge in pre-

sumptions to overthrow it: *Seymour v. Dufur*, 53 Wash. 646, 102 Pac. 756.

In this state a tax judgment and deed may be set aside for patent as well as latent invalidity, as a cloud upon the title: *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829.

Equitable title to property, under a quitclaim deed with a faulty description (which might be reformed), is sufficient to authorize an action to quiet title and set aside a void tax title, nor is it necessary that the plaintiff be in possession: *Brodsky v. Nelson*, 57 Wash. 671, 107 Pac. 840.

A distribution in probate proceedings of the property of the deceased to his heirs is some evidence of title, without deraignment of title from the government, and sufficient to support a judgment removing the cloud of tax foreclosure proceedings against land assessed to the deceased, as to parties claiming through the same source: *Preston v. Cox*, 50 Wash. 451, 97 Pac. 493.

As to tax deed as cloud on title, see note in 10 L. R. A. 294. But see note in 45 Am. St. Rep. 377.

As to right of holder of land under title purely equitable to bring suit to quiet title, see note in Ann. Cas. 1913B, 89; also 10 L. R. A. 293.

Under this section a defendant cannot defend upon the ground that a quitclaim deed constituting an alleged cloud is invalid and in fact not a cloud because not recorded, where he claims title under such deed: *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113.

§ 786.

An action to quiet title against an execution sale, under a revived judgment recovered twelve years previously against the holder of the record title, is not barred by the statute of limitations, where it appears that the judgment debtor held the title only as a trustee for another, and acknowledged and executed the trust three years prior to execution sale, and that the plaintiff had been in possession ever since the execution of the trust and commenced action the year after the execution sale: *Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137.

One claiming land by adverse possession, inclosed and held by him under a mistake as to the true boundary line of lots purchased by him, cannot invoke the seven-year statute of limitations for the recovery of land held under color of title, since the paper title is in the true owner, and the ten-year statute applies: *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073.

Since an action to quiet title is the remedy against one out of possession, where an action of ejectment to oust one claiming under a tax title was dismissed, there is a presumption that the tax claimant was in possession and that the tax title had not

lapsed, the tax deed being regular on its face and admitted in evidence without objection: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

A tax title claimant cannot claim adverse possession and the payment of taxes for seven successive years, prior to seven years after the date of the tax deed, by the taking of possession under the certificate of delinquency before the sale; and Laws of 1897, page 182, section 95, subdivision 4, making the certificate of the same effect as a judgment does not make the certificate color of title or give the right to possession, the same being merely a legislative definition of the nature of the lien, in view of the next section requiring judgment and sale: *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119.

§ 788.

A sheriff's certificate of sale upon mortgage foreclosure, delivered to the purchaser, is color of title, and with payment of taxes for seven years, in good faith, constitutes a title by adverse possession of vacant and unoccupied lands, as against the foreclosure defendants, and also their wives who were not made parties to the foreclosure, where they all had acquiesced in the decree, and had not been in possession, or paid any taxes, or made any claim to the land, for twelve years: *Goetter v. Moore*, 53 Wash. 5, 101 Pac. 365.

A void tax deed is sufficient color of title under the seven years statute of limitations with payment of taxes: *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166.

As to how far tax title constitutes color of title, see note in 2 L. R. A. 512; also note in 9 L. R. A. 772.

COLOR OF TITLE AND GOOD FAITH.
The grantee in a quitclaim deed having knowledge that the grantor was a stranger to the title and that the title was vested in another cannot show good faith or gain title by adverse possession, under this section: *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749.

As to quitclaim deed as color of title, see note in 38 Am. St. Rep. 719; also note in 4 L. R. A., N. S., 776.

To obtain title by adverse possession and the payment of taxes for seven years, the possession must be shown to be actual, open and notorious under claim and color of right made in good faith; and it is not sufficient to show mere possession at one time, and payment of taxes and color of title for seven years: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

As to the necessity that possession shall have been continuous, open and notorious, see note in 28 Am. St. Rep. 158; also note in 4 L. R. A. 641.

There can be no title by adverse possession where the claimants had no color of title and their possession had its inception

less than five years prior to the commencement of the action: *Spinning v. Pugh*, 65 Wash. 490, 118 Pac. 635.

A void deed is color of title starting the running of the statute of limitations: *Hoko River Boom Co. v. Fairservice*, 69 Wash. 357, 125 Pac. 145.

DURATION AND CONTINUITY OF PAYMENT.—Under this section the taxes must be paid continuously each successive year: *Seymour v. Dufur*, 53 Wash. 646, 102 Pac. 756.

As to what is essential in general to establish adverse possession, see notes in 28 Am. St. Rep. 158, and 88 Am. St. Rep. 701.

§ 792.

In ejectment a plaintiff suing the owner's agent in possession cannot complain because the agent did not have his rights protected by substituting the owner as party defendant, since plaintiff, under this section, had the right to make the owner a party defendant: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

§ 793.

In an action to quiet title, the complaint sets out the cloud upon the title with sufficient certainty when it alleges that the defendants claim through void tax sale proceedings, giving the court, the number, and title of the case, referring to the judgment and tax deed following, and describing particularly the summons and manner of serving, showing the entire proceeding to be void, all of which were matters of record: *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829.

As to void judgments and tax certificates as not being clouds on title, see note in 45 Am. St. Rep. 377.

Under this section, the court is to determine the title and grant relief according to the equities of the case; and defendants in possession, claiming that plaintiffs' execution sale was void on the ground that the judgment had been paid, need not first institute a direct proceeding to cancel the judgment before answering the complaint: *McLiesh v. Ball*, 58 Wash. 690, 137 Am. St. Rep. 1087, 109 Pac. 209.

Where the plaintiff, in an action to quiet title and set aside a void tax title, held a superior equitable title, before suit brought, under a deed with a faulty description that might be reformed, a quitclaim deed correcting the error, received by the plaintiff after commencement of the action, is admissible to supply proof of the error in the original deed upon which an action of reformation could have been based: *Brodsky v. Nelson*, 57 Wash. 671, 107 Pac. 840.

Upon an issue as to the forgery of a deed in plaintiff's chain of title, it is presumably in his possession, and the opposite party need not produce it or account for its loss

in order to admit the evidence of experts who had compared it with proven signatures: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

In an action to recover a certain tract of land under a deed intended as a mortgage, it is error to determine the title to another tract upon which a similar mortgage deed was given at the same time, when there was nothing in the issues as to such tract, and the evidence received thereon was material upon the question of intent as to the tract mentioned in the complaint: *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682.

In an action to recover land under a deed to plaintiffs, which the court found to be intended only as a mortgage, in which action the defendant merely asks that it be adjudged to be the owner subject to the mortgage, it is outside of the issues and error to decree a foreclosure of the mortgage, notwithstanding that evidence was received without objection upon the question whether the mortgage had been satisfied: *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682.

In ejectment, the burden is upon the plaintiff to establish his title; and he fails to do so, as regards a disputed boundary line, where it appears that the line is not located on the ground, and it is reasonably certain defendant is not occupying any of plaintiff's land, plaintiff's main contention being for a sixty-foot overlapping strip, under a deed subsequent to defendant's deed: *Lundell v. Allen & Nelson Mill Co.*, 57 Wash. 150, 106 Pac. 626.

In ejectment, the burden is upon defendant to establish the defense that an after-acquired title, inuring to the benefit of the plaintiff, was lodged in an alien incapable of acquiring real property in this state: *Gough v. Center*, 57 Wash. 276, 106 Pac. 774.

In an action to quiet title, an answer alleging that a charitable trust had failed by reason of the fact that the beneficiaries had procured a dissolution of the society through the courts, and a judicial sale of the land, which was void, does not show that the title reverted to the donors of the trust, but only shows a cessation of the uses for which the property was devoted, and is insufficient on demurrer, to show title in the successors of the donors: *Peth v. Spear*, 63 Wash. 291, 115 Pac. 164.

A complaint to recover the possession of real estate, setting forth the nature of plaintiffs' title, as required by this section, is sufficient without alleging that the plaintiffs were seised and possessed of the premises within the statutory period for commencing the action: *Wilkeson v. Miller*, 63 Wash. 680, 116 Pac. 268.

As to the requisites of bills to remove clouds on title, see note in 67 Am. Dec. 110.

The complaint in an action seeking equitable relief to set aside certain proceedings is insufficient as a suit to quiet title to the

land where it contains no proper description of the land: *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

§ 794.

In ejectment it is a good defense to plead title in another with right to possession as his agent and that plaintiff's deed is a forgery, under sections 793, 794: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

In an action to remove the cloud of a void tax sale, it is no defense to allege that the plaintiff is an attorney at law and purchased a debatable title for an inadequate consideration for speculative purposes, and to foster litigation: *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829.

— EVIDENCE ADMISSIBLE UNDER PLEADINGS.—Although the plaintiff in ejectment fails to deraign his title, the defendant cannot, under a general denial, introduce affirmative evidence to show title in himself by adverse possession, under this section: *Brown v. Haley*, 56 Wash. 218, 105 Pac. 478.

§ 796.

In an action by an upland owner against a boom company to recover possession of the land and the rents, issues, and profits during the detention, the plaintiffs are not entitled to damages for cutting off their ingress and egress from the water, or incidental tortious acts, especially where the acts causing such damage are not pleaded: *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

Where injury was done by converting plaintiffs' land into a channel of a river, it is immaterial, as far as concerns the damages recoverable in ejectment, whether the channel was navigable or not: *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

In ejectment against a boom company for uplands and shore lands along navigable waters, the value of the lands as a boom site cannot be considered in determining the damages for detention: *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

§ 797.

In an action to recover land sold under a void tax judgment, the defendants can recover for improvements made upon the land since the enactment of this section, but not for those made prior thereto: *Gould v. White*, 54 Wash. 394, 103 Pac. 460; *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119.

A finding that the value of improvements on real property is four hundred dollars is contrary to the evidence, where the only testimony on the subject was the affidavits

of two witnesses fixing the value at seven hundred dollars and thirteen hundred dollars, respectively: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 648.

Under this section one having in good faith acquired record title and entered into peaceable possession and commenced the erection of a building is entitled to a counterclaim for the taxes paid and the value of the building by him erected pending a suit to quiet title brought by one who had acquired actual title by adverse possession under a mistake as to the true boundary; and no damages having been shown, the decree should secure payment of the same, or, in default thereof, make the parties tenants in common according to their proportionate interests: *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073.

As to what in particular may be recovered in an action of ejectment, see note in 116 Am. St. Rep. 581.

As to plaintiff's right to recover interest on value of the premises for the time of the detention, see note in 16 Ann. Cas. 853.

§ 799.

Under this section, the plaintiff should be given a provisional judgment granting the statutory options, title and immediate possession to be secured by final judgment in favor of the party entitled to receive it, at the expiration of the time limited: *Gould v. White*, 62 Wash. 406, 114 Pac. 159.

§ 806.

See notes to § 705.

In an action to quiet title, in which both plaintiff and defendant claim full title to lands held by defendant, a decree quieting plaintiff's title to an undivided one-half interest has the effect to confirm defendant's title to the other half: *Del Notaro v. Douglass*, 55 Wash. 493, 104 Pac. 774.

In an action to quiet title, in which the court finds the title in the defendant subject to the value of plaintiff's improvements, the judgment is bad in form where it permits the plaintiffs to remain in possession until their lien for improvements is paid; and the judgment must establish the rights of the parties in conformity with Laws of 1903, page 262: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 648.

An action to forfeit a land contract and remove the cloud upon the title, the complaint alleging that the defendants were nonresidents and not seeking any award of possession, is not an action to recover the possession of land, within this section; and a petition to vacate is therefore barred after one year, under the provisions of sections 235, 464, 466, providing for the vacation of judgments in other cases within one year: *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

§ 809.

See notes to § 705.

Under this section for the determination of adverse claims, a decree to quiet title may be had where the defendant filed for record an invalid notice, claiming a contract for purchase, although the claim did not constitute a cloud within equitable principles: *McGuinness v. Hargiss*, 56 Wash. 162, 21 Ann. Cas. 220, 105 Pac. 233.

Under this section, enlarging equity jurisdiction, an action lies to quiet title against a mortgage given by a stranger to the title: *Pacific Coast Pipe Co. v. Hedican*, 61 Wash. 576, Ann. Cas. 1912C, 833, 112 Pac. 655.

§ 810.

In forcible entry and detainer, the defendant cannot change the action to one of debt by surrendering the premises to a third person after the commencement of the action: *Hutchinson v. Wilson*, 54 Wash. 410, 103 Pac. 474.

As to pleadings and proceedings in forcible entry and detainer, see note in 8 L. R. A. 532.

§ 811.

Judgment for plaintiff in an action for unlawful detainer will not be reversed on the ground that proof of service of the notice was not made and the notice itself not received in evidence, where the case was reopened to supply the proof and plaintiff testified to making the service, and the notice itself was on file; and a ruling that affidavit of service was not necessary in view of plaintiff's testimony and the return of the service of notice shows that the notice on file was not intended to be excluded: *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95.

Where a lease for one year at a monthly rental "payable monthly in advance," was executed on the 11th of the month and possession taken on the 15th, and rent was paid for the last half of the first month, and thereafter was demanded and paid in advance on the first day of each calendar month for several months without question, the lease will be construed as calling for payments on the first of each calendar month, and the lessee is estopped to assert that notice in unlawful detainer on the 7th, not objected to at the time, was premature; especially where at the trial no issue as to the time of payment or sufficiency of notice was raised by the pleadings, evidence or requests for findings: *Kneeland Inv. Co. v. Aldrich*, 63 Wash. 609, 116 Pac. 264.

As to the necessity of proof of notice and demand, see note in 120 Am. St. Rep. 48; also notes in 121 Am. St. Rep. 402, and 7 Ann. Cas. 731.

§ 812.

RIGHT TO MAINTAIN ACTION IN GENERAL.—Where premises are conveyed by deed absolute in form, the grantor remaining in possession under an oral agreement to pay a monthly rental, the conventional relation of landlord and tenant exists, making the summary proceeding by unlawful detainer available, and it is incompetent for the grantor to show by parol a reservation or limitation whereby it was orally agreed that the grantor was to retain an interest and possession for the period of one year upon making the monthly payments: *Oregon & Washington R. Co. v. Vulcan Iron Works*, 57 Wash. 372, 106 Pac. 1120.

As to prior possession by defendant as a defense, see note to 121 Am. St. Rep. 410.

The failure of a lessee to pay taxes, as agreed in the lease, entitles the lessor to maintain unlawful detainer: *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521, Ann. Cas. 1912D, 365, 115 Pac. 1083.

As to failure to pay taxes as a ground of claim of forfeiture of possession, see note in 120 Am. St. Rep. 51.

DEFENSES AND GROUNDS OF OPPOSITION.—In forcible entry and detainer, where defendant admits the lease, default, and notice to quit, equitable defenses, offsets and counterclaims are not available: *Hutchinson v. Wilson*, 54 Wash. 410, 103 Pac. 474.

In forcible entry and detainer, the defendant cannot interpose, as a legal defense, the fact that the lease was void for fraud, entitling him to retain possession until reimbursed for his losses: *Hutchinson v. Wilson*, 54 Wash. 410, 103 Pac. 474.

The title of the plaintiff cannot be tried out in an action of unlawful detainer of demised premises: *Monroe v. Stayt*, 57 Wash. 592, 30 L. R. A., N. S., 1102, 107 Pac. 517.

Under a tenancy from month to month, tender of rent for the months of May and June before the commencement of the action is no defense to the action of unlawful detainer upon proper notice terminating the tenancy at the end of the month of April: *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188.

In an action of unlawful detainer, evidence that checks were given for the rent does not establish payment of the rent where it appears that the checks covered rent for some other month, or that payment of the checks was refused for want of funds to meet them: *Kegley v. Skillman*, 68 Wash. 637, 123 Pac. 1081.

As to equitable defenses in forcible entry and detainer, see note in 121 Am. St. Rep. 411.

As to title to the premises as a matter not in issue, see note in 8 L. R. A. 537.

CONDITIONS PRECEDENT—SUFFICIENCY OF NOTICE OR DEMAND.—A

notice to quit under this section, subdivision 2, is not objectionable in that it purports to terminate the tenancy on the last day of the month rather than on the date the notice was given, to take effect at the end of the month: *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188.

A notice to quit a monthly tenancy expiring at the end of the month may properly notify the tenant to vacate on the last day of the month instead of at the end of the month, where it was served twenty days prior thereto: *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188.

The notice to pay rent or quit in unlawful detainer of leased premises is sufficient if signed in the firm name of the landlords, where they were doing business as partners under their own surnames: *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

This section, subdivision 2, providing that a tenancy for an indefinite term may be terminated on twenty days' notice, has no application to the alternative notice to pay rent or quit where possession is continued after default, on three days' notice, as provided in subdivision 3: *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

As to notice to quit, in actions of unlawful detainer, see note in 120 Am. St. Rep. 45.

A notice to quit served prior to the amendatory act of 1905 is not ineffectual by reason of such prior service: *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439.

A notice to quit for default in the payment of rent is sufficient without a computation of the rent, where it designates the months for which rent is due: *Olson Land Co. v. Alki Park Co.*, 63 Wash. 531, Ann. Cas. 1912D, 365, 115 Pac. 1083.

A statutory notice to vacate leased premises, terminating a lease on August 31st, is sufficient notice that the landlord's agent has no further authority to collect rents, and payment to the agent for the rent of September is not a defense to an action for unlawful detainer in holding over for that month: *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

TIME TO SUE AND LIMITATIONS.—

In an action of forcible entry and detainer, where interveners were ousted by a provisional writ of restitution without notice, the action was premature as to them, and the final judgment should restore them to their original possession; but it is error to also restore them "to the unexpired term therein," when that was not an issue in the case: *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439.

Under this section, making a tenant guilty of unlawful detainer if notice to quit or pay rent remains uncomplished for the period of three days after service thereof, and section 814, providing for service of notice on a corporation, if no one is found on the premises, by posting a notice thereon and "sending a copy through the mail," addressed to the corporation, etc., service is not complete until the copy mailed is received by the corporation, as the statute contemplates three full days within which to comply with the notice; hence where a copy is mailed January 2d, and not received until Monday, January 4th, an action commenced January 6th, is premature, and tender of rent on that day is in time: *Smith v. Seattle Camp No. 69, W. O. W.*, 57 Wash. 556, 107 Pac. 372.

PROCEEDINGS.—Provisions as to the time and manner of bringing the special proceeding of forcible entry and detainer against a tenant are to be strictly construed and the provisions of the general practice act for service by mail are not applicable: *Smith v. Seattle Camp No. 69, W. O. W.*, 57 Wash. 556, 107 Pac. 372.

A defect in a summons in unlawful detainer, in not requiring the defendant to appear within fifteen days, as required by statute, is waived by a general appearance: *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521, Ann. Cas. 1912D, 365, 115 Pac. 1083.

Error in issuing a writ of restitution during the pendency of an action of forcible entry and detainer cannot be urged as ground for reversing the final judgment: *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439.

§ 814. Service of Notice.

Any notice provided for in this act shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at

the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: Provided, That in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging-house, boarding-house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders or persons renting such rooms shall not be considered as subtenants within the meaning of this act, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this act may be had upon a corporation by delivering a copy thereof to any officer, agent or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: Provided, however, That when service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice. [L. '11, p. 95, § 1.]

See note to § 812.

§ 827.

DAMAGES.—This section requires judgment to be entered in unlawful detainer of leased premises for double the sum found as damages for the unlawful detention: *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188.

A clause in a lease providing for an initial deposit as stipulated damages in case the lessee does not faithfully pay the rent and perform all the covenants and conditions of the lease, refers only to a violation of the contract, and does not relate to the penalty for unlawful detainer, fixed by this section at double the amount of rent due: *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95.

In unlawful detainer, this section expressly requires judgment for double the amount of rent due, where no damages are claimed: *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95.

Damages for unlawful detainer of a dwelling for one month, in that the landlord lost a prospective tenant and was compelled to move from a hotel and occupy the house, cannot be allowed for the landlord's increased cost for family expenses for several months while occupying the house, which cost them more than living at the hotel, as the same is fanciful, remote and specu-

lative: *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

Upon the unlawful detainer of a house for one month after notice terminating the lease, the landlord is entitled, under this section, giving double damages during the detention, to recover double the rental value for one month, and consequential damages or the rental value during the next month while the house remained vacant and unoccupied: *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

§ 831.

Under this section, a supersedeas bond reciting that it is to secure such a stay and conditioned to pay all "damages and rents which the superior or supreme court shall adjudge reasonable for the possession of the property," entitles the obligee, on affirmance of the appeal, to recover, in an action on the bond, reasonable rents during the pendency of the appeal, without alleging that the court had adjudged anything therefor, since under section 1739 the rent could not be ascertained without an issue and trial: *Hinckley v. Casey*, 54 Wash. 34, 102 Pac. 1051.

§ 838.

Where a divorced second wife has come into the possession of community real property of the first marriage belonging one-half

to the children of the first wife, they are entitled to an accounting and partition: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

§ 844.

Rights of action to quiet title and for a partition may be united in one action, under this section: *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113.

§ 886.

See notes to Const., art. 2, § 26.

The fact that the state makes a contract—the lease of an armory—does not create a liability for a tort committed by its officers in connection with the subject matter of the contract, or make the action arising thereon one on contract: *Riddoch v. State*, 68 Wash. 329, 42 L. R. A., N. S., 251, 123 Pac. 450.

The state, through its legislature alone, has the sovereign power to waive its immunity from liability for torts: *Riddoch v. State*, 68 Wash. 329, 42 L. R. A., N. S., 251, 123 Pac. 450.

§ 891. Appropriation of Property by the State, Requisites of Petition.

Whenever any officer, board, commission, or other body representing the state is authorized by the legislature to acquire any land, real estate, premises, or other property deemed necessary for the public uses of the state, or any department or institution thereof, and the officer, board, commission or other body whose duty it is to acquire such land, real estate, premises, or other property is unable to agree with the owner or owners thereof for its purchase, it shall be the duty of the attorney general to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such lands, real estate, premises or other property, or in case a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made as aforesaid be ascertained and determined by the court or judge thereof. [L. '11, p. 335, § 1.]

§ 898.

This section providing that, in the event of conflicting claims to property condemned, the court may direct an action to be brought to determine the same, is not exclusive where the fund had been paid into court; and where all the parties appeared as upon an intervention and there was a trial on the merits, the court had jurisdiction to inquire into all the claims, and having done so, the supreme court on appeal can direct the proper judgment to be entered: *State ex rel. Smith v. Superior Court*, 71 Wash. 354, 128 Pac. 648.

school system" of the state, etc., where the act itself was very general and covered all manner of subjects relating to the public schools: *State ex rel. School District No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

§ 910.

It is not an abuse of discretion in eminent domain proceedings to refuse an owner a separate trial, unless it appears that he is deprived of a fair trial and makes an affirmative showing of prejudice: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

§ 906.

The provision of the code of public instruction relating to the acquisition of school sites is germane to and within the title "an act providing for the maintenance of and relating to a general and uniform

§ 913.

This section, providing that, upon the condemnation of a school site, the compensation to be paid the owner shall be the fair and full value of the premises does not limit the recovery to the naked value of the land,

in violation of the constitution requiring payment of the value of the land taken and for any depreciation to the land not taken, since the statute is directory, and contains no words of limitation confining the jury to the value of the land taken alone: *State ex rel. School District No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

§ 921.

See notes to § 8739.

CONSTRUCTION.—The statutes of eminent domain are to be strictly construed: *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384.

As to the nature of the right of eminent domain, see note in 102 Am. St. Rep. 811.

Statutes of eminent domain, being in derogation of common right, are strictly construed: *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

As to the principles generally of the law of eminent domain, see note in 13 L. R. A. 332.

Statutes conferring the right of eminent domain are to be strictly construed as to the extent of the interest or title that may be acquired by appropriation: *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A., N. S., 522, 117 Pac. 864.

As to the constitutional restrictions upon the right of eminent domain, see note in 4 L. R. A. 786.

PROCEEDINGS.—As between two public service corporations seeking condemnation of the same lands, the one prior in time is prior in right: *State ex rel. Cascade Public Service Corp. v. Superior Court*, 53 Wash. 321, 101 Pac. 1094.

The rule that property sought to be condemned must be described with reasonable certainty is sufficiently complied with where, in condemnation of littoral rights and waters in a lake for irrigation purposes, the petitioner exempted such water as was necessary to irrigate the lands of the littoral owners, and showed the number of acres of their irrigable land and that five thousandths of a cubic foot per second of time per acre was sufficient, since that gave the court a definite basis for a decree, and that is certain which can be made certain: *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

A petition to condemn a right of way for a railroad alleging that, when constructed, it will be a common carrier of passengers, is not demurrable for failure to allege that the land will be devoted to a public use: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

As to the uses for which a railroad right of way may be devoted as against the owner of the fee, see note in 36 L. R. A., N. S., 512.

In condemnation by an irrigation company of the waters of a lake, affecting the right of littoral owners to water used by them for irrigation purposes, an offer of evidence of a proposed stipulation agreeing to permit the defendants to use sufficient water to irrigate their lands, is in substance an amendment of the petition limiting the water sought to be conveyed, and error, if any, in refusing the evidence is sufficiently reserved by exceptions, without formal offer to amend the petition: *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

§ 922.

After condemnation proceedings for a railroad right of way are instituted, the owners may by oral agreement stipulate as to the compensation and waive their constitutional right to have it paid before the land is taken; and after standing by and seeing the land used for railway purposes for many years, they cannot maintain ejectment: *Pearl Oyster Co. v. Seattle & Montana R. Co.*, 53 Wash. 101, 101 Pac. 503.

A boom company at the mouth of a river, and a driving company floating down logs by splash-dams and artificial freshets, may properly join as parties plaintiff in an action to condemn overflowed lands, where it appears that the overflow is caused by the concurrent acts of the driving company in creating the freshets and of the boom company in choking the mouth of the river with logs and retarding the current, and both companies are jointly interested in gathering and holding logs in the river: *State ex rel. Gray's Harbor Boom Co. v. Superior Court*, 57 Wash. 71, 106 Pac. 481.

Under this section mortgagees, lien claimants and a city having a lien for assessments are proper parties defendant: *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853.

§ 925.

PUBLIC USE — IN GENERAL.—The declaration in constitution, article 1, section 16, that the question of public use shall be a judicial question to be determined irrespective of legislative assertion, does not mean that it is to be determined without reference to constitutional assertions upon the subject: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

As to public use, and when the question may be considered by the courts, see note in 88 Am. St. Rep. 926.

The fact that the stock of a railroad company is held by individuals or a corporation having a special interest in the construction of the road does not affect the public character of the road: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

The fact that all the stock of a toll-logging road is held by a lumber company or its stockholder who own most of the timber accessible to the road sought to be condemned does not deprive the road of its public character or render the enterprise a private one, where considerable other timber owned by others will be rendered accessible and can be transported over the road: *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444.

As to the requirement that the proposed use of the land must be a public one, see note in 102 Am. St. Rep. 822; also notes in Ann. Cas. 1912D, 909, 2 L. R. A. 680, and 4 L. R. A. 787.

The condemnation of land adjacent to a schoolhouse site, which the physical development of the school children required as a suitable place for recreation and exercise, is for a public use and within the provision of the public schools: *State ex rel. School District No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

As to the acquisition of land for public schools as a public use, see note in 22 L. R. A., N. S., 169.

Uplands and the abutting tide lands to deep water, purchased from the state, there being no intervening harbor area, is private property which cannot be taken or damaged without compensation by the operation of a railroad drawbridge across navigable water authorized by federal and state authority; and the obstruction of a wharf on such premises by the operation of the draw is not damage absque injuria, and may be enjoined: *Northern Pac. R. Co. v. Slade Lumber Co.*, 61 Wash. 195, 34 L. R. A., N. S., 423, 112 Pac. 240.

This section invests the court with power to determine whether the specific land sought is necessary in view of the general location or in the event of bad faith or abuse of power in selection: *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

In condemnation proceedings for a telegraph line, the selection of a general route is conclusive as to the necessity of such route, but the issue is presented whether the particular land sought is a necessary part of the general route adopted: *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

WATER SUPPLY IN GENERAL.—A water company having a municipal franchise to supply water to a city and its inhabitants is, under our constitutional and statutory provisions, authorized to exercise the right of eminent domain to acquire the necessary lands and waters, where the owner thereof refuses to supply the city with water upon request so to do; and the general statutes subjecting such corporations to control and regulation are sufficient in that respect without any statute fixing the rates which shall be charged for such supply: *State ex rel.*

Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. 3.

As to resort to condemnation proceedings for a water supply system, see note in 58 L. R. A. 241.

The use of waters for irrigation is a public use, under constitution, article 21, section 1, providing that "the use of the waters of this state for irrigation . . . shall be deemed a public use": *State ex rel. Golden Valley Irr. Co. v. Superior Court*, 67 Wash. 556, 122 Pac. 19.

As to irrigation as a public use, see note in 1 Ann. Cas. 304. But see note in 102 Am. St. Rep. 832.

A condemnation for an electric power plant is for a public use, where the only present market for the power and the only present purpose was to furnish electric light for a town and its inhabitants; and it is immaterial that the petitioner was also authorized by its articles to sell power for all purposes, public and private, since these uses are separable: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

As to water purveying for manufacturing power as a public use, see note in 22 L. R. A., N. S., 160.

Condemnation for an eighty horse-power plant to furnish electric light to a town that has present need for only thirty horse-power is not excessive, in view of the probable growth of the town, where there is no intention to use the power for other than public use, except in such small quantities as to be insignificant and incidental to the main public purpose: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

In a condemnation for an electric light plant by a company having a franchise and under agreement to furnish a town with electric light, it will not be presumed that the plan is wasteful, and that another plan would develop greater power from the same source does not establish that there is no public necessity for the plan proposed; since, under this section, the court is to determine the question of necessity, and can decide between the two plans when the occasion arises: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 391.

WAREHOUSES OR ELEVATORS.—The evidence of an engineer in charge of the surveys that a certain lot was necessary for the use of a railroad for a warehouse in which to handle its freight business is competent and sustains a finding that it was necessary for a public use: *State ex rel. True v. Superior Court*, 56 Wash. 249, 105 Pac. 639.

As to appurtenances of a railroad as a public use, see note in 22 L. R. A., N. S., 122.

— **RAILROADS.**—A railway terminal company organized primarily to connect

business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries, and to carry freight in carload lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by expending one hundred thousand dollars, and has under contract equipment that will cost four hundred thousand dollars additional for barges, car-floats and terminals, although it owns no rolling stock: *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

A court of equity will not protect a railroad company in the use of a public street, pending condemnation proceedings, where the company had no franchise and was a trespasser in the street ab initio: *State ex rel. Sylvester v. Superior Court*, 60 Wash. 583, 111 Pac. 787.

The taking of soil to make a railroad embankment is a public use, where it appears that for twenty-two miles the railway line has been damaged and washed away by floods, which interfered with traffic and the safety of the public, that it was necessary to raise embankments upon which the railroad is constructed, and that the land is necessary to obtain earth therefor: *State ex rel. Great Northern R. Co. v. Superior Court*, 68 Wash. 572, 40 L. R. A., N. S., 793, 123 Pac. 996.

The widening of a street to be given over in part to a railway company is a public use, and will not be reviewed by the courts in the absence of positive fraud: *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940.

A railway terminal company organized primarily to connect business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries operated by the company and reaching various cities, and to carry freight in carload lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by the expenditure of money for the acquisition of like terminals in another city: *State ex rel. Bremer v. Superior Court*, 69 Wash. 278, 124 Pac. 1135.

In eminent domain proceedings to condemn a right of way necessary for a new railway line, and also necessary for the petitioner's use in the construction, maintenance and operation of another old line which is coincident with the new line at a certain point, land may be condemned for the purpose of a necessary slope on moving the old line to the west in order to make a fill for the new line, forty feet above the old line: *State ex rel. Flint v. Superior Court*, 69 Wash. 300, 124 Pac. 1127.

A railroad company cannot condemn an abutter's interest in a city street in which it seeks to lay its railway tracks without first obtaining a franchise from the city giving it the right to the use of the streets: *State ex rel. Sylvester v. Superior Court*,

60 Wash. 279, 111 Pac. 19; *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

Condemnation for a toll-logging road cannot be objected to on the ground that no necessity is shown for condemning the particular route surveyed, since the company can make its own selection: *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444.

That a railroad line is but six and one-half miles long is not a defense to a proceeding to condemn its right of way: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

A railroad may condemn land in aid of its public purposes only, although it is also authorized to engage in private business: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

The selection by a railroad of a route for a change in its location necessitated by an engineering error makes a prima facie case of necessity, which is conclusive in the absence of evidence of a more suitable and less injurious route, and the selection of a street does not show an abuse of power: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

A railroad company may condemn a right to lay tracks in a street as against the rights of abutting owners if it has a lawful franchise to use the street: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

It is immaterial that the city license to use the spur track was limited to the purpose of serving a commercial warehouse on private property, in view of section 8626-13, giving the right to maintain spurs for the use of a private shipper: *De Kay v. North Yakima & Valley R. Co.*, 71 Wash. 648, 129 Pac. 574.

The nature of a railroad's occupancy of a city street is not to be determined by its petition to condemn against the abutter, nor by the order of necessity, but by the terms of the franchise: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

— PUBLIC PROPERTY.—It is not a valid objection to the necessity of a railroad company's condemnation of tide lands that it must first cross the abutting harbor area and that the constitution and laws prohibit the acquisition of harbor area by condemnation, since the state may lease for thirty years the right to construct a railroad on the harbor area: *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

A thirty-foot strip off the state university grounds may be condemned for a street, and it cannot be objected that it is already devoted to a public use, where there is nothing in the record to indicate that it was actually used by the university, and the record shows that the land remaining will

be benefited thereby: *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25.

That state lands were already in use as a street is no objection to condemnation proceedings to acquire the same for a permanent street, since an easement cannot be acquired upon state land: *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25.

As to the power of the legislature to authorize the taking of lands already held for a public use, see note in 24 Am. Rep. 551.

— **PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE.**—Strips of land owned by a railroad company, fifteen feet wide, adjacent to a street in which the railroad company has its railroad tracks, are not devoted to a public use so as to exempt them from condemnation for a public use by another railroad company, where it appears that they had never been used for railroad tracks but were in possession of a mill company under leases for nominal rent or rent free, and were used by the mill for loading platforms, although such use was a convenience to the mill as a patron of the owning railroad company, the test being the use to which the property is applied as a matter of right, and not the ownership: *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

The more extended and beneficial public use employed by a municipal corporation amounts to a reasonable necessity for and authorizes the taking of the property of a public service corporation already devoted to the same public use, under constitution, article 12, section 10, declaring that the exercise of the right of eminent domain shall not be abridged to prevent the legislature from taking the property and franchises of incorporated companies, the legislature being exclusively vested with the right to determine under what circumstances, and to what extent, the power may be exercised: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

One railroad company may condemn a portion of the right of way of another where there is a necessity therefor, and the same can be taken without material detriment or injury to the other company; and if a public necessity exists and each road will have a right of way sufficient for all necessary public use, findings on conflicting evidence in favor of the condemnation will not be disturbed on appeal: *State ex rel. Everett & Cherry Valley Traction Co. v. Superior Court*, 59 Wash. 598, 110 Pac. 428.

The interest of the stockholders of a boom company in a lumber company and a connecting railway, inviting monopolistic control of the industry by them, is no objection to condemnation proceedings by the boom company, since the companies are public service corporations bound to give reasonable service and are amenable to control

by the public authorities: *State ex rel. United Tanners' Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

One boom company cannot condemn the lands previously devoted to a public use and necessary to another boom company, to be used for the same purposes, in the same locality, and in the same manner as they are already being used in competition with the relator; and it is immaterial that the record title to the land is in a trustee for the company, where such company is in the actual possession of the property and devoting it to the public use: *State ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 117 Pac. 755.

ABANDONMENT OF USE.—The owner of lands that have been appropriated by a railroad company for public purposes may maintain an action to recover possession thereof when the railroad company has permanently abandoned the same to uses of a private nature: *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A., N. S., 522, 117 Pac. 864.

Where land had been appropriated by a railway company for right of way, side-tracks, depot grounds, and terminal yards, a complaint by the former owner, seeking to recover the lands on the ground of abandonment and reversion, states a cause of action where it alleges that the railroad company had never used the lands for railroad purposes but had leased the same for a term of twenty-five years to a private corporation, which had constructed a private warehouse thereon and exclusively occupied the lots in conducting its private business as a wholesale grocer: *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A., N. S., 522, 117 Pac. 864.

As to reversion of land taken under power of eminent domain when public use ceases, see note in 19 Ann. Cas. 155.

DAMAGES.—Under constitution, article 1, section 16, providing that no private property shall be taken for public use without just compensation having been first made, the measure of damages for the taking of property is its value at the time of the trial, including improvements made since the filing of the petition, rather than its value at the time of the commencement of the proceedings: *Gray's Harbor & Puget Sound R. Co. v. Kauppinen*, 53 Wash. 238, 101 Pac. 835.

As to the general rule for determining damage in cases of private property taken for a public use, see note in 85 Am. St. Rep. 292; also note in 26 L. R. A., N. S., 189.

INJURIES TO PROPERTY NOT TAKEN.—In eminent domain proceedings to appropriate lands to be flooded, the measure of damages is the fair market value of the lands taken irrespective of any benefit, and the damage, if any, to the lands not

taken: *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940.

Constitution, article 1, section 16, providing that no private property shall be taken or damaged until just compensation has been made, does not entitle an owner of property to damages by reason of the construction of a railroad, where his property does not abut on the right of way, and his damage therefrom, or by the use of streets in the vicinity, is only such as the public in general suffers therefrom: *Clute v. North Yakima & Valley R. Co.*, 62 Wash. 531, 114 Pac. 513.

A judgment for damages upon the condemnation of community property is not deemed real property upon the doctrine of equitable conversion, in a controversy between the husband and wife living separate and apart, but is personal property, subject to the control and management of the husband: *Stay v. Stay*, 59 Wash. 651, 110 Pac. 549.

In eminent domain proceedings by a power company seeking to create a storage basin by raising the waters of a lake and flooding lands, the relator may at the trial restrict its use so as to permit the land owner to exercise riparian rights for which he seeks damages, provided that they be exercised without damage to relator's dikes and dams, since the limitations and restrictions may be embodied in the decree and given weight by the jury determining the damages: *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940.

The owner of tide lands, appropriated by a railroad company, having the preference right to lease the abutting harbor area, is entitled to recover as damages the value of the land taken at the time of the trial and damages to the part not taken, plus the value of the statutory right to lease abutting harbor area; and it is immaterial that the title to the tide land was not acquired from the state until after the condemnation suit was commenced, it having been previously applied for: *State ex rel. Hulme v. Gray's Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

The preference right of abutters to lease the harbor area lying in front of tide and uplands is property or an interest in land or a "contract right relating thereto, including any leasehold interest therein," which is subject to condemnation for a railroad right of way: *State ex rel. Wilson v. Gray's Harbor & Puget Sound R. Co.*, 60 Wash. 32, 110 Pac. 676.

In proceedings to condemn a leasehold, the measure of damages is the difference between the rent reserved and the rental value during the remainder of the term, plus loss of profits while moving to a new location: *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

Where a lease provided for a renewal for five years at a rental to be agreed upon or fixed by arbitrators, at the option of the

lessee, and the fee was acquired by a public service corporation, which refused to consent to an extension for longer than eighteen months, and refused at all times to agree upon the rental or arbitrate the matter, but commenced a condemnation suit to appropriate the leasehold, the court cannot, eleven months after expiration of the original term, require an arbitration at that time within one day pending a stay of the trial, and in default thereof, take evidence and fix the value of the rental, in disregard of the method prescribed in the lease, the lease contemplating an adjustment of the rent before the expiration of the original term: *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

In such case, the rights of the tenant in the condemnation suit can only be protected by adhering to the view that the rent reserved in the lease continued for the renewal term, especially in view of the fact that the relator's agent demanded and collected one month's rent at such rate, and the lessee tendered the same each month, while the relator at all times refused to comply with the terms of the lease requiring it to agree upon or arbitrate the matter of the rent: *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

Where a riparian owner had granted the right to take water from the river limited to such quantity as would result in no damage to her fishery and fishing rights, she thereby conveyed all her water rights except as she reserved sufficient to protect her fishery and divested the lands of their character as riparian lands; hence, on condemnation of the rights of her subsequent lessee, no damages could be allowed for loss of riparian rights, although the lease purported to include riparian rights except as reserved for a fishery: *Northwestern Elec. Co. v. Lyle Light, Power & Water Co.*, 71 Wash. 384, 128 Pac. 674.

In a common-law action for damages to abutting property by the construction of a steam railroad in a city street, tried as a condemnation case with a judgment in that form, the damages being the same as in a condemnation suit which defendant should have commenced before the unlawful entry, the defense cannot be made that the injury was committed by the defendant as a construction company which built the road and has since transferred it, since defendant was a trespasser: *Keil v. Gray's Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113.

Under this section, making the question of public necessity in condemnation proceedings a question for the court to finally decide, a formal resolution by the corporation adopting the particular plan or location prayed for in the petition is not essential, either to pleading or proof, as a prerequisite to an adjudication of public use, where the contest is between the relator and the land owner, and there is no question of priority

between rival companies making time material, the filing of the petition being sufficient as against the land owner: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

§ 926.

PROCEEDINGS.—In condemnation proceedings by a railroad company, it is not necessary to first show that the city had granted a necessary right of way across adjoining streets: *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

The obtaining of a city franchise to cross streets is not a prerequisite for the condemnation of a railroad right of way: *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200.

The question of the reasonable necessity requisite to authorize condemnation does not depend on the fact that other property might be appropriated for the purposes of the relator, nor on the fact that it would increase the cost to the mill company of loading cars and result in a loss of business to the defendant railway company, especially where the defendant has other property that can be used for loading platforms, as these are questions largely of expediency, it appearing that the route of relator's spur track is the most feasible one and reasonably necessary: *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

Laches in failing to build its line is no defense to a proceeding by a railroad company to condemn land, where it is about to utilize the property and is fully authorized: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

The consent of the war department to bridge a navigable stream is not a condition precedent to the condemnation of a railroad right of way crossing the stream: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 106 Pac. 637.

In proceedings to condemn a leasehold, the rental value of the unexpired term cannot be measured by "the highest and best use" of the premises, where the lease restricts its use to a specified business: *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

While the selection of a route is evidence of the highest character of the necessity therefor, the same is overcome by convincing evidence that the land selected is not reasonably necessary to the general route, and that a slight change of location will equally meet the necessity and do less damage to the owner; and in the absence of any rebutting evidence, the condemnation should be refused: *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

Where condemnation for a railroad right of way increased the expense of shipping shingle bolts upon lands not taken, the loss

is an element of damages not too remote or speculative: *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*, 65 Wash. 402, 118 Pac. 318.

The prosecution of condemnation proceedings for certain lands, instituted by an authorized attorney of the petitioner, is a ratification of the proceeding, and estops the petitioner from claiming that the action was unauthorized: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

Where a railway trestle crossed a street diagonally, and did not touch the street in front of one of the lots of the plaintiff, damages to such lot cannot be recovered: *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

A tender of taxes as a condition precedent to an action to set aside a tax deed is excused where it appears that the defendants claimed title to the land and plainly indicated that any tender would be refused: *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840.

To recover, in condemnation of shore lands, for the contemplated use of the lands as a mill site, the use must be shown to be available, and that means a possible use not dependent on the abandonment of the use of adjoining lands of another, or upon remote uncertain or speculative contingencies: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

As to the right to disprove the necessity for taking, see note in 42 Am. St. Rep. 407.

As to the degree of necessity requisite, see note in 22 L. R. A., N. S., 58.

EVIDENCE AS TO RIGHT TO TAKE. In condemnation proceedings by a railroad company, evidence to show negotiations by the company to trade the land to a city for use as a street in exchange for the vacation of a city street is inadmissible, where a reasonable necessity for the condemnation was shown, since the railroad company could not condemn the land and dispose of it to the city for street purposes: *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

The evidence sufficiently shows that there is a necessity for the acquisition of 20,000 horse-power for public lighting purposes, where the city now uses 9,000 horse-power under contract with a power company, that in the past three years the increase has been from 3,400 to 9,000 horse-power and from 5,228 lighting meters to 11,258, with an increase of one hundred miles of wire in the last six months, and that at the same ratio, the increase in the next ten years would require 20,000 to 25,000 horse-power: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

As to the rights to exercise eminent domain as affected by the extent to which the general scheme has progressed, see note in 7 L. R. A., N. S., 198.

Where the full title to land had been condemned for a railroad right of way, the owner is not entitled, in proceedings to assess damages, to have the company produce the plans for the construction of the roadbed: *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814.

Upon an issue as to the value of land condemned for a railroad right of way, the company should not be required to produce the plans for a bridge which was not on the land in controversy: *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814.

A finding that a building condemned was worth \$1,000, when the experts' highest estimate was \$750 to \$800, does not show that the jury was prejudiced, considering the character, condition and uses to which it might be put and the fact that it would cost \$1,285 to replace it: *Sedro-Woolley v. Willard*, 71 Wash. 646, 129 Pac. 372.

In proceedings to condemn a leasehold, while the lessee's expense of moving to a new place and damage to stock and fixtures therefrom is not recoverable as specific items apart from the leasehold, evidence thereof is admissible as showing the value of the unexpired term: *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

As to incidental damage, such as cost of removing personalty and loss or injury to business, see note in 85 Am. St. Rep. 298.

Same in the case of tenants, see note in 21 L. R. A. 212.

Where a telegraph company was a trespasser in setting up its poles, the cost of their removal cannot be considered upon an issue as to the necessity of condemning an easement for the line: *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855.

Upon condemnation of twenty-two cubic feet of water to be taken from a creek thirteen miles above defendant's mill site, evidence is admissible to show that it would not result in a loss of that much water at the point of defendant's property; inasmuch as the ordinance to condemn the same did not show an intent to condemn water all of which belonged to defendant: *Walla Walla v. Dement Brothers Co.*, 67 Wash. 186, 121 Pac. 63.

In determining the damages in condemnation proceedings, evidence of the price paid for the land more than fifteen years ago is inadmissible, the present value and the diminution by reason of the proposed appropriation being the true basis: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

In condemnation proceedings of a strip of land between a street and a cul-de-sac, evidence of the value which the land would have if the cul-de-sac should be vacated in the future, is inadmissible on the subject of damages, being too remote and speculative: *Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791.

In condemnation proceedings, evidence of the prices paid by the petitioner for property in the vicinity is inadmissible on the question of values: *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

In condemnation proceedings, evidence of a general increase in the value of property is inadmissible on the subject of values, when not limited to the vicinity of the property condemned: *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

In condemnation proceedings, evidence of the prices paid for the property one year previous to the condemnation is admissible on the subject of values: *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

Upon an issue as to compensation in condemnation proceedings, where damages were claimed by reason of loss of business while buildings were being raised to a new street level, evidence is admissible of the cost of an abutment on the street line which would permit of the use of the buildings without raising them: *In re Mercer Street, Seattle*, 55 Wash. 116, 104 Pac. 133.

In eminent domain proceedings, upon an issue as to the value of the property, it is not admissible for the defendant to show offers made for the land: *North Coast R. Co. v. Newman*, 66 Wash. 374, 119 Pac. 823.

In eminent domain proceedings, evidence of offers for the land is not made admissible on redirect examination by the fact that on cross-examination a witness had volunteered a statement as to offers which was struck out as not responsive to the question: *North Coast R. Co. v. Newman*, 66 Wash. 374, 119 Pac. 823.

In an action for damages to lots by the construction of a railway trestle in the street, where evidence was admitted to show diminished value for the use to which the property was adapted, evidence is admissible in rebuttal to show that such value would be increased rather than diminished, where announcement was made that it was not introduced for the purpose of offsetting benefits against damage: *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

Where there was an issue as to whether land condemned was more valuable for farming purposes or for booming purposes, it is proper to overrule an objection to the competency of two witnesses who were farmers and competent to testify as to its value for agricultural purposes: *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814.

As to expert testimony upon the question of value, see note in 26 Am. St. Rep. 498.

— VERDICT AND FINDINGS.—A verdict on the question of damages in a condemnation proceeding is not conclusive as to the amount of damages, if there was error in injecting into the case an improper element of damages: *Gray's Harbor Boom Co.*

v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

On the trial of actions for the condemnation of separate tracts of land held by different owners consolidated for convenience, in which separate verdicts for the damages were to be rendered, it is error to treat the tracts involved as one tract in the instructions to the jury; and the value of the land taken in each action, and the damage to lands not taken, must be separately determined: *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940.

§ 927.

Where, in proceedings by a railroad company to condemn the right to cross street railway tracks, the court determined that there was no present necessity for safety devices, it is improvident and error to order that the petitioner, or junior road, should pay the cost of safety appliances that might be required in the future by the city or any lawful authority: *Chicago, M. & St. P. R. Co. v. Tacoma R. & Power Co.*, 53 Wash. 682, 102 Pac. 778.

Under constitution, article 1, section 10, requiring full compensation for private property condemned, the award of damages in eminent domain proceedings draws interest from the date of the rendition of the verdict to the time of entry of the judgment, where the owners, remaining in possession of the premises, received no rents or profits and were unable to rent the property because of the award: *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384.

As to right to interest as part of the compensation allowed, see note in 15 Ann. Cas. 108.

After an award of damages in eminent domain, judgment need not be entered immediately, but the petitioner has a reasonable time within which to elect whether to abandon the proceedings or appropriate the property: *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384.

As to the right of land owner to damages upon voluntary discontinuance of eminent domain proceedings, see note in Ann. Cas. 1912B, 944.

Where a lessee intervenes, a specific sum awarded to the tenant in possession as the value of his leasehold may properly be ordered paid to him: *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853.

Where a railroad company appropriated land for right of way and terminal purposes, but devoted the same to other purposes, the final judgment in the condemnation proceedings is not *res judicata* nor a bar to an action by the former owner to recover the lands, where his complaint alleges that the lands were being devoted by the railroad company to a private use not alleged or adjudged to be public in the condemnation proceedings, since the cause of action is consistent with the judgment: *Neitzel v.*

Spokane International R. Co., 65 Wash. 100, 38 L. R. A., N. S., 522, 117 Pac. 864.

Under section 8740, authorizing a railway company to condemn land for its right of way and for yards, grounds, docks, and warehouses required for receiving, delivery, storage and handling of freight, and section 927 providing that the decree shall vest the legal title in the corporation for corporate purposes, the fee simple title does not vest in the corporation, but it acquires only such qualified title or interest as it needed for its corporate purposes constituting a public use; and devotion of the same to a private purpose is an abandonment which calls for an explanation to avoid a reversion: *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 38 L. R. A., N. S., 522, 117 Pac. 864.

As to a taking under a mere mask of its being for a public use, see note in 22 L. R. A., N. S., 77.

The judgment in condemnation proceedings concludes the parties and their privies as to all matters which were put in issue: *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13.

In condemnation proceedings, when all persons interested in or claiming title to the land were duly served, and the true owners defaulted, and a trial of the issues was had between the relator and certain claimants, the relator is not charged with errors in determining who were the parties entitled to the award, and an award to such claimants and a decree adjudging that they are the true owners of the land is not void as to the relator, who acquired title to the land upon payment of the award to the clerk of the court, as provided by section 929: *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

The final decree in condemnation proceedings effects an involuntary sale of the land, and a subsequent deed by the owner conveys nothing, since the title was divested by the payment of the award and the subsequent deed did not operate as an assignment of the award, where it contained no apt words of assignment: *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

§ 930.

Where, in condemnation proceedings, the railway company failed to make a mortgagee and lien claimants parties defendant, and they failed to come in voluntarily under this section and claim an interest in the award of damages, their liens against the property were not affected by an award of damages for the full value of the land, paid into court; but they have the same rights in equity against the fund representing the land as they had against the land, and as though they had been claimants under the statute; hence the railway company, having paid full value, had an equitable right, irrespective of statute, to be protected against the liens through proper control of the funds

in court; and it was error to order the fund paid to the owners without discharge of the liens, against objection by the company: *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853.

As to notice to land owner being necessary, see note in *Ann. Cas.* 1913A, 1256.

As to tenants and others as contemplated as well as land owners in the requirements as to notice, see note in *Ann. Cas.* 1912A, 316.

§ 931.

APPEAL AND REVIEW.—The award of a jury in a condemnation proceeding well within the extremes of conflicting evidence after a view of the premises is conclusive on appeal: *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814.

Under the rule that appeal does not lie from an order adjudging a public use in condemnation proceedings, no appeal can be taken from an order refusing to vacate an adjudication of a public use, since a review of the question of public necessity can only be obtained by certiorari: *North Coast R. Co. v. Gentry*, 58 Wash. 80, 107 Pac. 1059.

As to appealable judgments and orders in eminent domain proceedings, see note in 16 *Ann. Cas.* 1004.

There being a remedy by appeal, certiorari does not lie to review an order adjudging a public use for the condemnation of a street; and the adequacy of the remedy by appeal from the award of damages is not affected by the fact that, during the delay, the city may start construction which will interfere with plaintiff's use of the property: *State ex rel. Bremer v. Superior Court*, 68 Wash. 51, 122 Pac. 614.

Upon certiorari to review a judgment in a proceeding by one public service corporation to condemn the lands of another, as having a prior right thereto, objections filed by leave of the supreme court, by a municipal corporation claiming rights in the property and that neither party is a public service corporation, will not be considered by the supreme court: *State ex rel. Cascade Public Service Corp. v. Superior Court*, 53 Wash. 321, 101 Pac. 1094.

On certiorari to review an adjudication of public use and necessity, objection cannot be made to the setting of the case for trial on the subject of damages: *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200.

Error in sustaining a demurrer to a complaint in intervention in condemnation proceedings can only be reviewed by a timely application for a writ of certiorari: *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

Under this section, limiting the right to appeal in proceedings to condemn land to the question of the justness and propriety of the amount of the damages awarded, an

intervening public service corporation, claiming a prior public use, whose petition in intervention was dismissed upon the sustaining of a demurrer thereto, occupies the same position as an original party, and is not entitled to prosecute an appeal from the judgment of dismissal before any award of damages, either under the eminent domain act, or the general appeal act, its remedy being by writ of certiorari: *Olympia Light & Power Co. v. Tumwater Power & Water Co.*, 55 Wash. 392, 104 Pac. 778.

Appeal or writ of certiorari in condemnation proceedings must be taken within thirty days, and the pendency of an appeal is no excuse for failure to apply for a writ of certiorari: *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815.

Upon appeal from an award of damages in a condemnation proceeding, only errors going to the propriety or justness of the award can be reviewed: *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031.

Under the constitutional provision prohibiting the taking of private property without just compensation being first made or paid into court, costs of an appeal, successfully prosecuted by the petitioner from an award of damages, cannot be taxed against the land owner, on remanding the case for a retrial to determine the proper damages, since the petitioner must pay all costs of the proceedings to ascertain the damages: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

A jury's award of damages in a condemnation case will not be disturbed on appeal, on conflicting evidence of values, where it is supported by substantial evidence, notwithstanding this section, providing that an appeal presents the justness of the award: *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*, 65 Wash. 402, 118 Pac. 318.

On appeal from a judgment awarding to claimants the money deposited for the land condemned, service of the notice of appeal need only be made upon the parties appearing and claiming the deposit: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

The supreme court will not substitute its judgment for that of the jury as to the damages awarded in condemnation, especially where the jury viewed the property: *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940.

§ 939.

In an action for trespass in cutting standing timber, treble damages should be awarded as provided by this section, where there was no claim by defendant, pursuant to section 940, that the trespass was casual or involuntary, and the jury found specially that the defendant had no probable cause to believe that the land was its own, and might, by the exercise of ordinary care, have ascertained that it belonged to the plaintiff:

Northern Pac. R. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

As to measure of damages for trespass where the injury was unintentional, see note in 54 Am. St. Rep. 451.

An action for the wrongful and willful cutting of timber on the land of another, the complaint praying for treble damages, is an action in tort, under this section, upon which treble damages may be awarded: *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453.

As to the recovery of damages as for tort under the law of the place where, see note in 91 Am. St. Rep. 726.

Upon trespass for cutting and carrying away timber, and for altering the course of a river, this section allows treble damages only for the cutting and removal of the timber: *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash. 559, 111 Pac. 774.

Under this and the next section, giving treble damages for cutting or carrying off trees or timber without lawful authority, unless the trespass was casual or involuntary, a verdict for single damages, upon an unsupported finding that the trespass was casual or involuntary, will not be disturbed on appeal, where the evidence showed that the cutting was authorized by the plaintiff's superintendent who requested an accurate account of all timber cut, since it warranted a finding that it was not cut without lawful authority: *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash. 559, 111 Pac. 774.

Under this section, the owner of city lots may recover treble damages for the cutting of trees in an abutting street and alley, whether as owner of the lots or as owner of the fee in the street, since the fee to the street rests in the owner of the abutting property: *Simons v. Wilson*, 61 Wash. 574, 112 Pac. 653.

In an action for damages for cutting timber on the defendant's land, judgment is properly directed for plaintiff where its title indisputably appears and defendant cut the timber without plaintiff's consent: *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453.

This and the next section, imposing treble damages for cutting and removing any timber "on the land of another person" unless the trespass was "casual or involuntary" or the defendant had "probable cause to believe that the land was his own," has no application where the owner of the fee cut and

removed timber that had been reserved from the grant and belonged to another, since the statute is penal and must be strictly construed, and defendant had probable cause to believe that the land was his own, within the proviso fixing single damages: *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645.

This section, in connection with section 940, providing for single damages if the trespass be casual or involuntary, the measure of damages is treble the value of the standing timber and not its increased value after it is cut into logs, the statute being penal in its nature: *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720.

As to statutory award of treble damages for trespass in cutting timber on the plaintiff's land, see note in 1 Am. St. Rep. 497; also notes in Ann. Cas. 1912A, 919; 15 L. R. A. 612; 19 L. R. A. 656.

§ 940.

See notes to § 939.

Under this section, an interrogatory submitted to the jury as to whether defendant had reasonable cause to believe the "land" was his own is in substantial compliance with the statute, and not prejudicial error, although the defendant claimed to own only the timber and not the land: *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453.

§ 943.

A mail-carrier, whose route was over a bridge negligently destroyed by the defendant, sustains special damage for which he may maintain action, under the common law and this and the next section, where, after destruction of the bridge, he sustained losses by reason of being compelled to deliver the mail by a more circuitous route: *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 28 L. R. A., N. S., 1053, 105 Pac. 632.

The obstruction of a highway may be enjoined by one who suffers a special damage in that he uses the highway at least twice a day to go from his residence to another tract which he was farming, and the obstruction required him to use another road with worse grades and twice the distance: *Ingalls v. Eastman*, 61 Wash. 289, 112 Pac. 372.

As to interference with one's use of highway as a special damage, see note in 28 L. R. A., N. S., 1053.

§ 946-1. Houses of Prostitution to be Abated.

Whoever shall erect, establish, maintain, continue, use, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place, or the ground itself, in or upon which lewdness, assignation or prostitution is conducted, permitted or

carried on, continued or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. [L. '13, p. 391, § 1.]

§ 946-2. Actions—Temporary Injunction.

Whenever a nuisance exists, as defined in this act, the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the state of Washington upon the relation of such prosecuting attorney or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or the agent of the building or ground upon which said nuisance exists. In such action, the court or judge may upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary injunction if it shall be made to appear to the satisfaction of the court or judge that such nuisance exists. At least three days' notice in writing shall be given the defendant of the hearing of the application. Any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided. [L. '13, p. 391, § 2.]

§ 946-3. General Reputation of Place—Dismissal of Action.

In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal approved by the prosecuting attorney in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute such action to judgment, and if the action is continued more than once, upon the application of either party, any citizen of the county or the prosecuting attorney may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen who originally brought such action. [L. '13, p. 391, § 3.]

§ 946-4. Contempt—Punishment.

In case of the violation of any injunction granted under the provisions of this act, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavit, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [L. '13, p. 392, § 4.]

§ 946-5. Order of Abatement—Effect.

If the existence of the nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and may direct the sale thereof in the manner provided for the sale of chattels under execution and effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period not exceeding six months. If any person shall break and enter or use a building or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling all movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. [L. '13, p. 392, § 5.]

§ 946-6. Proceeds of Sales.

The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the person owning such property prior to said sale. [L. '13, p. 393, § 6.]

§ 946-7. Voluntary Abatement—Release.

If the owner appears and pays all costs of the proceedings, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court or judge may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property, and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this action [section] shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [L. '13, p. 393, § 7.]

§ 946-8. Penalty—Tax Lien.

Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purposes prohibited by this act, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars. The assessment of said tax shall be made by the county assessor of the county in which the nuisance exists and shall be made within three months from the date of the granting of the permanent injunction. In case the assessor fails or neglects to make said assessment the same shall be made by the sheriff of the county, and a return of said assessment shall be made to the county treasurer. Said tax may be enforced and collected in the manner prescribed

for the collection of taxes under the general revenue laws and shall be a perpetual lien upon the real property, and personal property not already sold as provided by this act, used for the purpose of maintaining said nuisance, and the payment of said tax shall not relieve the person or building from any penalties provided by law, and when collected shall go into the county general fund. [L. '13, p. 393, § 8.]

§ 947.

DESCRIPTION, EVIDENCE AND ASCERTAINMENT: See 4 Remington's Digest, "Boundaries"; *Campbell v. Seattle*, 59 Wash. 612, 110 Pac. 546; *Aiken v. Boyd*, 55 Wash. 696, 104 Pac. 1101; *Davies v. Wickstrom*, 56 Wash. 154, 134 Am. St. Rep. 1100, 105 Pac. 454; *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084; *Ouellette v. Olympia Jim*, 60 Wash. 562, 111 Pac. 700; *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252; *Lundell v. Allen & Nelson Mill Co.*, 57 Wash. 150, 106 Pac. 626.

Where a surveyor was employed to establish the lines of a lot for the purpose of erecting thereon an apartment house, and such a house, not an expensive one of its kind, was erected in reliance on the survey, the surveyor is liable in damages for the cost of removal of the building, where, through negligence and error in the survey, the house was placed five feet in the street, and the owner was compelled to move it: *Taft v. Rutherford*, 66 Wash. 256, Ann. Cas. 1912C, 522, 38 L. R. A., N. S., 1043, 119 Pac. 740.

Where a surveyor was employed to make an accurate survey of a lot for the purpose of erecting thereon an apartment house, he cannot escape liability for negligence by showing that the survey was not guaranteed and that it was customary to give a certificate of accuracy upon the payment of a larger fee than he was paid: *Taft v. Rutherford*, 66 Wash. 256, Ann. Cas. 1912C, 522, 38 L. R. A., N. S., 1043, 119 Pac. 740.

In an action against a surveyor for damages from an erroneous survey of a lot, negligence is shown by evidence that the survey was wrong and that the parking strip was overlooked or the figures on the chain misread: *Taft v. Rutherford*, 66 Wash. 256, Ann. Cas. 1912C, 522, 38 L. R. A., N. S., 1043, 119 Pac. 740.

As to proximate and remote consequences of defendant's act bringing injury to the plaintiff, see note in 36 Am. St. Rep. 807.

As to liability of surveyor for errors or mistakes, see note in 38 L. R. A., N. S., 1043.

A practical location of a boundary line is not shown by mere notice that an adjoining owner made a private survey to establish the correct boundary, without proof that it was accepted or agreed to or that improvements were made with reference thereto: *Hruby v. Lonseth*, 63 Wash. 589, 116 Pac. 26.

The grantee, first in time, of a portion of a tract set off by metes and bounds, without reference to other conveyances, is not required to yield any portion of his land to satisfy a deficiency in a subsequent overlapping grant from the common grantor, the rule of apportioning excess or deficiency having no application: *Hruby v. Lonseth*, 63 Wash. 589, 116 Pac. 26.

As to controlling calls in surveys in connection with boundary suits, see notes in 22 Am. St. Rep. 34 and 129 Am. St. Rep. 1005.

Upon a dispute as to the true location of a line between two lots, plaintiffs failed to sustain the burden of proof and are estopped to assert title to a strip two and forty-four hundredths feet wide outside of their fence, where it appears that they built a fence upon what they supposed was the true line and maintained the same and made no claim to the additional strip for thirteen years, and defendants bought the adjoining lot supposing the fence to be on the line and held possession for more than ten years; there also being evidence on the part of defendants that the fence was set on the line marked by the original stakes, and was pointed out as the line by the common grantor: *Riphey v. Harrison*, 66 Wash. 109, 119 Pac. 178.

Practical or agreed location of a boundary line results where a fence on the supposed boundary was pointed out to the vendee, who took possession and made valuable improvements close to the line without any protest upon the part of the vendor, and the same was acquiesced in for seventeen years: *Windsor v. Sarsfield*, 66 Wash. 576, 119 Pac. 1112.

As to the effect of agreement or acquiescence upon the conclusiveness of boundaries, see note in 110 Am. St. Rep. 679.

Where the northwest corner of a plat is eight and one-quarter feet south of the government subdivision and the northeast corner is twenty-one and forty-four hundredths feet south of the same line, the true north line of the townsite is the north line of the north tier of blocks as actually marked on the plat and not the government subdivision line: *Goldbach v. Gaines*, 67 Wash. 260, 121 Pac. 61.

As to map as affecting description, see note in 13 L. R. A. 142.

It cannot be claimed that there was an agreed location of a boundary along a blazed line, where one of the parties refused to build a fence thereon until it was surveyed, and the other did not know exactly

where the line was and agreed that the line was subject to survey: *Goldbach v. Gaines*, 67 Wash. 260, 121 Pac. 61.

As to a boundary established by agreement, see notes in 1 L. R. A. 214 and 522. See, also, note in 4 L. R. A. 643.

Plaintiff's evidence that he, not being a surveyor, established a disputed center line of a section by measuring forty chains east of the southwest corner of the section, is insufficient to sustain a verdict finding that to be the true location of the line, where the true quarter corner was established in accordance with the rules for relocating lost corners on a straight line between and equidistant from the section corners, by an experienced and disinterested surveyor, who made an accurate survey and found the south line of the section to exceed one mile by five hundred and twenty-eight feet: *Koenig v. Whatcom Falls Mill Co.*, 67 Wash. 632, 122 Pac. 16.

The evidence sufficiently shows that a quarter corner was not located on a straight line between the section corners, where a witness testified that he found and identified the original stake out of a true line, which was corroborated by the fact that a line fence was constructed to it by defendant, and the inclosure was farmed for twelve years by others, without objection by defendant or any effort on his part to correct the alleged mistake, although the land was being bought and sold: *Hale v. Ball*, 70 Wash. 435, 126 Pac. 942.

An obliterated corner must be restored at its original location if ascertained by competent evidence: *Hale v. Ball*, 70 Wash. 435, 126 Pac. 942.

The court will not appoint a commission to establish a lost corner, under this section, merely because the stake was obliterated; and where the corner was not lost or uncertain eighteen years before, at which time a fence was built to it, and nothing had since been done to question the location, the court cannot say that the corner is lost, since evidence of its location was not overcome by better evidence: *Hale v. Ball*, 70 Wash. 435, 126 Pac. 942.

As to the establishing of lost corners, see note in 22 Am. St. Rep. 34.

Under this section, the appointment of commissioners is discretionary, and not subject to review on appeal: *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367.

Under this section, only one commissioner may be appointed to establish a disputed boundary: *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367.

§ 955.

TENDER OR DEPOSIT OF AMOUNT OF TAXES OR PURCHASE MONEY AS CONDITION PRECEDENT: See 4 Remington's Digest, "Taxation," § 161 et seq.; *Holly v. Munro*, 55 Wash. 311, 133 Am. St. Rep. 1028, 104 Pac. 508; *Gould v. Know*,

53 Wash. 248, 101 Pac. 886; *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459; *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829; *Gould v. White*, 54 Wash. 394, 103 Pac. 460; *Thompson v. Emerson*, 55 Wash. 138, 104 Pac. 201; *Craver v. Mossbach*, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016; *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

PLEADING AND EVIDENCE: See 4 Remington's Digest "Taxation," §§ 169-171; *French v. Taylor*, 54 Wash. 624, 104 Pac. 125; *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 Pac. 327; *Worthington v. La Violette*, 60 Wash. 525, 111 Pac. 784; *Felsinger v. Quinn*, 62 Wash. 183, 113 Pac. 275; *Craver v. Mossbach*, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016; *Gleason v. Owens*, 53 Wash. 483, 132 Am. St. Rep. 1087, 17 Ann. Cas. 819, 102 Pac. 425.

A tender of taxes, made by statute a prerequisite to a suit to set aside a tax sale, cannot be excused by an allegation that the county had proclaimed and stated that any tender on account of taxes for the year in question would be refused, no officer of the county having any authority to make any such waiver: *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

As to the effect of tender of taxes due as a condition of relief from invalid tax sale, see note in 10 L. R. A. 296.

§ 967.

See notes to § 183.

§ 976.

Under this and the next section, providing for determining the questions of suretyship as between defendants primarily and secondarily liable, and section 3582, defining a person "primarily liable to be one who is absolutely required to pay the same," debtors who are expressly made principal contractors cannot avail themselves of the statute to determine equities between themselves, as against objection by the plaintiff: *First National Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038.

As to primary liability under the law of principal and surety, see note in 70 Am. St. Rep. 443.

§ 982.

GROUND—CRUELTY.—A divorce is warranted on the ground of cruelty and personal indignities rendering life burdensome, where the husband, in the presence of others and of grown children, continually charged his wife with unchastity and denied the authorship of his children: *Morris v. Morris*, 57 Wash. 465, 107 Pac. 186.

As to charging a wife with unchastity regarded in the aspect of cruelty for which divorce will be decreed, see note in 65 Am.

St. Rep. 80. See, also, note in 18 L. R. A., N. S., 300.

A husband is guilty of cruelty warranting a divorce, where it appears that he had community property of the value of ten thousand dollars to twelve thousand dollars upon which he could have borrowed funds, that when their first child was born he placed his wife in a hospital as a charity patient, and on her parents removing her to a private hospital, he made no effort to see her for five weeks, no explanation of his conduct was made, and there was also want of proper support: *Gould v. Gould*, 63 Wash. 484, 115 Pac. 1041.

As to failure to support considered as grounds for divorce, see note in 119 Am. St. Rep. 634; also note in 138 Am. St. Rep. 164.

A divorce on the ground of cruelty on the part of the wife is justified where it appears that she refused to cohabit with the plaintiff, was guilty of fraud and deceit in securing a marriage without intent to cohabit, and brought an unfounded charge of adultery against him: *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

As to refusal to cohabit as cruelty calling for divorce, see note in 14 L. R. A. 685.

INABILITY TO LIVE TOGETHER.—This section does not authorize a divorce merely because the parties cannot live together; and it is error to grant a divorce to a husband upon evidence of incompatibility, quarrels and irritation for which he was as much to blame as his wife, and no other sufficient cause appears: *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837.

As to the claim that the parties cannot live together, wherefore divorce is asked, see note in 135 Am. St. Rep. 967.

A complaint for a divorce on the ground of personal indignities rendering life burdensome states a cause of action when it alleges that the husband applied profane and vulgar language to the wife and was guilty of cruelty consisting of physical violence: *Briggs v. Briggs*, 56 Wash. 580, 106 Pac. 126.

A decree for a divorce, where the evidence is not brought up on appeal, is supported under a liberal construction of findings to the effect that the condition of the home life of the parties has been such as to cause an utter estrangement and loss of love and affection, without fault on the plaintiff's part, and that longer living together is a source of great mental worry and anguish to the plaintiff, and the parties can no longer live together, the same being in effect a finding of personal indignities rendering life burdensome: *Bloom v. Bloom*, 57 Wash. 23, 135 Am. St. Rep. 965, 106 Pac. 197.

A divorce sought by a husband on the ground of indignities is properly denied where it appears that the wife's impatient and bitter remarks made in the presence of

the children, which constitute the only substantial charge against her, were provoked by the conduct of the husband, who had deserted his wife and family: *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

Under this section, a divorce should not be granted against a wife who is not at fault and who is willing to attempt to continue the marriage relation, simply because it appears that the parties can no longer live together, since there must be some other sufficient cause: *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

As to personal indignities rendering life burdensome, as cause for divorce, see 18 L. R. A., N. S., 308.

FAILURE TO SUPPORT.—Under this section, abandonment for one year, and neglect or refusal of the husband to make suitable provisions for his family, are in no way connected, and nonsupport need not have continued for one year prior to the commencement of the action; but the wife is entitled to divorce as a matter of law where, without fault on her part, nonsupport has continued for such a reasonable time as to show a settled intention to permanently refuse to support, and three months is sufficient: *Garland v. Garland*, 66 Wash. 226, 119 Pac. 386.

As to how failure to support is to be considered when urged as a ground for divorce, see note in 29 L. R. A., N. S., 618.

DEFENSES.—A divorce for misconduct of the husband should not be denied a wife because of indiscreet or disgraceful acts committed by the wife in the husband's presence and with his approval: *Briggs v. Briggs*, 56 Wash. 580, 106 Pac. 126.

As to the right to recrimination by way of defense in divorce, see note in 86 Am. St. Rep. 333. Also note in 6 Ann. Cas. 171.

WEIGHT AND SUFFICIENCY OF EVIDENCE.—Findings that there was no cruelty warranting a divorce are sustained, where it appears that quarrels and bickerings prompted the wife to consult attorneys about a divorce a few days after the marriage, that she left him several times and returned, and commenced the action within two and a half months after the marriage, disappointment as to property and ill-feeling between the husband and his wife's parents appearing to be the principal cause of their trouble: *Wilhelm v. Wilhelm*, 57 Wash. 157, 106 Pac. 627.

As to what is cruelty within contemplation of divorce law, see note in 65 Am. St. Rep. 69.

A decree of divorce sought on the ground of cruelty and personal indignities is warranted where it appears that the defendant manifested a violent temper against the plaintiff, frequently using profane language, that he stated to her and to neighbors that she was not wanted, and that he neglected

her while she was sick in bed: *Taylor v. Taylor*, 59 Wash. 306, 109 Pac. 1019.

As to personal violence as essential to cruelty as ground for divorce, see note in 9 Ann. Cas. 1090.

An abandonment of a wife is shown where, although the parties continued to live in the same house, the husband refused to treat her as his wife, or converse with her, or allow her credit for necessities, and insisted upon her getting a divorce: *Herrett v. Herrett*, 60 Wash. 607, 111 Pac. 867.

As to what, in certain cases, may be regarded as abandonment, see notes in 119 Am. St. Rep. 618, and 138 Am. St. Rep. 147.

In the absence of any denial, evidence of an adulterous disposition, coupled with opportunities to commit the act, and circumstances showing guilt, are sufficient to sustain a charge of adultery in an action for divorce: *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292.

As to the admissibility in divorce suits of evidence to show adulterous disposition of the defendant, see note in 16 Ann. Cas. 1118.

It is not error to allow a complaint for a divorce to be amended to set up a cause of action for the annulment of the marriage: *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915.

As to amendment stating new cause of action, the general rule and exceptions, see note in 51 Am. St. Rep. 414.

An action for a divorce and the division of community property, seeking also the annulment of a foreign divorce fraudulently obtained by the defendant, constitutes a collateral attack on such decree, the annulment of which is a mere incident to the primary purpose of the action: *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945.

§ 983.

Under this section a divorced woman who remarries within six months, while incapacitated, may maintain the action where she did not know that the marriage was illegal, and was less in the wrong than the husband, who knew the facts as to the divorce: *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915.

Upon the annulment of a void marriage, it is not an abuse of discretion to award to the plaintiff property which belonged to her prior to marriage, and upon which she had paid all taxes, where the improvements placed thereon by the defendant added little to its value, and he was paid for the greater part of his work, and had abused the plaintiff and failed to properly provide for her: *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915.

As to property rights arising out of void marriage, see note in 68 Am. St. Rep. 376.

§ 984.

This section has no application to actions for separate maintenance: *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 25 L. R. A., N. S., 387, 104 Pac. 771.

§ 986.

Plaintiff is not entitled to have a cross-complaint for a divorce made more definite and certain as to the times and places at which and with whom adultery was committed, where no direct charge of adultery is made, although adultery might be inferred from the facts stated: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

Where a complaint for divorce shows jurisdictional residence of the plaintiff, defendant's cross-complaint need not allege his residence in the county, nor in the state for one year preceding the commencement of the action, in order to give jurisdiction to grant a divorce upon the cross-complaint: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

The evidence shows an abandonment of the marriage relation and of the husband's right to fix the domicile of his wife, which she may thereupon establish for herself, where it appears that they had been separated for several years and lived in different counties, the husband had leased his home for a term of five years to a widow in consideration of "boarding and lodging," had stated that he would have nothing to do with his wife, and did not visit her during her last sickness or attend her burial: *Buchholz v. Buchholz*, 63 Wash. 213, Ann. Cas. 1912D, 395, 115 Pac. 88.

§ 988.

TEMPORARY ALLOWANCE.—An order for alimony pendente lite and suit money cannot be made, independently of statutory provisions, in an action brought for separate maintenance, where the fact of marriage is denied and the defendant alleges inability to pay: *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 25 L. R. A., N. S., 387, 104 Pac. 771.

As to marriage as a prerequisite to alimony, see note in 68 Am. St. Rep. 375.

As to power of courts to create lien for alimony on annulment of marriage, see note in 102 Am. St. Rep. 710.

An allowance of twenty-five dollars per month alimony and one hundred and fifty dollars attorneys' fees is not unreasonable, where it appears that defendant was thirty-six years of age, in good health, engaged in the insurance business, and capable of earning considerable money: *Cooper v. Cooper*, 64 Wash. 219, 116 Pac. 673.

This section does not give the court jurisdiction to determine the questions of compensation arising between the parties and their attorneys; but section 474, leaving such agreements to the parties in civil

actions, applies to actions for divorce; hence, in fixing the attorney's fee in divorce, the court considers the circumstances and conditions of the defendant, irrespective of the wife's agreement with her counsel: *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

As to the husband's liability for the wife's attorney fees in divorce suit, see note in 15 Ann. Cas. 21.

§ 989.

COUNSEL FEES AND EXPENSES OF WIFE.—Where a default judgment of divorce was secured by a wife through fraud, and all the property was awarded to her and in her possession, and it does not appear that the husband has any means, it is error to require the husband to pay fifty dollars suit money as a condition precedent to the prosecution of a petition to vacate the decree: *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135.

Allowance of costs and attorneys' fees to a wife in an action for divorce is within the discretion of the trial court, although divorce be granted to the husband on his cross-complaint, and will not be disturbed on appeal, where there is no suggestion of abuse of discretion: *Van Gelder v. Van Gelder*, 61 Wash. 146, 112 Pac. 86.

As to the court's discretion to allow the wife suit money in divorce cases, see note in 36 L. R. A. 1001.

An attorney's fee of seventy-five dollars in a divorce case is not unreasonably inadequate: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

On motion for a new trial in a divorce case, the court has jurisdiction to reopen the case and modify the decree by requiring payment of costs and a further allowance for attorneys' fees: *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

The allowance of attorneys' fees to the wife in a divorce case is within the sound discretion of the trial court; and no abuse is shown by the allowance of five hundred dollars additional, upon denying a motion for a new trial, the preliminary allowance having been two hundred and fifty dollars: *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

Upon granting a divorce on the ground of cruelty on the part of the wife, who secured the marriage by deceit, allowances to the wife of six hundred dollars alimony, one hundred and twenty-five dollars suit money, and seven hundred and fifty dollars attorneys' fees and costs, is an ample provision, where there was no community property and the husband, a retired farmer in comfortable circumstances, had already given her one thousand dollars: *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

In view of the liberal provisions of the code for suit money in actions for divorce, the husband is not liable for attorneys' fees

incurred by the wife in instituting a divorce which was settled and dismissed without the attorney's consent: *Humphries v. Cooper*, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606.

The wife is liable to attorneys employed by her to prosecute a divorce suit which was settled and dismissed without their consent: *Humphries v. Cooper*, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606.

As to a husband's liability on his wife's contract for attorney fees in divorce suit, see 13 L. R. A., N. S., 244.

ALIMONY AND DISPOSITION OF PROPERTY—SUFFICIENCY OF ALLEGATIONS AND PRAYERS IN PLEADINGS.—The court is without jurisdiction to make any disposition of real property of the parties not mentioned in the divorce proceedings: *Carpenter v. Brackett*, 57 Wash. 460, 107 Pac. 359.

As to right to join prayer for return of plaintiff's property with prayer for divorce, see note in 29 L. R. A., N. S., 819.

In a divorce action, commenced in the county where the plaintiff resides, the court has jurisdiction to dispose of real property situated in another county, where it is described in the complaint, under this section; and section 204, providing that actions to recover real estate shall be brought in the county where the subject is situated, does not apply: *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387.

As to extraterritorial effect of decrees of divorce, see note in 83 Am. St. Rep. 616; also note in 94 Am. St. Rep. 553.

As to effect of divorce in another state upon property rights generally, see note in 59 L. R. A. 183.

After awarding a wife a divorce the court has no jurisdiction in the divorce action to amend its decree so as to be a final determination between her and her counsel as to his agreed compensation, although when the parties are properly before the court it can determine the validity and amount of the attorney's lien upon the judgment: *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

As to power of the court to open or vacate divorce decrees, see note in 60 Am. St. Rep. 658.

As to the power of the court to decree alimony after the granting of the divorce, see note in 88 Am. Dec. 657.

In such a case, the attorney not being a party, and having no adequate remedy at law or by appeal, prohibition lies to prevent the amendment of the divorce decree in so far as it affects the attorney's right to compensation: *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

It is error to allow seven hundred and fifty dollars as alimony out of the husband's estate valued at ten thousand dollars, upon granting the husband's prayer for a divorce, where the wife had estate of the

value of two thousand five hundred dollars, and there was no community property for division, and she had inveigled the husband into the marriage relation for the purpose of gaining a share of his property, had brought unfounded charges of cruelty in order to obtain a divorce, and was guilty of cruelty and indignities rendering the husband's life burdensome: *Van Gelder v. Van Gelder*, 61 Wash. 146, 112 Pac. 86.

As to the allowance of alimony, in its general features, see notes in 1 L. R. A. 320, and 3 L. R. A. 349.

A decree of divorce distributing the property will be presumed to settle the rights of the parties, and precludes the maintenance by the wife of another action against the husband for communicating a venereal disease during coverture, affecting her health and physical condition, which was, or should have been, considered in granting the divorce: *Schultz v. Christopher*, 65 Wash. 496, 38 L. R. A., N. S., 780, 118 Pac. 629.

As to the doctrine of *res judicata* as it affects issues in action on which the judgment is silent, see note in 6 Ann. Cas. 104.

As to actions between husband and wife after divorce, see note in 38 L. R. A. 509.

In granting a divorce and making a division of real estate, it is immaterial whether the only property of the parties was separate estate of the husband: *Leaser v. Leaser*, 53 Wash. 135, 101 Pac. 705.

As to the effect of a divorce decree upon property rights, see note in 65 Am. Dec. 358; also note in 11 L. R. A. 790.

In granting a divorce to a wife on the ground of cruelty, leaving her with five minor children to support (four by a former marriage), it is an abuse of discretion to award her but three hundred and fifty dollars out of property of the value of four thousand six hundred dollars, and ten dollars per month for the support of an infant child, where her husband was an able-bodied man earning from three dollars and a half to five dollars per day eleven months in the year; and the decree will be modified on appeal so as to award her the whole of the property: *Leaser v. Leaser*, 53 Wash. 135, 101 Pac. 705.

As to husband's prospects as basis for alimony, see note in 4 L. R. A., N. S., 909.

A money judgment in lieu of alimony and costs upon granting a divorce does not have the effect of a general judgment and is not a lien upon real estate awarded to the husband as his separate property free and clear of all claims of the wife, since there is no lien for alimony in the absence of statute or express provision in the judgment therefor: *Seattle Brewing & Malting Co. v. Talley*, 59 Wash. 168, 109 Pac. 600.

As to the power of the court to create and enforce liens for alimony, see note in 102 Am. St. Rep. 700. See, also, notes in 9 Ann. Cas. 90, and 18 Ann. Cas. 565.

It is discretionary in granting a divorce for the trial court to award all of the property to the husband, subject to the payment of reasonable alimony: *Brojna v. Brojna*, 67 Wash. 687, 122 Pac. 1.

Five hundred dollars alimony and three hundred and eighty-five dollars suit money is not an excessive allowance where the husband had several thousand dollars' worth of property, and the trial occupied several days' time: *Taylor v. Taylor*, 59 Wash. 306, 109 Pac. 1019.

As to the proportion of the husband's estate to be awarded the wife as alimony, see note in Ann. Cas. 1913A, 803.

Where the pleadings in a divorce action submitted specified community property to the jurisdiction of the court, praying that an equitable share be apportioned to the wife, a decree, based on findings in favor of the wife, awarding her more than one-half in value of all the property, was intended to set apart such equitable share, and left the balance standing in the husband's name as his share, although not mentioned in the decree, free from any claim of the wife; and the fact that she joined in a mortgage thereof pending appeal is not evidence that she retained an interest therein: *Nelson v. McPhee*, 59 Wash. 103, 109 Pac. 305.

As to the effect upon community property of decree annulling marriage, see note in 36 L. R. A., N. S., 845.

As to effect of divorce decree upon homestead, see note in 23 L. R. A. 239.

A wife to whom property is awarded on a divorce cannot appeal from that part of a decree awarding the divorce, without also appealing from the award of the property to her, in view of this section, since section 996 only authorizes an appeal from a disposition of the property without appeal from the decree of divorce: *Wilkinson v. Wilkinson*, 63 Wash. 126, 114 Pac. 915.

As to the right of appeal from a final decree of divorce, see note in 13 Ann. Cas. 837.

Where the interest of a deceased wife was bid in and purchased at administrator's sale, in contemplation of marriage with the widower, and considering his interest in the property, and after marriage of the parties, other liens accrued against the property, it is not an abuse of discretion, on granting the husband a divorce, to award him part of the real property, the rule as to the wife's separate property acquired before marriage not applying to the peculiar circumstances of the case: *Mullin v. Mullin*, 65 Wash. 532, 118 Pac. 638.

As to the effect of divorce upon property held by the entireties, see note in 30 L. R. A. 333.

A motion to vacate a decree of divorce in so far as it disposes of property rights, made on the ground of mistake and excusable neglect in presenting the case, is properly denied where, after taking evidence

and a full hearing, it appears that the former judgment was right and the moving party failed to substantiate her claims, any irregularities in the former proceeding being thereby cured: *Scammon v. Scammon*, 66 Wash. 217, 119 Pac. 383.

Where the property cannot be divided without loss, it is proper to award it to the husband, with alimony to the wife: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

Where a divorce obtained by a husband made no mention of community property, the title thereto vests in the parties as tenants in common; and the wife has a right of action for a division or in lieu thereof some provision for maintenance: *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945.

A decree of divorce making no mention of community property is not an assertion of an adverse claim thereto; and as the husband holds possession as a tenant in common, limitations do not run against the wife's right of action for a division: *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945.

A decree of divorce will not be vacated, after the remarriage of the plaintiff, because a large amount of community property had been concealed from the court and was not disposed of, since the same becomes common property, and can be recovered in a proper action: *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

CUSTODY OF CHILDREN.—An order awarding the custody of a daughter fourteen years of age to the mother, upon a divorce, will not be disturbed when in harmony with the welfare of the child: *Wingard v. Wingard*, 56 Wash. 354, 105 Pac. 833.

As to custody and support of children after the divorce of their parents, see note in 6 L. R. A. 682.

A judgment of divorce on the ground of cruelty of the husband, awarding the custody of a child, eight years old, to grandparents, with whom the wife was residing, should be modified so as to give the husband custody of the child where, nine months after the decree, the wife was adjudged insane and sent to an asylum, and the evidence shows that the husband had a suitable home and family and was in every way a proper person to have the custody of the child: *Morin v. Morin*, 66 Wash. 312, 37 L. R. A., N. S., 585, 119 Pac. 745.

Where there is doubt as to the character of the wife, the court may award the custody of the children to her for a limited period only, subject to future revision: *Brojna v. Brojna*, 67 Wash. 687, 122 Pac. 1.

Where a decree of divorce awarded the custody of one child to the wife and of one child to the husband, with the right to both parties to visit the children, and after the husband had sent his child outside of the state to its paternal grandparents, the

court denied an application to modify the decree, but confirmed it, the original decree will not be interpreted as requiring that the child be kept within the jurisdiction of the court: *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594.

Where the wife is denied the right to visit the child as provided in the decree, by reason of the hostility of the paternal grandparents having custody of the child, she may apply to the court of first instance for a modification of the decree or for a rule against the defendant for contempt; but the right to visit a child is not absolute and must yield to the welfare of the child: *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594.

The court granting a divorce and awarding periodical alimony for the support of a child retains jurisdiction to increase the future allowances, as to both the persons and the subject matter, although both parties have since left the state, on service of notice on the defendant and the attorneys of record, no original process being necessary: *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673.

SEPARATE MAINTENANCE.—The evidence justifies a decree for separate maintenance, although the husband allowed the wife to live in the same house and provided groceries and paid laundry and doctor's bills, where he had abandoned her, refused her credit for clothing, and by his treatment sought to force her to obtain a divorce: *Herrett v. Herrett*, 60 Wash. 607, 111 Pac. 867.

Separate maintenance in the sum of fifty dollars per month, two hundred and twenty dollars for money borrowed, and seventy-five dollars attorneys' fees, is justified, where the community property was valued at thirty thousand dollars: *Herrett v. Herrett*, 60 Wash. 607, 111 Pac. 867.

As to a wife's right of action for separate maintenance, see note in 77 Am. St. Rep. 228.

ENFORCEMENT OF ORDER OR DECREE.—Pecuniary inability is a complete defense to contempt proceedings for failure to pay alimony; and the same is established by clear and satisfactory proof, where it appears that the defendant was a dentist, with no property except office furniture and instruments used in his practice, which were subject to a mortgage indebtedness of twelve hundred dollars or fifteen hundred dollars, that his income from the date of the decree fell short of his living expenses, and he was hopelessly insolvent: *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653.

As to contempt proceedings to enforce payment of alimony, and the defense therein of inability to pay, see note in 137 Am. St. Rep. 881.

A proceeding to enforce a decree for alimony by means of notice and commitment for contempt in case of default is not an

independent contempt proceeding to be prosecuted in the name of the state, but is properly entitled in the divorce case: *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469.

The remarriage of the wife does not prevent the enforcement of a decree for alimony: *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469.

The fact that, on remarriage, the wife's husband assumed the custody and support of a child is no answer to contempt proceedings to enforce the payment of alimony awarded to the wife for such support: *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469.

As to remarriage of wife and the effect of same on award of alimony, see note in 11 Ann. Cas. 523; also note in 62 L. R. A. 965.

Where a decree of divorce set aside certain property for the benefit of children upon the prayer of the complaint asking that it be deeded in trust for them, the court lost jurisdiction to compel such conveyance where the parties remarried before conveyance and jointly petitioned for modification of the decree, the court having no jurisdiction to take control of the children in such case: *Lowe v. Lowe*, 53 Wash. 50, 101 Pac. 704.

A show cause order to enforce a decree for alimony is properly entitled in the divorce case, as the same is an equitable proceeding in aid of the court's original jurisdiction, and not a contempt proceeding to be prosecuted as a criminal case in the name of the state, under section 1054, although the order was to show cause or be adjudged in contempt: *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2.

The jurisdiction of the court in a divorce case to enforce the payment of alimony awarded for the support of children is a continuing one, without the necessity of another action to collect payments past due: *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2.

As to enforcement of decree for alimony by action at law, see notes in 3 Ann. Cas. 579, 10 Ann. Cas. 547, and 20 Ann. Cas. 1068.

FOREIGN DIVORCE.—The courts of this state will, on the principle of comity, recognize the validity of a divorce granted by the courts of a sister state, to a husband who was for three years a resident in such state, although it is based on a substituted service and the matrimonial domicile was in another state, the divorce having been granted forty years ago and the wife having had notice thereof: *Douglas v. Teller*, 53 Wash. 695, 102 Pac. 761.

As to the effect of a decree of divorce entered in another state, see note in 109 Am. St. Rep. 254.

A foreign judgment of divorce obtained on substituted service against Elizabeth D. is not void as a fraud upon the defendant, whose true name was Hannah Elizabeth

D., where there was evidence that she was commonly known by the former name: *Douglas v. Teller*, 53 Wash. 695, 102 Pac. 761.

As to the validity of a foreign divorce as dependent upon jurisdiction over the defendant, see note in 5 Ann. Cas. 26.

§ 991.

OPERATION AND EFFECT OF DIVORCE—RIGHT TO MARRY: See 4 Remington's Digest, "Divorce," § 108; *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45.

§ 996.

See notes to § 989.

Under this section the supreme court, on appeal by the husband from orders relating to alimony, has jurisdiction to grant suit money and attorneys' fees on the pending appeal, and before any final decree on the merits in the court below: *Gallagher v. Gallagher*, 65 Wash. 310, 118 Pac. 4.

Upon appeal by a husband of ample ability from orders for temporary alimony and suit money, the supreme court will require the payment of one hundred and fifty dollars attorneys' fees and one hundred dollars suit money to enable the wife to defend the appeal, she being without means: *Gallagher v. Gallagher*, 65 Wash. 310, 118 Pac. 4.

As to allowance of temporary alimony, or suit money, in matrimonial action pending appeal, see notes in 3 Ann. Cas. 51, and 15 Ann. Cas. 229.

An order relating to the control of the children, not appealed from within the time required by law, cannot be reviewed on appeal from a subsequent order on the subject: *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634.

An order relating to the custody of children of divorced parents will not be disturbed on appeal except for abuse of discretion and unless it is reasonably clear that the welfare of the children requires it: *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634.

On appeal by the husband from the dismissal of his divorce action, the supreme court will not allow further costs to the wife, where the trial court allowed her two thousand dollars for expenses and three thousand dollars for attorneys' fees, and she is financially able to meet additional expenses incurred: *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

Where the action of a wife for a divorce was dismissed after a full hearing and appears to be without merit, and both parties are possessed of considerable property, and there is no community property, the supreme court will not grant suit money and temporary alimony pending the appeal, since the equities must be so strong or the interests in the property so mutual as to

make it a matter of right rather than of privilege: *Gust v. Gust*, 69 Wash. 220, 124 Pac. 504.

Upon appeal from a judgment of divorce, disposing of the property rights of the parties, the superior court loses all jurisdiction, and cannot issue a writ of garnishment to enforce the judgment for costs and attorneys' fees against the husband, although he failed to file any supersedeas bond on his appeal, in view of this section: *State ex rel. Gibson v. Superior Court*, 69 Wash. 280, 124 Pac. 686.

The supreme court will not, pending appeal in a divorce case, restrain the husband from violence, in violation of an order restraining him, since adequate remedy is provided by statute: *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636.

The superior court has jurisdiction, pending appeal in a divorce case, to order the defendant to return to the stenographer employed by him the notes of the evidence so that they might be extended for the use of the plaintiff in preparing a statement of facts, in view of this section, providing that on appeals in a divorce case the superior court shall certify the evidence adduced at the trial, and section 1731, providing that notwithstanding the appeal has been perfected the superior court shall retain jurisdiction for the purpose of settlement and certifying bills of exception and statements of facts and for all purposes in so far as the cause is not affected by the appeal: *State ex rel. Griffith v. Superior Court*, 71 Wash. 386, 128 Pac. 644.

Upon appeal by the wife from a judgment denying a divorce, the appellate court will, in aid of its appellate jurisdiction, award her temporary alimony and suit money for an efficient preparation of her case (reversed on rehearing): *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636.

Under the constitution, limiting the original jurisdiction of the supreme court to special writs and to all other writs necessary and proper to the complete exercise of its appellate jurisdiction, the supreme court has no jurisdiction, pending an appeal in a divorce case, to award the wife temporary alimony, suit money and attorneys' fees for the prosecution of her appeal: *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636.

A wife in necessitous condition will be awarded temporary alimony of twenty dollars per week for the support of herself and children, with possession of the family home, and one hundred and fifty dollars suit money and attorneys' fees for prosecuting an appeal from a judgment denying a divorce, where there was evidence that the community owns property of the value of thirty thousand dollars or forty thousand dollars, which the defendant admitted was of the value of five thousand dollars, over and above all indebtedness (reversed

on rehearing): *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636.

As to temporary alimony, see note in 102 Am. St. Rep. 703.

§ 1002.

NATURE AND GROUNDS.—A writ of certiorari to review an order suspending a temporary injunction will be quashed where the suspension was to permit the institution of a condemnation suit, which was dismissed pending the hearing, since the suspension has become inoperative, and the relator can apply to the lower court for relief: *State ex rel. Sylvester v. Superior Court*, 60 Wash. 583, 111 Pac. 787.

As to right to certiorari where there is another remedy available, see note in 40 Am. St. Rep. 30; also note in 28 L. R. A., N. S., 516.

Certiorari does not lie to review an order denying a temporary injunction, since it is not reviewable on appeal unless there is a finding that the parties against whom the injunction is sought are insolvent, under section 1716, subdivision 3, and there is an adequate remedy by appeal from the final judgment or by an action at law for damages: *State ex rel. Mohr v. Superior Court*, 54 Wash. 225, 103 Pac. 17.

Certiorari does not lie to review an order for the inspection of papers, made under section 1262, since there is an adequate remedy by appeal from the final judgment: *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 28 L. R. A., N. S., 516, 106 Pac. 150.

Certiorari does not lie to review an order vacating a default judgment, since there is an adequate, though less speedy, remedy by appeal from the final judgment: *Jones v. Paul*, 56 Wash. 355, 105 Pac. 625.

A writ of certiorari does not lie to review an order that is not appealable because reviewable upon appeal from the final judgment: *Wilson v. McGillivray*, 58 Wash. 291, 108 Pac. 620.

A writ of certiorari to review the dismissal of a police officer by the civil service commission is properly quashed where the cause assigned for dismissal was sufficient: *King v. Listman*, 63 Wash. 271, 115 Pac. 93.

Certiorari does not lie to review an order denying a motion to quash a summons on the ground that service was not made in the manner prescribed by law, since the same is reviewable on appeal from the final judgment: *State ex rel. Coplen v. Superior Court*, 66 Wash. 225, 119 Pac. 383.

Certiorari does not lie to review an order denying a temporary injunction, which by statute is not appealable unless there is a finding of insolvency, the legislative intent being that such orders shall not be reviewed except on appeal from the final judgment: *State ex rel. Coombs v. Superior Court*, 69 Wash. 439, 125 Pac. 779.

The delay incident to an appeal in an election contest does not authorize a review by certiorari, or render the remedy by appeal inadequate, by reason of the fact that the term of office begins, and the period of six months for preserving the ballots expires before the appeal can be heard, since the ballots can be preserved as other documentary evidence offered and rejected at the trial; and especially in view of the statute providing for appeals in election contests: *State ex rel. Quigley v. Superior Court*, 71 Wash. 503, 129 Pac. 83.

Certiorari lies to review an order for a change of venue, since the remedy by appeal is inadequate: *State ex rel. Schwabacher Bros. & Co. v. Superior Court*, 61 Wash. 681, Ann. Cas. 1912C, 814, 112 Pac. 927.

Certiorari will not lie to review an order striking an amended complaint, as it is not subject to review except on appeal from the final judgment: *State ex rel. Mohr v. Superior Court*, 54 Wash. 225, 103 Pac. 17.

As to who may resort to certiorari, see note in 103 Am. St. Rep. 111.

PROCEEDINGS AND DETERMINATION.—As the statute fixes no time within which to apply for a writ of certiorari, by analogy, application for a writ must be made within the time for taking an appeal: *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815.

§ 1014.

NATURE AND GROUNDS IN GENERAL.—The remedy by appeal is inadequate, and mandamus lies to correct an improper change of venue, since the supreme court cannot assume that jurisdiction will be assumed in the wrong county; nor on appeal from a judgment in such county, direct a trial in the proper county: *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 133 Am. St. Rep. 1030, 104 Pac. 607.

The adequacy of the remedy by appeal is not affected by the failure of the party to avail himself thereof within the statutory period: *State ex rel. Brunn v. State Board of Medical Examiners*, 61 Wash. 623, 112 Pac. 746.

As to the definition and the requisites of the issuance of mandamus, see note in 98 Am. St. Rep. 865.

Mandamus lies to compel the trial court to enter judgment upon a verdict of not guilty, after refusal so to do: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

Where, notwithstanding a verdict of not guilty, the court refused to enter judgment for the defendant, but forfeited her bond and entered judgment against her and her sureties, the remedy by appeal is not adequate, and mandamus lies to compel vacation of the judgment and entry of proper

judgment on the verdict: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

As to mandamus to compel a judge to sign or enter a judgment, see note in 98 Am. St. Rep. 894.

Where bonds issued by a school district in excess of the constitutional limit of indebtedness were purchased by the state officers empowered to invest the school fund, mandamus will not lie to compel the state auditor to issue a warrant for such portion of the bonds as would fall within the constitutional limit, the bonds being void and attacked prior to acceptance of the issue, there being in such case no question of estoppel or good faith: *State ex rel. Zylstra v. Clausen*, 66 Wash. 324, 119 Pac. 797.

As to mandamus to aid in unlawful acts, see notes in 1 Ann. Cas. 204, and 125 Am. St. Rep. 493.

Mandamus does not lie to compel the industrial insurance commission and the attorney general to commence actions to collect delinquent assessments due the commission under the industrial insurance act of 1911, section 6604-20 of the act merely providing that the attorney general shall be the legal adviser of the commission and shall represent it in all legal proceedings, and section 6604-8 providing that delinquent assessments shall be collected by an action at law in the name of the state, since the commencement of such actions rests entirely within the discretion of the commissioners and attorney general and cannot be controlled by mandamus: *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 Pac. 987.

Mandamus lies to compel a city to levy and collect the maximum tax for its indebtedness fund and to pay into such fund the revenue belonging thereto, where for years it had wrongfully diverted the revenue belonging to such fund and made no provision for the payment of its past indebtedness: *State ex rel. Polson v. Hardcastle*, 68 Wash. 548, 124 Pac. 110.

As to mandamus to force the collection of a tax, see note in 98 Am. St. Rep. 871.

In mandamus proceedings to compel the prosecuting attorney to test the validity of an order of the school superintendent consolidating two school districts, the wisdom or policy of the order cannot be inquired into, where the same can be reviewed by appeal, since it is a collateral attack on the order and only its validity can be questioned: *State ex rel. Harris v. Ward*, 69 Wash. 342, 124 Pac. 913.

After the granting of a motion changing the venue to another county, mandamus does not lie to compel a modification of the order, changing the venue to another county, since error, if any, in the order can be reviewed on appeal from the final judgment, even if the orders were made by several judges or in several counties: *State ex rel. Furth v. Superior Court*, 71 Wash. 147, 127 Pac. 1107.

As to mandamus to prevent change of venue, see note in 2 L. R. A., N. S., 568.

Upon application to the supreme court for a writ of mandamus, the applicant has the burden of proof, if the facts are denied, and must fail where he stands upon allegations put in issue without asking for a reference to determine the facts: *State ex rel. Ferguson v. Grady*, 71 Wash. 1, 127 Pac. 305.

As to the necessity that the petitioner show a clear legal right to the writ, see note in 3 L. R. A. 777.

Mandamus will not lie to compel a court to render a decision in a cause where, after trial and submission, the court found that other parties were necessary to a complete determination of the case, and ordered them brought in, since the court is exercising its discretion and not refusing to proceed with the cause; and the remedy for error, if any, is by appeal from the final judgment: *In re Clerf*, 55 Wash. 465, 104 Pac. 622.

Mandamus does not lie, as a matter of right, to compel the county auditor to place the names of candidates upon a ballot until they have been, or it is certain that they will be, certified to the auditor: *State ex rel. Shepard v. Superior Court*, 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233.

The right of a county to make an assessment on property benefited by a drain, being barred by the lapse of ten years, a proceeding by holders of void warrants to compel the county by mandamus to make a reassessment is barred by the lapse of the same time: *State ex rel. Seymour v. Slater*, 53 Wash. 608, 102 Pac. 651.

A writ of mandamus to compel the judge of the superior court to request the governor to call another judge to hear causes in which the trial judge is disqualified will not be issued where it appears that the trial judge has from time to time called other judges, so that litigants and attorneys have not been inconvenienced, and where, since the alternative writ was issued, he has called in another judge so that the controversy has ceased: *State ex rel. Bremerton v. Yahey*, 68 Wash. 284, 123 Pac. 13.

Mandamus does not lie to review the action of the board of medical examiners in refusing a license to practice, there being an adequate remedy by appeal, under section 8399: *State ex rel. Brunn v. State Board of Medical Examiners*, 61 Wash. 623, 112 Pac. 746.

As to mandamus to compel action by medical board, see note in 20 L. R. A. 355.

A plaintiff who misleads the court as to her course, after being ordered to bring in new parties, delaying many months without action, is not in a position to complain of the dilatoriness of the trial judge, where he proceeded with reasonable diligence as soon as plaintiff's refusal to bring in new parties was made known: *In re Clerf*, 55 Wash. 465, 104 Pac. 622.

Upon mandamus to compel payment of a state warrant on claims, part of which were illegal, the supreme court will not direct payment to the extent of the valid claims, the state treasurer not having refused to honor a proper warrant therefor: *State ex rel. Olympia Nat. Bank v. Lewis*, 62 Wash. 266, 113 Pac. 629.

Where the insurance commissioner is vested with a discretion to designate one newspaper from several of the largest circulation, mandamus does not lie at the suit of the paper having the largest circulation to compel its designation: *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901.

As to mandamus where the duty to be performed is one involving the exercise of judgment or discretion, see note in 125 Am. St. Rep. 502.

In mandamus to the state auditor to compel the auditing of a state warrant, the auditor may raise the question of the constitutionality of the act authorizing the warrant and requiring its payment, his duty to conserve public funds constituting a sufficient interest: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

As to unconstitutionality of statute as defense against mandamus, see note in 24 L. R. A., N. S., 1260.

Mandamus is the proper remedy to compel a city engineer and board of public works to make estimates of work done by a contractor on public works, for which payment was to be made in warrants, which estimate they wrongfully and capriciously withheld in violation of the terms of the contract, notwithstanding the amount may be in dispute: *State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

The duty of a city engineer and board of public works to make estimates called for in a contract made by the city is not contractual, but is one imposed by law, where it falls within the general charter provisions as to their duties and powers: *State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

§ 1015.

In mandamus to compel the designation of a certain newspaper for the publication of annual insurance reports, the allegation that the insurance commissioner wrongfully and unlawfully designated a certain paper for the publication amounts to no more than the conclusion of the pleader from the facts alleged: *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901.

§ 1016.

A peremptory writ of mandamus, on sustaining a demurrer to the application, upon findings and conclusions, issued prior to the

entry of formal judgment, is premature, since the proceeding has all the elements of a civil action, and the statute provides for judgment on the issues distinct from the writ issued to enforce it: *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501.

§ 1018.

An affidavit is sufficient as an answer in mandamus, where the allegations of the complaint and alternative writ were put in issue thereby and the same was in effect an answer, and after demurrer thereto there was a trial on the merits: *State ex rel. Hallett v. Seattle Lighting Co.*, 60 Wash. 81, 30 L. R. A., N. S., 492, 110 Pac. 799.

§ 1024.

The procedure in mandamus being but a form of civil action under our code, it is not essential that the prayer be granted in toto or denied in toto; and upon an application for a writ to secure a salary warrant for more than the relator is entitled, the court may grant the writ for a warrant for the sum to which the party may be entitled: *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

As to mandamus as action or special proceeding, see note in 8 Ann. Cas. 311.

§ 1027.

Under this section and constitution, article 4, section 4, the supreme court has power to issue a writ of prohibition only to restrain the exercise of an unauthorized judicial or quasi-judicial act, notwithstanding a stipulation of the parties to the application limiting the inquiry to the constitutionality of a specified statute: *State ex rel. Bennett v. Taylor*, 54 Wash. 150, 102 Pac. 1029.

§ 1028.

NATURE AND GROUNDS.—Prohibition does not lie to correct errors in matters of procedure where jurisdiction exists: *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207.

Prohibition lies to prevent the threatened issuance of letters of general administration without jurisdiction, since there is no adequate remedy at law: *In re Guye's Estate*, 54 Wash. 264, 132 Am. St. Rep. 1111, 103 Pac. 25.

Prohibition does not lie to prevent the issuance of a writ of assistance, after a mortgage foreclosure, since there is an adequate remedy by appeal: *State ex rel. Biddle v. Superior Court*, 63 Wash. 312, 115 Pac. 307.

Prohibition does not lie to prevent further proceedings in a cause, after denial of a petition to vacate a default, since there is an adequate remedy by appeal, and appellant's failure to avail himself of the remedy by appeal and supersedeas does not affect the adequacy thereof: *State ex rel. Skamser*

v. Superior Court, 65 Wash. 457, 118 Pac. 844.

Prohibition lies to prevent a judge from trying a cause after erroneously denying a motion for a change of venue on account of prejudice, where the relator is in jail on a charge of felony and unable to furnish bail, as the remedy by appeal is not speedy or adequate: *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830.

As to prohibition to restrain a court from proceeding in a case where it has erroneously denied a change of venue, see note in 2 L. R. A., N. S., 395.

Prohibition does not lie to a police judge to prevent the trial of a criminal charge upon the grounds of error in refusing a change of venue and the unconstitutionality of the law sought to be enforced, as there is a plain, adequate, and speedy remedy by appeal or writ of review: *State ex rel. Lyon v. Police Court of Hoquiam*, 53 Wash. 361, 101 Pac. 1082.

Prohibition does not lie to prevent the trial of an action by a court to which a change of venue is taken on account of prejudice of the judge, since the court acquired jurisdiction and there is an adequate remedy by appeal: *State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 926.

Prohibition will not lie to prevent the enforcement of an order requiring the defendant, who had employed a court stenographer, to return to the stenographer his notes of the trial so that he might extend the same for use in preparing a statement of facts on appeal, since the court had jurisdiction of the subject matter and the parties, and prohibition does not lie to correct error where there is an adequate remedy by appeal: *State ex rel. Griffith v. Superior Court*, 71 Wash. 386, 128 Pac. 644.

The remedy by appeal is inadequate, and prohibition lies to prevent the superior court from proceeding to review the action of a city council on certiorari from the revocation of a liquor license, where it appears that the license would expire before the case could be heard on appeal: *State ex rel. Puyallup v. Superior Court*, 50 Wash. 650, 97 Pac. 778.

The remedy by appeal is inadequate, and prohibition lies to prohibit the superior court from enjoining compliance with an order of the public service commission, where the relator is subject to the penalties for disobedience to the orders of court, on the one hand, and of the order of the commission, if lawfully made, on the other, and in a position of extreme uncertainty: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

The remedy by appeal is not adequate and prohibition lies, where the court made an order without authority of law requiring a witness to show cause why he should not be punished for contempt in failing to appear for examination, that he made answer showing the illegality of the summons, that the court was about to erroneously punish

him for contempt, and before he could appeal from the judgment of contempt he must be fined and possibly illegally taken from one county to another and imprisoned: *State ex rel. Peterson v. Superior Court*, 67 Wash. 370, 121 Pac. 836.

Prohibition will not issue to prevent the superior court from proceeding with the trial of an offense of which it has jurisdiction, pending the hearing of an appeal from an order denying a release by habeas corpus, as no stay of proceedings is given in such a case: *State ex rel. Hamilton v. Superior Court*, 56 Wash. 91, 105 Pac. 171.

A taxpayer is not a "person beneficially interested" within this section, and prohibition does not lie on his application to restrain the superior court from summoning a grand jury because of alleged error in the drawing: *State ex rel. Hanna v. Main*, 62 Wash. 242, 34 L. R. A., N. S., 255, 113 Pac. 632.

As to when the writ of prohibition lies, see note 111 Am. St. Rep. 929. See, also, note 1 Ann. Cas. 712 and 3 Ann. Cas. 357.

§ 1034.

Quo warranto lies in favor of a foreman of construction work, even if he is not an "officer" as defined by the common law, where the city charter adopts the merit system and applies it to all employees placed in the civil service list with manifest intent to classify such positions as offices and to have such officers removable only for cause: *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963.

§ 1038.

A motion to quash a quo warranto, upon the ground that the information did not state sufficient facts to entitle the relator to the relief prayed, may properly be treated as a demurrer to the information: *State ex rel. Port Angeles v. Morse*, 56 Wash. 654, 106 Pac. 147.

In quo warranto to oust an illegal appointee of the commissioner of public utilities and to restore the plaintiff to the position and for damages, the commissioner in his official capacity is a proper party defendant, since plaintiff is not required to resort to two actions where one will suffice: *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963.

As to quo warranto at common law and the principles underlying modern statutes, see note in 125 Am. St. Rep. 634.

§ 1049.

Where a deed conveyed one-half of the waters awarded to a party by a decree, the grantee is guilty of contempt in violating the decree if he uses more than half of the quantity fixed by the decree: *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 Pac. 148.

As to disobedience of order of court as contempt, see note in 8 L. R. A. 587.

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An injunction being, under section 729, binding from the time the party is informed thereof, a defendant contractor is chargeable with notice of an injunctive order from the time of oral announcement thereof in open court, and is guilty of contempt if his employees disobey the order prior to the formal entry: *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104.

The violation by defendant of an injunctive order, issued pendente lite, with jurisdiction, is contempt, although the court finally decides that the plaintiffs are without remedy: *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104.

§ 1050.

Under this section, the court has no jurisdiction to assess a fine in excess of one hundred dollars for the violation of an injunctive order, where the right or remedy of the adverse party has not been prejudiced or affected: *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104.

§ 1051.

See notes to § 2372.

A summary punishment of contempt committed in the presence of the court is not a denial of due process of law merely because there was a delay in entering the order, due process meaning according to the established forms of law, especially where defendant's appeal recited that the notice of appeal was taken in open court on the same day that the act was committed: *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

As to contempt when committed in the court's presence, see note in 17 Ann. Cas. 220.

§ 1052.

An affidavit for civil contempt for the violation of a judgment is sufficient where it sets out a willful violation of the order and the damages caused thereby: *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 67 Wash. 317, 121 Pac. 467.

As to sufficiency of affidavit on information and belief to support contempt proceedings, see note in 14 Ann. Cas. 1042.

§ 1053.

The right to trial by jury does not extend to proceedings for contempt for the willful violation of a judgment, although damages for civil contempt are claimed and may be awarded on summary trial by the court, under this section and section 1056: *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 67 Wash. 317, 121 Pac. 467.

§ 1054.

See notes to § 996.

§ 1056.

See notes to § 1053.

§ 1058.

NATURE AND ELEMENTS OF CONTEMPT—CIVIL CONTEMPT: See 4 Remington's Digest, "Contempt"; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

The measure of damages for civil contempt in operating a boom in violation of a judgment, whereby certain logs were prevented from entering relator's boom, is the price relator would have earned in booming the logs, less the reasonable cost of boomage, the profit being neither remote nor speculative: State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 67 Wash. 317, 121 Pac. 467.

As to the punishment of a corporation for contempt, see note in 4 L. R. A., N. S., 1001.

§ 1062.

An order adjudging a party in contempt and requiring the payment of certain costs is appealable under this section: Drainage Dist. No. 1 v. Costello, 53 Wash. 67, 101 Pac. 497.

No appeal lies from an order purging a party of contempt in so far as an attempt is made to impose a fine and imprisonment on a charge of contumacy affecting the dignity and processes of the court only: State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

Upon appeal from a summary conviction of contempt committed in the presence of the court, the facts recited in the order are taken as true; and where they show jurisdiction and are sufficient to constitute contempt, there can be no further inquiry on appeal: State v. Buddress, 68 Wash. 26, 114 Pac. 879.

A judgment for contempt in the violation of an injunction will not be disturbed on appeal unless the evidence shows beyond a doubt that the party was not guilty of contumacious conduct: State ex rel. Curtiss v. Erickson, 66 Wash. 639, 120 Pac. 104.

As to appealability of judgments, in contempt, under appeal statutes, see notes in 3 Ann. Cas. 759 and 17 Ann. Cas. 321.

PARTIES OR PERSONS INJURED OR AGGRIEVED.—Under this section, providing for an appeal in contempt proceedings "in like manner and like effect as from judgment in an action," appeal lies from the dismissal of a contempt proceeding seeking an award of damages resulting to private interests from the violation of a judgment of the court: State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

As to appealability of judgments in contempt under appeal statutes, see notes in 3 Ann. Cas. 759 and 17 Ann. Cas. 321.

§ 1063.

NATURE AND GROUNDS OF REMEDY: See 4 Remington's Digest, "Habeas

Corpus"; In re Newcomb, 56 Wash. 395, 105 Pac. 1042; In re Hamilton, 56 Wash. 405, 105 Pac. 1046.

§ 1075.

Under this section, one in custody under a warrant issued upon an information for violating a statute is not entitled to release on habeas corpus on the ground that the statute is unconstitutional: In re Putnam, 58 Wash. 687, 109 Pac. 111.

As to whether, on habeas corpus, there may be a determination had of the constitutionality of the statute under which the petitioner is held, see note in 3 Ann. Cas. 581.

§ 1100.

Where creditors agree to accept an assignment in full payment of their claims, they cannot subsequently recover the deficiency from an associate of their debtor on the claim that there was a silent partnership between them, since the discharge of one partner discharges all: Blodgett v. Inglis, 63 Wash. 513, Ann. Cas. 1912D, 662, 115 Pac. 1043.

An agreement by creditors to discharge their debtor in consideration of an assignment for creditors operates to discharge the debtor's partner, notwithstanding representations made to the creditors that it would not have that effect, where the partner was not responsible for the representations: Blodgett v. Inglis, 63 Wash. 513, Ann. Cas. 1912D, 622, 115 Pac. 1043.

As to discharge of partner from liability on account of firm debt, and the operation of same as discharge of other partners, see note in Ann. Cas. 1912D, 624.

§ 1111.

A provision in a chattel mortgage that the mortgagee could take possession upon default in any payment, and immediately proceed to sell in the manner provided by law and pay the amounts provided in the notes, authorizes a foreclosure for the whole amount due when any part becomes due; and seizure on notice of sale is a sufficient declaration of intent to declare the whole debt due: Woodward v. Lutsch, 69 Wash. 59, 124 Pac. 393.

As to the rights of the mortgagee, under a chattel mortgage, in respect of foreclosure and sale, see note in 96 Am. St. Rep. 682.

§ 1112.

A provision in a chattel mortgage that in case of default the mortgagee may take immediate possession and proceed to sell the same in the manner provided by law must be construed to have reference to the taking of possession by the method provided by statute for the foreclosure thereof, as an exclusive remedy; and consequently replevin

cannot be maintained: *Nettleton v. Evans*, 67 Wash. 227, 121 Pac. 54.

As to replevin as remedy of mortgagee, under a chattel mortgage, after condition broken, see note in 96 Am. St. Rep. 690.

After seizure of mortgaged chattels and commencement of foreclosure, a tender must include accrued costs, including a reasonable attorney's fee stipulated for in the mortgage: *Woodward v. Lutsch*, 69 Wash. 59, 124 Pac. 393.

As to the effect of tender after default upon security of chattel mortgage, see note in 15 Ann. Cas. 495.

A proceeding by a chattel mortgagee to preserve his security, under this section, does not have the effect of an election to declare the whole debt due or accelerate the maturity of the debt, where he did not allege such an election, the notes did not provide for an acceleration of the maturity of the debt in such case, and the judgment merely applied the sum realized from the sale of the property in payment of the notes past due "without prejudice to the rights of the plaintiff to bring an action against the mortgagor not satisfied by this decree"; hence an action on the unpaid notes is not barred until six years after their maturity: *Haggard v. Sanglin*, 69 Wash. 151, 124 Pac. 373.

As to how a chattel mortgage is to be construed which gives the mortgagee the right to take possession when he deems himself unsafe, see note in 51 Am. Rep. 805. See, also, note in 19 L. R. A., N. S., 915.

§ 1114.

RIGHTS, LIABILITIES AND REMEDIES: See 4 Remington's Digest, "Chattel Mortgages," § 53 et seq.; *Bradley Eng. & Mach. Co. v. Muzzy*, 54 Wash. 227, 18 Ann. Cas. 1072, 103 Pac. 37; *Edmonds v. Eubanks*, 57 Wash. 529, 107 Pac. 387; *Inland Trading Co. v. Edgecomb*, 57 Wash. 257, 106 Pac. 768.

In an action to foreclose a chattel mortgage, brought against the mortgagor and a third person as claiming some interest in the property, the court has jurisdiction to determine a paramount title pleaded by the third person as superior to that of the mortgagor at the date of the execution of the mortgage, since possession follows the sale and the rule as to real estate mortgages does not apply: *Dungeness Logging Co. v. Oregon & Washington R. Co.*, 65 Wash. 631, 118 Pac. 825.

As to the efficacy of a chattel mortgage upon fixtures, see note in 15 L. R. A. 56. See, also, note in 37 L. R. A., N. S., 122.

The purchaser of sheep upon which there was a chattel mortgage is shown to have promised to pay the mortgage debt, by clear, satisfactory and convincing evidence, where it appears that he had notice of the chattel mortgage and refused to pay the price without authority from the mortgagees, who, upon request of the mortgagor,

telegraphed direct to the purchaser that he had their consent to receive the sheep upon paying the balance due, that, upon ascertaining the amount and finding that it exceeded the price and claims of the herder, the mortgagor notified the mortgagees of such fact, whereupon the mortgagees telegraphed direct to the purchaser that they would pay his draft for the shortage, whereupon he drew a sight draft therefor and took possession of the sheep, since he acted upon the authority given, and acceptance of the proposition obligated him to pay the mortgage debt: *Bicknell v. Henry*, 69 Wash. 408, 125 Pac. 156.

§ 1116.

Under this section two trust deeds of lands in two counties may be foreclosed by an action in either county: *Empire State Surety Co. v. Ballou*, 66 Wash. 76, 118 Pac. 923.

INSURANCE.—Where a mortgage in trust for creditors stipulated that the mortgagor should keep the premises insured, he cannot, in an action to foreclose the mortgage, charge the trustee as mortgagee with the loss of property by fire which such mortgagee had failed to insure: *Spokane Merchants' Assn. v. Parry*, 60 Wash. 204, 110 Pac. 991.

As to fire insurance stipulation in mortgage and its effect, see note in 135 Am. St. Rep. 743. See, also, note in 11 Ann. Cas. 936.

TENDER.—Where a mortgagor had no notice of the assignment of the mortgage, tender of interest to the mortgagee is sufficient, and prevents exercise of an option to declare the whole debt due: *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A., N. S., 232, 106 Pac. 495.

Tender of the amount due on a mortgage before law day, extended by construction until suit commenced, discharges the lien of the mortgage, and the tender need not be kept good by bringing it into court: *Murray v. O'Brien*, 56 Wash. 361, 28 L. R. A., N. S., 998, 105 Pac. 840.

Where defendant's tender of the amount due on a promissory note and mortgage was sufficient when made, the plaintiff is not entitled to an allowance for attorneys' fees: *Scandinavian American Bank v. Washington Hotel & Imp. Co.*, 70 Wash. 223, 126 Pac. 438, 128 Pac. 222.

In the rule for the discharge of a mortgage by tender before law day or at any time before foreclosure and sale, "foreclosure" and "law day" are synonymous terms, and mean the "institution of the suit" as contradistinguished from the "law day" of the common law; and "law day" does not, as to a tender inter partes, extend to the day of sale: *Murray v. O'Brien*, 56 Wash. 361, 28 L. R. A., N. S., 998, 105 Pac. 840.

The rule that a tender discharges the lien of a mortgage does not avail one who is seeking affirmative relief and asking the cancellation of the debt: *Murray v. O'Brien*, 56 Wash. 361, 28 L. R. A., N. S., 998, 105 Pac. 840.

The mailing of a check for interest due on a mortgage is a sufficient tender to prevent the exercise of an option to declare the whole debt due, where all other payments of interest had been made by check, and no objection was made to the character of the money or specie tendered: *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A., N. S., 232, 106 Pac. 495.

As to the effect of tender in connection with mortgage transactions, see note in 36 L. R. A., N. S., 308.

RIGHT TO FORECLOSE AND DEFENSES.—A provision in a mortgage that on failure to pay any of the notes when due, the whole sum shall become due, does not mature the whole debt: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

An assignee of a mortgage giving to the mortgagor the option to declare the whole sum due upon default in the payment of interest or principal has the right to exercise the option, although the mortgage omits words of inheritance or of succession: *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 126 Am. St. Rep. 856, 15 L. R. A., N. S., 590, 94 Pac. 900.

To entitle the assignee of a mortgage on which an installment of interest is overdue to exercise the option given in the mortgage of declaring the whole sum due, he need only notify the maker that he was the holder and that interest could be paid at a certain place, no formal demand of payment being necessary: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

As to necessity of notice by mortgagee to mortgagor of intention to exercise power of sale in mortgage, see note in 11 Ann. Cas. 170.

A mortgage matures and may be foreclosed for the whole sum, upon default in the payment of annual interest, where the mortgage note provided for interest payable annually "and if not so paid to become a part of the principal and bear interest until so paid," and the mortgage provided for its foreclosure in case of any default in the payment of interest when the same becomes due under the terms of the note, and further stipulated that in case of foreclosure, "the whole of said principal and interest, whether the same shall be then due or not" shall be retained: *Castor v. Muramoto*, 69 Wash. 145, 42 L. R. A., N. S., 108, 125 Pac. 153.

A provision in a mortgage that the whole debt shall become due in case of nonpayment of interest is waived if the mortgagee does not manifest intention to claim it prior to tender of the interest: *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A., N. S., 232, 106 Pac. 495.

As to place and requisites of tender of interest which will prevent acceleration of maturity of mortgage under interest clause, see note in 36 L. R. A., N. S., 308.

Notes and a mortgage given October 1st for a pre-existing debt, assigned November 4th as collateral security for another pre-existing debt, have priority over a judgment secured against the mortgagors on December 4th, since liens securing pre-existing debts take priority from the respective dates of their creation: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837.

Where a mortgage debt is evidenced by negotiable paper, a transfer before maturity in good faith for value frees the mortgage from defenses by reason of infirmities not available against the notes: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837.

As to the effect of mortgage contemporaneous with note as defense to note, see note in 43 L. R. A. 472.

The former owner of land is not a necessary or proper party defendant to an action to foreclose a mortgage, although the defendants may have claims against him: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

Upon foreclosure, a mortgagee may recover for taxes paid by him, where the mortgage provided that he might pay the taxes and have a lien on the property therefor: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

As to tacking taxes to the mortgage debt, see note in 5 L. R. A. 293.

In an action to foreclose a mortgage and a mechanics' lien, the allowance of sixty dollars attorneys' fees stipulated in the mortgage and fifty dollars additional for the mechanics' lien is reasonable, and therefore proper, regardless of the apportionment: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

As to the validity and enforceability of provision in mortgage fixing attorneys' fees on foreclosure, see note in 19 Ann. Cas. 1068.

There being no conflict between a mortgage note calling for interest at a certain rate per annum, and a stipulation in the mortgage requiring payment of interest semi-annually, according to the terms of the note, the two are to be construed together as intending semi-annual payments, and hence failure to pay interest semi-annually constitutes a default within the provisions of the mortgage authorizing foreclosure thereon: *Bell v. Engvolsen*, 64 Wash. 33, 116 Pac. 456.

Where new notes and a mortgage were given, not in satisfaction, but in renewal of a former mortgage on the same security, and the cancellation of the old and substitution of the new mortgage were contemporaneous acts, equity, looking to the substance rather than the form, will, when the new mortgage is found ineffectual for want

of proper execution, disregard the release as failing for want of consideration, and substitute the old mortgage as a continuing lien securing the continuing debt, as between the parties, by a doctrine akin to equitable subrogation: *American Savings Bank & Trust Co. v. Helgesen*, 67 Wash. 572, Ann. Cas. 1913A, 390, 122 Pac. 26.

As to what constitutes discharge of mortgage, see notes in 7 Am. St. Rep. 703, and 55 L. R. A. 673.

Where a purchase money mortgage upon high class business property, which was inaccessible because eighty to ninety feet above street grade, stipulated that the mortgagee should bring the property and part of the street down to the established grade within a specified time, the mortgagor, on breach of the stipulation by delay in performance, can recover the reasonable rental value of the property during the time which she was kept out of its use by reason of the delay; and a provision in the mortgage postponing the maturity of the note until the grading had been done does not show an intention to make that the measure of the mortgagee's liability for the breach of the stipulation, where a substantial part of the purchase price had already been paid: *Scandinavian American Bank v. Washington Hotel & Imp. Co.*, 70 Wash. 223, 126 Pac. 438, 128 Pac. 222.

In such case, the interest on the mortgage note does not abate from the date of its maturity until the grading was completed, where the note by its terms bears interest "until paid," and the mortgage stipulates that it shall not be due and payable until the grading is completed, and the contract contemplates that the mortgagee shall reduce the property to grade and have its value as fixed by the contract: *Scandinavian-American Bank v. Washington Hotel & Imp. Co.*, 70 Wash. 223, 126 Pac. 438, 128 Pac. 222.

As to recitals in mortgage as evidence of debt, see note in 112 Am. St. Rep. 793.

A stipulation in a mortgage providing for interest at the rate of twelve per cent upon all remaining unpaid installments, if default be made in the payment of any installment of principal and interest upon the day it becomes due, provides for interest at such increased rate from the date of the default, and not from the date of the note: *Equitable Sav. & Loan Assn. v. Bowes*, 70 Wash. 169, 126 Pac. 436.

Where a first mortgage had been foreclosed, establishing the priorities and the amount of the respective debts, without making junior mortgagees parties to the suit, it is proper to dismiss a subsequent action to foreclose the junior mortgage, since the right of redemption secures all the rights they would have by their foreclosure: *Wakefield v. Fish*, 62 Wash. 564, 114 Pac. 180.

As to the right of the holder of junior mortgage to foreclose, see note in 5 L. R. A. 291.

Failure of the trustee to account for certain accounts and bills receivable will not prevent the trustee from foreclosing a mortgage given in trust for creditors, where enough appears to show the necessity for foreclosure, since he must fully account later for all receipts: *Spokane Merchants' Assn. v. Parry*, 60 Wash. 204, 110 Pac. 991.

As to validity of power of sale under the mortgage, see note in 92 Am. St. Rep. 574.

The owner of a half interest in mortgaged property, acquired after the commencement of suit to foreclose the mortgage, has a right to intervene in the foreclosure suit and make a tender with a view of being subrogated to the rights of the mortgagee against his co-owners: *Murray v. O'Brien*, 56 Wash. 361, 28 L. R. A., N. S., 998, 105 Pac. 840.

As to persons entitled to intervene in actions and interests that will support intervention, see note in 123 Am. St. Rep. 297.

PLEADING AND EVIDENCE.—Upon the foreclosure of mortgage notes, part of which were not due, judgment may be entered for the amount due at the date of the entry of the decree, without the filing of any supplemental complaint as to an installment falling due since the action was commenced, where the foundation of the judgment was laid in the complaint and the notes introduced in evidence: *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116.

As to the right to successive foreclosures, see note in Ann. Cas. 1912C, 846; also note in 37 L. R. A. 737.

The evidence sufficiently shows that previous payments of interest on a mortgage note had been made by checks, where the mortgagor so testified according to his best judgment and that such was his custom, the mortgagee did not testify, and there was no other evidence on the subject: *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A., N. S., 232, 106 Pac. 495.

One having notice that a certain mortgage was to be made to raise money to satisfy his undisclosed equity in the property cannot charge the mortgagee with the application of the proceeds where he failed to give the mortgagee direct notice of his claim thereto, even if the mortgagee had notice of the mortgagor's agreement to so apply the proceeds: *Wakefield v. Fish*, 62 Wash. 564, 114 Pac. 180.

As to the protection of the rights of the mortgagee, see note in 7 L. R. A. 631.

Under the negotiable instruments act, a holder for value of notes secured by mortgage can apply the proceeds of foreclosure to the payment of any one or all of the notes without observing the equities existing between joint makers who were all primarily liable thereon: *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

OPENING OR VACATING.—A judgment creditor of an insolvent corporation, who stood by and permitted a purchaser to

acquire its rights and thereafter expend money in improvements, cannot ask the vacation of a foreclosure sale under a prior bona fide mortgage, so as to establish a prior lien in his favor, without offering to pay the mortgage, since the mortgage would continue as a valid lien equitably assigned to the purchaser at the foreclosure sale, which sale would not satisfy the mortgage: *Boyes v. Turk Min. Co.*, 56 Wash. 515, 106 Pac. 475.

As to right of third person to have judgment of foreclosure set aside, see note in 54 L. R. A. 763.

FEES AND COSTS.—The sum of one thousand dollars is not an unreasonable attorney's fee in the foreclosure of an indemnity mortgage, although the total amount of the judgment was but seven thousand dollars, where the suit was strenuously resisted and the record was voluminous: *Fidelity & Deposit Co. v. Oliver*, 57 Wash. 31, 106 Pac. 483.

§ 1118.

Upon the foreclosure of two mortgage liens, the second mortgagee is properly subrogated to the rights of the first mortgagee, upon paying into court the amount due on the first mortgage: *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

As to subrogation of junior mortgagees to the rights of senior, see notes in 5 L. R. A. 290 and 23 L. R. A. 121.

§ 1121.

The title to an act relating to sales under execution and orders of sale and the confirmation of sheriff's sales and redemption therefrom is not sufficiently broad to include the subject matter of Laws of 1899, page 85, section 2, which provides for or against the taking of deficiency judgments in an action to foreclose a mortgage when consented to in the agreement, or when stipulated against in the mortgage, as the case may be, and that the commencement of an independent action shall be a waiver of the mortgage security: *Bradley Eng. & Mach. Co. v. Muzzy*, 54 Wash. 227, 18 Ann. Cas. 1072, 103 Pac. 37.

A mortgage foreclosure sale conveys the whole title subject to redemption with right to possession and rents: *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893.

Upon the foreclosure of a void mortgage, given in renewal of a former mortgage, upon the same security, a decree foreclosing the void mortgage may be sustained, as between the parties, by the equitable substitution of the old mortgage as a continuing lien securing the continuing debt without the necessity of a new trial: *American Savings Bank & Trust Co. v. Helgesen*, 67 Wash. 572, Ann. Cas. 1913A, 390, 122 Pac. 26.

§ 1126.

This section does not apply where, by reason of default or breach, the mortgagor has declared the whole principal sum due, in accordance with the provisions of the mortgage, since such provisions are valid and must be given force, and consequently no other installments are due: *Knisell v. Brunet*, 60 Wash. 610, 111 Pac. 894.

§ 1127.

See notes to § 1126.

Upon the foreclosure of mortgage notes, part of which are not due, application to ascertain if the property can be sold in parcels follows the judgment, under this section: *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116.

§ 1129.

A structure is of such a permanent and substantial nature as to be lienable for materials used in the "construction and erection of the building," where it appears that the first tenant of a new store building was given consent to and did build a mezz or balcony floor commencing at the rear of the store room extending about forty feet toward the front, and from side wall to side wall, connected with the lower floor by a stairway, the floor being upon girders supported by uprights, it being impossible to say how the fastening was made to the side walls or the lower floor without a prying apart, although as between landlord and tenant it may have been viewed as a trade fixture: *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248.

As to separate structures for single use in the aspect of lienable property, see note in 65 Am. St. Rep. 168.

A boiler, radiators, and other appliances, attached to a hot-water heating system, furnished with pipes, etc., under a building contract, are fixtures and subject to a mechanic's lien as part of the building, although they could be detached without damage, it being conceded that the pipes were fixtures and that some of the articles were designed for use in the particular building: *American Radiator Co. v. Pendleton*, 62 Wash. 56, 112 Pac. 1117.

As to fixtures as improvement for which a mechanic's lien may exist, see note in Ann. Cas. 1912B, 7.

RIGHT TO LIEN: See 4 Remington's Digest, "Mechanics' Liens," §§ 16-36; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766; *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383; *Holm v. Chicago, M. & P. S. R. Co.*, 59 Wash. 293, 109 Pac. 799; *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, Ann. Cas. 1912B, 225, 110 Pac. 541; *Yundt v. Schultz-Degginger Co.*, 62 Wash. 308, 113 Pac. 760; *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083;

Naden v. Christopher, 62 Wash. 413, 113 Pac. 1116.

An act entitled an act providing for liens for labor performed, material, provisions, and supplies furnished, the body of which gives a lien for labor and materials only, does not give a lien for supplies, although a proviso makes the company liable for supplies in case a bond is not taken from contractors to secure the same, since the title and provisos to an act do not extend its effect: *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766.

As to the constitutionality of a statute in respect of the sufficiency of its title, see note in 64 Am. St. Rep. 70.

There is a substantial performance of a contract for the plate glass for a large building, entitling the contractor to a mechanic's lien, where only two plates, of the value of thirty dollars, were faulty, and plaintiff offered to replace them or make a proper deduction: *Belknap Glass Co. v. Brown*, 69 Wash. 127, 124 Pac. 390.

As to the substantial performance of a building contract, see note in 134 Am. St. Rep. 678.

Under this section, a lien upon the irrigation ditches and power plant of a water company cannot be claimed for tools and appliances used to carry on the work of construction and not intended to enter into and become a part of the structure when completed: *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541.

Subcontractors furnishing material and doing work in the putting down of hardwood floors and installing plumbing and heating plants in a building are entitled to a lien for the value of the labor under this section, although they lost their lien for materials through failure to deliver duplicate statements to the owner of the material used, as required of materialmen by section 1133, and although the material and labor were furnished under an indivisible contract with the general contractor: *Heim v. Elliott*, 66 Wash. 361, 119 Pac. 826.

This section applies only to labor that goes into the finished structure, and does not cover labor in wrecking and removing a building on the lot preparatory to the construction of the new building, although that work was included in the contract for the new building: *Sound Transfer Co. v. Phinney Realty & Inv. Co.*, 71 Wash. 473, 128 Pac. 1047.

As to who is a "laborer," "workman" or "servant" within the meaning of mechanics' lien statutes, see note in 32 Am. Rep. 264.

As to tools and appliances, used for construction work, in the aspect of materials for which a mechanic's lien may be had, see Ann. Cas. 1912B, 227.

WAIVER.—A waiver of a mechanic's lien, conditional upon giving a mortgage subject only to a mortgage of twelve hun-

dred dollars, cannot be enforced where either the minds of the parties did not meet, or the property was subject to three mortgages aggregating more than that sum, and no tender of performance was made: *Pacific Lumber & Timber Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869.

As to waiver of mechanics' lien by taking security, see note in 41 Am. St. Rep. 761.

The right to a mechanics' lien on a subcontract is not waived by the fact that the subcontractor relied upon the credit of the principal contractors when he entered into his contract, he not intending to waive his right: *Smith v. Hopper*, 67 Wash. 224, 121 Pac. 77.

As to right of subcontractor or materialman to the protection of mechanic's lien laws, see notes in 14 L. R. A., N. S., 1036; 24 L. R. A., N. S., 321; 30 L. R. A., N. S., 85.

A release given by a lien claimant without consideration to enable the owners to transfer property is void as between the parties: *Seattle Lumber Co. v. Cutler*, 63 Wash. 662, 116 Pac. 1.

The giving of a release from all liability for labor performed or materials furnished, for the expressed purpose of enabling the owner to transfer property which was subject to a mechanics' lien, does not estop the lien claimant from asserting the lien against the purchasers of the property, where the purchasers did not rely upon or know of the release and the same was given without consideration: *Seattle Lumber Co. v. Cutler*, 63 Wash. 662, 116 Pac. 1.

PAYMENTS.—In an action by a materialman to foreclose a mechanic's lien for a balance due from the contractor, a tender by the contractor "in full payment," which includes all that could be charged as a lien against the property, could have been accepted without prejudice, and accordingly relieves the owner from liability, although the tender was insufficient to discharge all claims against the contractor: *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633.

As to the effect of tender in discharge of a mechanic's lien, see note in Ann. Cas. 1912B, 932.

A materialman receiving a check from a contractor, with notice that it was payment on the building contract, is bound to apply it on the contractor's account for that building, and cannot divert part of the proceeds to other accounts and claim a lien against the building for the balance: *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633.

§ 1131.

A lien for labor in clearing land attaches against a leasehold estate: *Owen v. Casey*, 48 Wash. 673, 94 Pac. 473.

As to who is a "laborer" within a statute giving a lien to laborers, see note in 58 Am.

St. Rep. 303; also note in Ann. Cas. 1913B, 263.

As to leasehold property as subject to mechanic's lien, see notes in 3 Ann. Cas. 1096 and 14 Ann. Cas. 1031.

A lien for labor in wrecking and removing an old building on a lot preparatory to the erection of a new building cannot be

claimed under this section: Sound Transfer Co. v. Phinney Realty & Inv. Co., 71 Wash. 473, 128 Pac. 1047.

§ 1132.

See notes to § 1133.

§ 1133. Prerequisites—Notice of Furnishing Materials or Supplies.

Every person, firm or corporation furnishing materials or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or any other building, or any other structure, or mining claim or stone quarry, shall, not later than five (5) days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail to the owner or the reputed owner of the property on, upon or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No materialmen's lien shall be enforced unless the provisions of this act have been complied with. [L. '11, p. 376, § 1.]

[N. B.—The notes below all have reference to 1 Rem. & Bal. Code, § 1133, prior to amendment.—Ed.]

Constitution, article 2, section 37, does not apply to an act complete and perfect in itself, although it amends by implication or is a substitute for a section in a former law on the same subject; and hence is not violated by the act of 1909, entitled an act relating to materialmen's liens and the enforcement thereof, providing for the service upon the owner of duplicate statements of all materials furnished for the construction of buildings, etc.: Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76, 109 Pac. 316.

The duplicate statements to the owners of materials furnished to contractors required by this section to be given when the materials are furnished is not excused by the fact that the owner had notice that they were being furnished: Finlay v. Tagholm, 62 Wash. 341, 113 Pac. 1083.

Under this section, one duplicate statement, given when the last of the materials are furnished, is insufficient: Finlay v. Tagholm, 62 Wash. 341, 113 Pac. 1083.

Subcontractors furnishing the materials and doing the work of putting down hardwood floors in a building and installing a plumbing and heating plant must deliver duplicate statements of the materials furnished at the time the same are delivered, in order to obtain a lien for the material, under this section: Heim v. Elliott, 66 Wash. 361, 119 Pac. 826.

This section is not substantially complied with by delivering with the first load one duplicate statement of all material to be furnished, where the deliveries were continued from day to day and extended over a period of several months: Heim v. Elliott, 66 Wash. 361, 119 Pac. 826.

Where the first part of lumber furnished to the general contractor for a building was not lienable because the lumber company failed to deliver duplicate statements to the owner during all the time the lumber was delivered, partial payments made to the lumber company without any direction as to their application may be applied by the company to the oldest items of the account, and a lien established for the balance of the last items furnished for which duplicate statements were delivered; and the owner cannot defeat such application by asserting that a bonding company not a party to the suit had an equity to have the payments otherwise applied: Heim v. Elliott, 66 Wash. 361, 119 Pac. 826.

A delivery to the contractor of duplicate statements of lumber furnished to the contractor for the construction of a house is not a compliance with this section, even though the court makes a general finding that the contractor was the agent of the owner in ordering the material, and in sole charge of the building, unless the evidence clearly established an agency for that purpose: Seattle Lumber Co. v. Richardson & Elmer Co., 66 Wash. 671, 120 Pac. 517.

Under this section, a statement August 18th of materials furnished on various days from July 30th to August 12th is insufficient to support a lien: *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517.

The absence of the owner from the city does not excuse a lien claimant from delivering duplicate statements of materials at the time the same are furnished, since the statute provides for service by mail, especially where the owner's resident address, where his wife was living, was given in the city directory and no attempt was made to ascertain the address or residence: *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517.

As to notice to owner, as condition to lien, see note in 11 L. R. A. 740.

Mailing of duplicate statements to the owner addressed to him at the place where the building was being constructed is not a compliance with the statute requiring the notices to be personally served or mailed to his last known place of residence, where that had never been his residence, as an inspection would have disclosed, and his residence was given in the city directory: *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517.

The fact that contractors misled materialmen as to the correct address of the owner, a resident of a large city, does not excuse their failure to properly serve or mail duplicate statements to the owner at the time material is furnished: *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517.

Where a contractor for a building defaulted and went into the hands of a receiver, and the receiver and the agent of the owner notified a subcontractor for the tile and mantel work to proceed with the performance of its subcontract, thereby recognizing and adopting the same, the subcontractor need not give the owner duplicate statements of materials furnished, as it is not a materialman, within the meaning of this section, which has no application to materials furnished direct to the owner on a contract made by the owner's agent: *Ringel v. Newman*, 69 Wash. 583, 125 Pac. 943.

As to the effect upon subcontractor, etc., of default by principal contractor, see note in 17 L. R. A. 116; also, 26 L. R. A., N. S., 409.

The duplicate statement of all materials or supplies furnished to any person or contractor, required by this section, to be delivered to the owner, need not specify the prices charged therefor, but is sufficient if it shows the kind and quality of the materials furnished: *Ringel v. Newman*, 69 Wash. 583, 125 Pac. 943.

This section has no application to bonds required of contractors on public work to secure laborers and materialmen employed

on the work, under section 1159: *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799.

This section does not apply to materials delivered to the owner: *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851.

This section has no application to materials furnished direct to the owner under a contract made by the owner's agent: *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177.

This section has no application where the materials or supplies are delivered to an owner under a contract with him: *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

This section applies only to materialmen and has no application to a lien claimed by a contractor furnishing both labor and materials for decorative plaster work under a contract with the owner through the owner's agent: *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177.

Under this section a mechanic's lien cannot be claimed where it is admitted that the notice was not mailed until some indefinite time, a few weeks or a month, after delivering the materials: *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782.

As to the commencement of running of time against a mechanic's lien for materials furnished on running account, see note in 7 L. R. A. 947.

Under this section notice must be given to the one who was known to hold the legal title to the lots, of lumber delivered to one in possession under a lease with an option to buy, notwithstanding that subsequently the owner gave a deed to the lessee and took back a mortgage, and that section 1132 makes a mechanic's lien superior to mortgages subsequent to the commencement of the furnishing of the materials: *Hewitt Lea Lumber Co. v. Sandell*, 66 Wash. 515, 119 Pac. 848.

§ 1134.

See notes to §§ 1129, 1133.

A materialman is not entitled to a lien upon a house for lumber furnished to a contractor who was also building another house, where the lumber for the two houses was so commingled by the materialman that it was impossible to determine what particular part went into the house upon which the lien was claimed, and he was unable to comply with a demand for a segregated bill therefor: *Little Brothers Mill Co. v. Baker*, 57 Wash. 311, 106 Pac. 910, 135 Am. St. Rep. 980.

As to the materials for which a lien exists and the necessity that they be incorporated in the structure, see *Ann. Cas.* 1913B, 502.

A corporation did not furnish material on the credit of the owners of the prop-

erty, where it appears that it furnished the same under an agreement with contractors, and the alleged substitution of the credit of the owners was by an agent without authority, and at a later time than alleged, it being after part of the materials were furnished: *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083.

Including in a lien notice in good faith an item of eighteen dollars paid for water connections incident to the plumbing work does not render the lien void as to other items, even if that item was nonlienable: *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843.

Where an undeterminable portion of the items forming a large part of a claim for a lien are not lienable, the lien must fail as to all the items: *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, Ann. Cas. 1912B, 225, 110 Pac. 541.

As to the effect of filing an excessive mechanic's lien, see note in 29 L. R. A., N. S., 305.

Upon the trial of an action to foreclose a mechanic's lien, a notice of a lien against the entire premises may be amended to claim a lien against the leasehold interest only of one who was alleged to have an unknown interest or lien upon the property; and it is immaterial that the amendment was made after the time for filing such a lien had expired, amendments being liberally allowed in all cases by sections 1134, 1147, regardless of such limitations: *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248.

The date of "cessation of the furnishing" of material for a building, within this section, is the date on which the materialman on demand of the owner replaced defective material rejected by the architect, where materialman acted in good faith and not for the purpose of prolonging the time: *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851.

A painter under a subcontract does not lose his right to a lien from the fact that he did not keep an accurate book account of the paint which he took and used from another job, where he is able to state the amount and value of the same: *Smith v. Hopper*, 67 Wash. 224, 121 Pac. 77.

A building contract authorizing the architect to order any alteration in plans or specifications without in any way interfering with or lessening the agreement does not authorize the architect to order a complete change in the interior finish, whereby the cost of a painting contract amounting to two hundred and thirty dollars would have been increased one hundred and forty-five dollars, the architect requesting him to do the work for an increase of twenty-five dollars; and upon conflicting evidence as to whether the plaintiff was ordered to cease work, findings that he had performed and could treat the contract as rescinded will be sustained: *Smith v. Hopper*, 67 Wash. 224, 121 Pac. 77.

An inadvertent and excusable mistake making an erroneous charge in a mechanic's lien notice will not defeat the lien, where at the commencement of the trial it was conceded and all excess waived: *Hillman v. Donaldson*, 67 Wash. 410, 121 Pac. 866.

One mechanic's lien on four houses belonging to the defendant cannot be asserted for a balance due the contractor on one entire contract for the four houses and one other house belonging to another in which the defendant had no interest, where the plaintiff did not keep separate accounts with the several buildings and cannot segregate the account against each property: *Sarginson v. Turner Investment Co.*, 69 Wash. 234, 124 Pac. 379.

§ 1138.

TIME TO SUE, LIMITATIONS AND LACHES.—Where a second notice of mechanic's lien is filed within the ninety days allowed by section 1134 for filing claims, for the purpose of correcting a supposed error in the first notice, the eight months allowed by this section for the commencement of an action to foreclose the lien begins to run from the date of filing the last notice, section 1147 requiring a liberal construction of the lien laws, and there being no provision of law preventing the filing of successive liens within the ninety-day period: *Lindley v. McGlaulin*, 58 Wash. 636, 109 Pac. 118.

Under this section the lien expires as to a mortgagee although suit was commenced against the owner within time, where the mortgagee was not made a party to the suit: *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334.

§ 1140.

PLEADING AND EVIDENCE: See 4 Remington's Digest, "Mechanic's Liens," §§ 87-94; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Dickerman v. Reeder*, 59 Wash. 405, 109 Pac. 1060; *Pacific Lumber & Timber Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869.

The evidence in a mechanics' lien case supports findings to the effect that an agreed length of a building was reduced two feet to avoid having cornices extend over the lot lines, where one of the parties so testified and was corroborated by the circumstances: *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88.

This section, providing that all lien claimants shall be joined in an action to foreclose a mechanics' lien, does not exclude a mortgagee as a necessary party to the action in order to affect his interests: *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334.

As to mortgagee as owner within mechanics' lien laws, see note in 39 L. R. A., N. S., 84.

In an action to foreclose a mechanic's lien, it is error to refuse to allow for extra work required by the architect in charge:

Ward v. Thorndyke, 65 Wash. 11, 117 Pac. 593.

In an action for foreclose a subcontractor's lien for excavation work, in which plaintiff recovered judgment against another subcontractor, who in turn was given judgment against the principal contractor for any sum he might be compelled to pay on plaintiff's judgment, the principal contractor cannot complain that plaintiff's judgment contained an item that was not lienable, the owner of the property and the subcontractor not having appealed: *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

In an action to foreclose a second subcontractor's lien for excavation work, in which the first subcontractor and the principal contractor are made defendants, the first subcontractor may cross-plead against the principal contractor and have legal relief on his contract, to avoid a multiplicity of suits, in view of section 406, providing that when the justice of the case requires it, the court may determine the ultimate rights of all the parties: *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

As to cross-bills in mechanic's lien foreclosure cases, see note in 9 Ann. Cas. 228.

§ 1141.

In consolidated actions to foreclose mechanics' liens, the owner, upon payment of a judgment in favor of a materialman, may enforce contribution from the contractor who was ultimately liable therefor: *Sweeney v. Archibald*, 60 Wash. 595, 111 Pac. 788.

In an action to foreclose a mechanic's lien for improvements made by a lessee, personal judgment cannot be rendered against the lesser, where he contracted none of the debts, although he had estopped himself from confining the liens to the leasehold interest of the lessee: *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

Where the architect rejected material and the owner demanded that the materialman replace it, which was done, a finding that it was "not done in performance of the original contract" is an unwarranted conclusion of law: *Rieffin v. Grafton*, 63 Wash. 387, 115 Pac. 851.

It is not an abuse of discretion to deny attorneys' fees in an action to foreclose a mechanic's lien, where tender was made of all sums that could be charged against the property: *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633.

§ 1143.

Where work is done on a building under an oral agreement that part cash and a note for the balance would be received in payment for the work, a mechanic's lien is waived if it was so specified in the note, under this section: *Ward v. Thorndyke*, 65 Wash. 11, 117 Pac. 593.

§ 1147.

See notes to §§ 1134, 1138.

§ 1150.

Under this section, a copy of the notice of a laborers' lien must be served upon the employer within thirty days after the same is filed for record, or the lien cannot be enforced: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

§ 1154.

A plumber doing work upon a soda-water fountain is not entitled to a lien under the provisions of Laws of 1905, page 137, section 1, giving a lien to blacksmiths, wagon-makers, machinists, and boiler-makers, expending labor on any chattel, as "machinist" does not include a plumber: *Modern Plumbing & Heating Co. v. American Soda Fountain Co.*, 57 Wash. 148, 135 Am. St. Rep. 975, 106 Pac. 628.

It cannot be objected that a corporation has no capacity to sue in an action to foreclose a mechanic's lien for work and labor in repairing a machine, under this section, where the claim for a lien was abandoned and not an issue at the trial: *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

§ 1159.

In an action upon a contractor's bond indemnifying against loss by reason of a breach of the building contract, the plaintiff cannot recover the costs of defending lien foreclosures which were not taxed or legally taxable, nor for costs in resisting a claim established against him for extra work not covered in the contract: *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276.

Neither the sureties nor a city contractor, who was paid for defective work upon his giving bonds to repair and complete the work, can interpose the plea of *ultra vires* to escape liability on the bonds, where the giving was not prohibited by law: *Spokane v. Costello*, 57 Wash. 183, 106 Pac. 764.

Where a city failed to require a contractor to enter into a bond for the performance of public work and the payment of debts incurred, as required by this section, the city's liability therefor is absolute; and the requirement of section 1161 for notice, being for the protection of sureties, has no application: *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799.

The evidence sufficiently shows that lumber was used in the construction of a plank road for a city, where it appears that it was ordered for that express purpose, that it was carried to the city by the contractor, and that the lumber actually used was of the same character, especially in the absence of any evidence that it was not the same

lumber: *American Mill Co. v. Montesano*, 63 Wash. 683, 116 Pac. 257.

The title, an act requiring bonds from contractors on public work conditioned to pay laborers, mechanics, materialmen, and others, is sufficiently broad to include provisions to indemnify parties furnishing "supplies and provisions" for carrying on the work, although such supplies or provisions did not enter into or become a part of the finished improvements, the doctrine of *sui generis* not applying in such case to the words "and others": *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

A bond under this section to indemnify laborers, mechanics, subcontractors and materialmen, and all persons supplying such persons with provisions or supplies for carrying on the work, covers fuel for a steam shovel used in excavating; also the services performed by teams with drivers furnished to the contractor, together with hay and grain to feed the horses: *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

But not for repairs on a steam shovel: *Standard Boiler Works v. National Surety Co.*, 71 Wash. 28, 127 Pac. 573.

As to contractors' bonds as substitutes for mechanics' liens, see note in 27 L. R. A., N. S., 579.

In an action against a city by a materialman to recover for lumber sold and shipped to the contractor, the city having failed to take a bond for the protection of materialmen, the plaintiff is not precluded from recovery by the fact that the actual delivery of the lumber from the cars to the work was made by the employees of the contractor, where it sold and delivered the same to the contractor for use in such work, and it was actually used therein: *Gate City Lumber Co. v. Montesano*, 67 Wash. 594, 122 Pac. 26.

Under this section, the liability on the bond is not limited to such provisions and supplies as enter into and become a part of the finished product, as in the case of liens under the lien laws of the state, notwithstanding that there is an analogy between the two laws; and the legislature has power to so provide: *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

The object of an act rendering municipal corporations liable to laborers and materialmen if the city fail to take a bond from contractors on public work is sufficiently disclosed by the title, an act requiring bonds from contractors on public work, conditioned to pay laborers and materialmen: *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140.

The fact that city officers did not have authority to make a contract for a public work will not avoid the liability of the city to laborers and materialmen for the failure of the city to take a bond from the contractor, as provided by this section, where

the contractor was engaged in a public work such as the officers had authority to carry on, with their knowledge and consent, and the city had received the benefit of the work: *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140.

This section creates a liability only upon a quantum meruit and not for the "agreed" price of the labor or material: *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140.

This section is remedial and not penal in its nature, not differing from statutes for mechanics' liens: *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140.

§ 1160.

The liability of a city for failure to take a bond to protect materialmen on public work is not affected by the fact that the work was to be paid for by special assessments on the property benefited: *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

Under this section, the city is liable for materials furnished for additional work, where, after letting a contract and taking the bond, the city ordered such radical changes in the work as to release the sureties on the bond taken, and failed to require a new bond to cover the additional liability created by the change in plans: *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

Under this section, a lumber company does not bring itself within the terms of the statute by loading lumber on the cars at a distance and billing it to the contractor, where part of the lumber was diverted to other places from the cars and not used in the work nor delivered on the ground for use: *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799.

§ 1161.

See notes to § 1159.

Under Laws of 1899, page 172, section 1, providing that no action shall be commenced by materialmen against the surety on the bond of a contractor on public work, "unless within thirty days from and after the completion of the contract and an acceptance of the work," notice to be filed, the claimant need not wait until the work is completed and accepted before filing notice of claim, where the contract was abandoned; nor need the notice be filed within thirty days after abandonment by the contractor where it was not completed or accepted, as the statute only fixes the time after which notice cannot be given: *Cascade Lumber Co. v. Aetna Ind. Co.*, 56 Wash. 503, 106 Pac. 158.

A notice by a materialman to a surety on the bond of a contractor on a public building, stating a claim against the building for material furnished to the principal contractor, complies, in substance, with Laws of 1899, page 172, section 1, which requires the notice to state claims against the bond: *Cascade Lumber Co. v. Aetna Ind. Co.*, 56 Wash. 503, 106 Pac. 158.

A contractor on public work and his surety on a bond, given pursuant to this section, to indemnify laborers and materialmen, are not liable for wages due to a laborer under an agreement with a subcontractor in excess of the reasonable value of the services: *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108.

Letters from a materialman to a library board, informing the board of a balance due for materials furnished a contractor, and requesting prompt payment without any reference to the contractor's bond, do not constitute notice to the city in compliance with this section: *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

Actual notice to part of sureties would not bind the other sureties: *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

Such statute is not complied with by actual notice given to the sureties, at a meeting of the library board, that the bill of the materialman for material furnished the contractor had not been paid, since the statute requires written notice of a claim upon the bond: *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

In an action for supplies sold, against city contractors and a bank as their assignee of all moneys due and unpaid on the contract and retained by the city to satisfy liens filed against the contractor's bond, it is error to impress the remaining fund with a lien in favor of the plaintiff, as against the bank, where plaintiff had filed no lien against the same within the time required by law: *Larkin v. Pederson*, 71 Wash. 116, 127 Pac. 844.

As to mechanics' liens on public property, see notes in Ann. Cas. 1913B, 747, 35 L. R. A. 141, and 20 L. R. A., N. S., 261.

As between an assignee of a contractor and a surety company guaranteeing labor claims, under a city contract for public work providing that seventy per cent of the amount earned should be paid the contractor as the work progressed, and thirty per cent retained by the city to secure the payment of laborers and materialmen, any balance due to the contractor on the completion of the work after deducting thirty per cent must be applied to discharge unpaid labor claims in excess of the thirty per cent retained by the city for their security, where the contractor agreed to pay all such claims, and that the city might withhold all payments until satisfied that all wages were paid, and the assignment recited that it was not valid against any claim for labor or materials: *First National Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837.

A contractor on public work may maintain an action in mandamus to compel the city authorities to levy a special assessment to pay for the work, and is not compelled to resort to an action for damages for breach of the city's contract: *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 127 Pac. 568.

As to mandamus against ministerial officers and boards to levy a tax to meet obligations, see note in 98 Am. St. Rep. 883.

§ 1162.

A lien upon logs cannot be claimed for a cable, boom chains, shoeing horses, and like articles furnished merely as tools and appliances for carrying on the work of logging: *Braeger v. Bolster & Barnes*, 60 Wash. 579, 111 Pac. 797.

As to tools and appliances in the aspect of materials for which a mechanic's lien may be claimed, see note in Ann. Cas. 1912B, 5.

This section includes railroad ties, under the rule of ejusdem generis: *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244.

As to mechanic's lien on railroads, see note in 8 L. R. A. 700.

Under this section, the owner of teams has a lien for their services in getting out logs without the rendition of any personal services by him: *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538.

As to mechanics' liens on logs, see note in 6 L. R. A. 362.

As to teamster's right to mechanic's lien, see note in 58 Am. St. Rep. 307; also note in 30 L. R. A., N. S., 89.

Under this section, one who runs a boarding-house, furnishing all supplies for meals at so much per week to be paid for out of wages of the men, is not entitled to a lien as cook: *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51.

As to who is not a "laborer" within the statute giving a lien to laborers, see note in Ann. Cas. 1912B, 139.

§ 1163.

Under this section there can be no lien on railroad ties manufactured elsewhere than at a mill, nor after the removal of ties from the mill where manufactured: *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244.

A finding that railroad ties were cut and manufactured in the woods precludes any inference that they were manufactured at a mill, within the meaning of this section, limiting liens on such ties to the time which they remain at the mill: *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244.

On the removal from the state of railroad ties manufactured elsewhere than at a mill, a logger's lien thereon should be enforced out of the proceeds of the sale thereof, garnished and paid into the registry of the court: *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244.

As to mechanic's lien, under contract made or performed in another state, see note in 38 L. R. A. 410.

Loggers' liens cannot be enforced against innocent third parties by laborers

who were given checks for the amount of their claims, which through their negligence and laches, were not presented until after the funds in bank for their payment had been withdrawn by the absconding contractor: *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538.

Under this section no lien can be claimed after the mill company had delivered it to a railway company, about a mile from the mill, the railway having taken possession and control of it: *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51.

§ 1179.

In an action to foreclose a lien upon logs, asserted in good faith but not established, the court has jurisdiction to enter a personal judgment against a defendant liable upon contract for the services performed by the plaintiff; and the judgment is not erroneous, in the absence of demand for a trial by jury, under section 316, relating to waiver of a jury: *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009.

As to a lien claimant's right to a personal judgment, see note in *Ann. Cas.* 1912A, 129.

§ 1181.

In an action to foreclose logger's liens, where the liability of the owner of the timber depends upon his own wrongful act in eloigning the same, he cannot claim the right to subrogation against the contractor who failed to pay the labor bills of the lien claimants, since subrogation depends upon equity: *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51.

Under this section as to the eloignment of logs and timber "upon which there is a lien," there can be no eloignment prior to the filing of the lien: *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51.

§ 1182.

RIGHT TO LIEN AND ENFORCEMENT: See 4 Remington's Digest, "Maritime Liens"; *Thompson v. Allen*, 56 Wash. 582, 134 Am. St. Rep. 1124, 106 Pac. 173; *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815.

Section 1133, providing for duplicate statements to the owners of all material or supplies for which a mechanic's lien is claimed, did not impliedly repeal the provisions of this and the next section, governing the subject of mechanics' liens on boats and vessels, repeals by implication not being favored, and the later act not being a complete law on the subject: *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

Under this section, a lien for lumber for the construction of a barge may be claimed and enforced without the filing or

recording of any notice or claim: *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

As to the general principles of maritime liens, see note in 70 L. R. A. 854.

§ 1186.

SUMMARY JUDGMENT: See 4 Remington's Digest, "Maritime Liens," § 11; *Kalb-Glibert Lumber Co. v. Cram*, 57 Wash. 550, 107 Pac. 381; overruled in *Kalb-Glibert Lumber Co. v. Cram*, 60 Wash. 664, 111 Pac. 1050.

§ 1188.

Under this section, providing that a landlord shall have a lien on the crops grown upon the demised land for the rents accrued and accruing and "for the a faithful performance of the lease," a landlord's lien for rent may be enforced upon crops under a lease renting both real and personal property, where the personal property was a span of horses and work harness leased to be used on the premises in carrying on and conducting the place during the term: *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

§ 1190.

Under this section, providing that a landlord's lien on crops for rent shall be filed within forty days after the expiration of each year of the lease, a lien may be filed after the rent has accrued not later than the time fixed, and is not void as premature because filed before the expiration of the year: *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

As to a landlord's right to reserve lien upon crops, to be raised by tenant, see note in 14 Am. St. Rep. 166.

§ 1197.

An agister's lien for the care and keep of livestock, under a statute taking effect after the execution of a chattel mortgage on the stock, is inferior and subject to the lien of the mortgage: *National City Bank v. Henderson*, 59 Wash. 354, 109 Pac. 1038.

This section was not intended to have any retroactive effect: *National City Bank v. Henderson*, 59 Wash. 354, 109 Pac. 1038.

As to retrospective laws, see note in 120 Am. St. Rep. 468.

§ 1203.

Upon proof of the loss of personal property from the room of a guest at a hotel, the burden of proof is upon the innkeeper to show facts exonerating him from liability: *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403.

The evidence was sufficient to fix upon an innkeeper, as the insurer of the prop-

erty of his guest at common law, liability for loss of a lady's handbag containing a gold watch and four hundred and sixty dollars in money, which the guest left upon her bed while absent from the room for a few minutes, notwithstanding a conflicting statement made by the guest, an old lady in ill-health, while greatly agitated over the loss: *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403.

A hotel-keeper is not exempted from liability for the loss of property of guests under this section, where he failed to keep an iron safe or vault in good order for the custody of valuables, and failed to post a copy of the statute in the sleeping-rooms, as required by the act, as the act must be exactly complied with to relieve from liability: *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403.

As to innkeeper's liability as insurer of guest's effects, see note in 99 Am. St. Rep. 578.

§ 1211.

A wife is competent to testify as to the trust relation that had existed between herself and her deceased husband, as to property since conveyed to her, where she files a disclaimer of any interest, notwithstanding the allegation of the objecting party that she was interested in the property: *Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137.

In an action against an estate by a former partner of the deceased, plaintiff is disqualified from testifying as to any transactions had with the deceased: *Shaw v. Lobe*, 58 Wash. 219, 29 L. R. A., N. S., 333, 108 Pac. 450.

As to the competency of person interested to testify to transactions with a deceased person in an action against the estate, see note in 29 L. R. A., N. S., 1179.

The surviving wife, claiming an interest in lands of her deceased husband, is, under this section, incompetent to testify as to the marriage or to any other transaction with the deceased: *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822.

A widow, the defendant in an action to quiet title, cannot testify to statements made by her deceased husband as to his interest in the property in dispute; since she is a party in interest and to the record, within this section: *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755.

As to death or divorce and the rule that neither destroys the privilege attached to communications and transactions between husband and wife, see note in 29 Am. St. Rep. 411.

Where the statute renders incompetent the evidence of declarations by a deceased person respecting his title to the property in dispute, it cannot be received as a part of the *res gestae*: *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755.

As to when declarations form part of the *res gestae*, see note in 58 Am. Rep. 184.

In an action by the heir of a deceased grantor in a deed of gift, testimony of the grantee that he had possession of the deed very soon after its date and had kept it in his trunk ever since is not inadmissible as evidence of a transaction had with the deceased within this section, excluding such testimony: *Bardsley v. Truax*, 64 Wash. 400, 116 Pac. 1075.

In an action on open account against defendant's decedent, it is incompetent, under this section, for plaintiff to testify that the deceased checked over the account and approved it: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

Objections to evidence of the adverse party as to transactions with the defendant's decedent are waived where the defendant, after objection, extended the cross-examination beyond the scope of the testimony in chief, introduced evidence on the subject, and called such adverse party as a witness and sought to use his testimony to the extent that it might be beneficial in defeating his claim or establishing a claim in favor of the estate: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

Where the adverse party defends as legal representative of a deceased person, evidence of conversations with the deceased is inadmissible, under this section: *Kalinowski v. McNeny*, 69 Wash. 681, 123 Pac. 1074.

As to the admissibility of declarations of deceased persons sought to be testified to by witness as against third person, see note in 94 Am. St. Rep. 672.

Property owners occupying their property and familiar with land values in the community, who are acquainted with a particular property, are qualified to express an opinion of its value, even if their estimate was higher than sales of other property; and their interest only affects their credibility: *Sedro-Woolley v. Willard*, 71 Wash. 646, 129 Pac. 372.

§ 1212.

On a trial for perjury committed in a civil action, the accused has a right to show that the principal witnesses against him are interested in the civil action, which was still pending for trial, and would profit by his conviction under this section: *State v. Eaid*, 55 Wash. 302, 33 L. R. A., N. S., 946, 104 Pac. 275.

§ 1213.

Whether a child nine years of age has sufficient capacity to understand the nature of an oath and is competent to testify is a matter within the trial court's discretion, not to be disturbed on appeal except for abuse of discretion: *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

Whether a boy nine years of age is competent to testify to an occurrence that happened three years previously rests largely in the discretion of the trial judge, and admission of his testimony will not be disturbed when no abuse appears, and the jury were properly instructed as to its weight and their right to disregard it if they believed that he was testifying to his belief from suggestions rather than from an actual remembrance of the facts: *Kalberg v. The Bon Marche*, 64 Wash. 452, 117 Pac. 227.

As to the competency of children as witnesses, see note in 124 Am. St. Rep. 296.

§ 1214.

This section providing that a husband shall not testify against a wife without her consent has no application to supplemental proceedings on a judgment for the community debt of the husband and wife: *Belknap v. Platter*, 54 Wash. 1, 132 Am. St. Rep. 1097, 103 Pac. 432.

Under this section, disqualifying a husband or wife from testifying against the other without the other's consent, except in certain cases and in criminal cases "for a crime committed by one against another," the wife is incompetent to testify against the husband without his consent in a prosecution for the crime of arson in the burning of a barn belonging to the wife, as the offense is not a crime committed against her: *State v. Kephart*, 56 Wash. 561, 26 L. R. A., N. S., 1123, 106 Pac. 165.

The wife is not a competent witness against the husband in a prosecution for incest, under this section, providing that a wife shall not be competent to testify against the husband without his consent, except in a prosecution for a crime committed against her: *State v. Beltner*, 60 Wash. 397, 111 Pac. 344.

As to the competency of husband and wife to testify against each other, see note in 14 Am. St. Rep. 481.

An attorney is not privileged from disclosing by whom he was employed nor the terms of the employment: *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913A, 1, 113 Pac. 625.

Letters between an attorney and client are not privileged irrespective of the nature of the confidential disclosures: *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913A, 1, 113 Pac. 625.

As to privileged communications between attorney and client, see note in 66 Am. St. Rep. 213.

The books of a corporation are not privileged from being produced in court on a subpoena duces tecum, on the ground that they are trade secrets, as a trade secret means an unpatented secret formula or process for compounding or manufacturing the article, and does not apply to merely private books or writings of a corpora-

tion: *In re Bolster*, 59 Wash. 655, 29 L. R. A., N. S., 716, 110 Pac. 547.

As to subpoena duces tecum and the rule of privilege in that connection, see note in 128 Am. St. Rep. 778.

This section providing that a regular physician shall not, without consent of his patient, be examined in a civil action as to any information acquired in attending such patient, does not prevent the cross-examination of a physician charged with abortion requiring him to state the nature of a certain operation performed by him upon a woman, where the identity of the patient was not disclosed: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

As to privileged communications between physician and patient, see note in 17 Am. St. Rep. 565.

§ 1215.

Since, under this section, a witness cannot be required to appear out of the county in which he resides and more than twenty miles from his residence, the court has no power to punish him for contempt in refusing to obey an order requiring his attendance: *State ex rel. Peterson v. Superior Court*, 67 Wash. 370, 121 Pac. 836.

§ 1216.

An officer authorized to take depositions may compel a witness to produce books and documents, under this section, and section 1235, providing that an officer authorized to take depositions may subpoena a witness "in like manner as he may be subpoenaed and compelled to attend as a witness in any court"; and sections 1236, 1237, providing the manner in which such a witness may be compelled to attend, without any mention of books or documents, were intended to make the other provisions effective, and not to restrict the power of the officer: *In re Bolster*, 59 Wash. 655, 29 L. R. A., N. S., 716, 110 Pac. 547.

A subpoena duces tecum requiring the plaintiff and its attorneys to produce all letters and telegrams passing between it and certain agents respecting the sale of the goods in suit is sufficiently particular to empower the court to compel plaintiff's attorneys, to whom letters were delivered, to produce them: *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470.

§ 1225.

It is not error to refuse to permit a physical examination of the plaintiff, during the trial of a personal injury case, where plaintiff was examined before the trial by physicians appointed by the court: *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149.

As to compulsory physical examination of witness, see note in 94 Am. St. Rep. 836.

In an action against a corporation, an order requiring a trustee to appear before the court for an examination, concerning the possession of the books and assets of the company, which the receiver was endeavoring to obtain, is a summons as a witness and not as a party, where the trustee was not a party to the suit: *State ex rel. Peterson v. Superior Court*, 67 Wash. 370, 121 Pac. 836.

§ 1231.

Where a commission to take a deposition proves abortive by reason of the refusal of a witness to sign a stenographic report, a second commission may be sued out: *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285.

As to stenographic notes as depositions, see note in 81 Am. St. Rep. 366.

§ 1233.

Under this section the notice must state the name of the witness to be examined, that being within the spirit if not the letter of the law: *Donaldson v. Winningham*, 54 Wash. 19, 102 Pac. 879.

§§ 1235-1237.

See notes to § 1216.

§ 1242.

A deposition taken on stipulation is properly suppressed where there is no certificate to it, and it was not returned to the clerk of the court conformably to this and the next section, not substantially complied with, it not being shown by whom it was reduced to writing or that it was read to the witness: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

As to rejection of deposition as evidence, see note in 13 L. R. A., N. S., 366.

§ 1244.

Under a stipulation to take a deposition upon interrogatories and cross-interrogatories, on a commission, a party has no right to be represented by attorney when the deposition is taken; and if he is, the deposition will be suppressed: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

A stipulation for the taking of a deposition reserving the right to object "to any and all questions and answers," does not exclude the right to object to the manner in which it was taken and returned: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

A stipulation for the taking of a deposition is not to be construed in connection with letters written by opposite counsel,

when the letters were not acted on, and the stipulation shows the agreement of the parties: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

A motion to suppress a deposition need not be made before the trial, when it was not then filed, and the motion was made as soon as it was published and the grounds ascertainable: *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

§ 1245.

A deposition taken on behalf of defendant before his answer was amended is admissible in evidence, where the facts alleged in the amended answer are substantially the same, since, under the code, amendments are almost a matter of course at any stage of the proceedings, and cross-examination is not confined strictly to the issues: *Miner v. Paulson*, 60 Wash. 150, 110 Pac. 994.

§ 1254.

An answer stricken out on motion of a defendant is not competent as an admission to prove any of the facts stated therein, as the same is functus officio, and its admissions are not binding on the defendant: *Wiley v. Northern Pac. R. Co.*, 60 Wash. 597, 111 Pac. 801.

§ 1257.

A state deed is admissible in evidence without proof of compliance with the statute pursuant to which it was issued: *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179.

§ 1259.

Laws of another state are presumed to be the same as our own, in the absence of pleading or proof: *Sheppard v. Coeur d'Alene Lum. Co.*, 62 Wash. 12, Ann. Cas. 1912C, 909, 112 Pac. 932.

In an action on a promissory note executed in a foreign country, it will be presumed, where nothing appears to the contrary, that the laws of that country were the same as our own: *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941.

As to the presumption that statutes of a foreign state are similar to our own, see note in 1 Ann. Cas. 459.

§ 1262.

See notes to § 1002.

This section does not contemplate an inspection of confidential and privileged matter not admissible in evidence; and the party may refuse to submit to the invasion of private rights and appeal from a judgment of contempt: *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 28 L. R. A., N. S., 516, 106 Pac. 150.

An order for the inspection of papers under this section is not a final order from which an appeal can be taken directly: *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 28 L. R. A., N. S., 516, 106 Pac. 150.

A foreign bank cannot, by demand for production of papers, be required to bring into court its books essential in the daily conduct of its business: *Bank of Commerce v. Newberry*, 71 Wash. 422, 128 Pac. 1064.

§ 1263.

A statement drawn from account-books is properly admitted in evidence where it was a copy from the books and a witness having personal knowledge of all the items testified that the items were correct: *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

As to the general rule for the admission of books of account, see note in 138 Am. St. Rep. 441.

A written contract to convey land, fixing the time for payments, with provisions for forfeiture, cannot be varied by parol proof of a modification whereby the vendor agreed not to declare a forfeiture for five years if the vendee would plant and cultivate an orchard and remain on the land: *Spokane Canal Co. v. Coffman*, 61 Wash. 357, 112 Pac. 383.

It is not error to admit evidence of the contents of a letter, demanded only twelve days before the trial, on the theory that the time was not sufficient for procuring and forwarding the letter from Minneapolis, as the time appears ample, in the absence of proper showing to the contrary: *Keenan v. Lauritzen Malt Co.*, 57 Wash. 367, 106 Pac. 1122.

A contract for the sale on consignment of such goods as the consignors shall see fit to send to the consignee at Spokane, Washington, cannot be varied by parol evidence that the consignees were to have the exclusive agency for the sale of the consignor's goods in the states of Idaho and Washington: *Passow & Sons v. Kirkwood Distillery Co.*, 54 Wash. 196, 103 Pac. 34.

A written contract for the sale of goods on consignment providing the compensation for the services of the consignee shall be the excess of the selling price over the prices fixed by the consignor cannot be varied by parol evidence that the consignors agreed to fix a list price, when the course of dealing showed that such oral agreement had not been omitted from the written contract by inadvertence or mistake: *Passow & Sons v. Kirkwood Distillery Co.*, 54 Wash. 196, 103 Pac. 34.

As to the admission of parol proof to vary written instruments, see note in 56 Am. St. Rep. 659.

The original assignments of tide land contracts, executed in due form and acknowledged before a notary, are competent proof

of the fact of the assignments, even if they were recorded without any authority of law: *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198.

Copies of letters are inadmissible where there was no attempt to procure the production of the originals: *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73.

The accounts shown by record books of a telephone company made up from time slips and oral reports sent in by numerous employees doing certain work, in the regular course of business, are admissible in evidence without producing the testimony of the men that they had correctly sent in their time, where it was shown by the clerks that the accounts were properly made up from the slips and correctly entered in the books, it being the best evidence obtainable: *Pacific Telephone etc. Co. v. Huetter*, 68 Wash. 442, 123 Pac. 607.

In an action to foreclose a lien for excavation work, there was competent evidence of the amount of earth removed, where it appears that plaintiff's foreman, who could not be found at the time of trial, signed daily slips showing the number of loads removed, his signature was identified, the bookkeeper examined and totaled the slips, the total checked with the sum paid by a third party to whom the dirt was sold and delivered, as evidenced by an indorsed check marked paid with a notation on the back as to the number of loads, and the parties had agreed as to the yardage of each load: *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

Entries in account-books of a corporation are admissible where the employee who made the original notations with knowledge of the transaction had left the country, and could not be found or produced, and his employment, duties and handwriting were proven: *Pioneer Sand & Gravel Co. v. International Contract Co.*, 70 Wash. 123, 126 Pac. 84.

In an action on open account by one employed by defendant's decedent as a time-keeper and bookkeeper, plaintiff's journal entries of the items charged at varying intervals, seemingly made in the usual course of business, are admissible in evidence, where the deceased frequently examined and checked the books, and slept in the office where they were kept during the times in question; and they are not rendered incompetent by the fact that some of the items were of money advanced by the plaintiff: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

An objection to account-books on account of erasures goes to the weight and not to the competency of the evidence: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

A book of account kept by general contractors is admissible in evidence, where it appears that the items were entered from

information and data acquired from blank slips filled out by their employees and turned in each week showing the time and kind of work done by each, and checked by the foreman, the foreman testified from personal knowledge to the correctness of the data, and the person making the entry in the book testified to the correctness of the original data and the record thereof in the book: *Lawn v. Prager*, 67 Wash. 568, 121 Pac. 466.

The loss of an original affidavit is sufficiently shown to admit evidence of a copy, which several witnesses testified was a true copy, where it appears that the original was filed as an exhibit at a former trial and officials in whose custody it should be testified that search had been made for it and it could not be found: *State v. Peeples*, 71 Wash. 451, 129 Pac. 108.

Books of account, openly kept by a general manager of a corporation for five years during which he had full charge of the business, containing entries crediting himself with a monthly salary, are admissible as tending to show an implied contract to pay a reasonable sum for his services, when the books were open to the inspection of the officers and trustees of the corporation, who made no objection thereto except an objection to one raise in the salary: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

Books of account, kept by a general manager of a corporation, are admissible for the purpose of showing the charges and credits against and in favor of the manager, since deceased, where, although not kept with the skill of an expert, they fairly show the transaction of the business covering a period of five years during which he was in control and the books had been at all times open to inspection of the officers, who made no objection thereto: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

As to general requisites of admissibility of books of account, see note in 138 Am. St. Rep. 445.

§ 1284.

This section means a "residence" in the strict legal sense, so that the domicile of a wife, under normal conditions, follows that of her husband for the purposes of administration: *Buchholz v. Buchholz*, 63 Wash. 213, Ann. Cas. 1912D, 395, 115 Pac. 88.

Where a husband has deserted his wife and has established a separate domicile, jurisdiction to probate the wife's estate depends upon her own domicile: *Buchholz v. Buchholz*, 63 Wash. 213, Ann. Cas. 1912D, 395, 115 Pac. 88.

As to what is domicile residence and citizenship, see note in 48 Am. St. Rep. 711.

§ 1288.

See notes to § 1297.

§ 1297.

See notes to § 1331.

Where a will has been filed with the clerk of the court, the court may take proof and probate the will without the filing of any formal petition by an interested party, under this section and section 1288, providing for the immediate probate of wills offered, and that wills filed may be opened and retained for probate: *In re Peirce's Estate*, 63 Wash. 437, 115 Pac. 835.

§ 1302.

See notes to § 1331.

§ 1306.

Failure to record a will, under this section, does not relieve a purchaser of taking notice of the interests of devisees where the will was probated in the county in which the land is located: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

§ 1307.

CONCLUSIVENESS OF PROBATE OR RECORD.—Under this section and section 1309, providing that the probate shall be binding if no person shall appear within the year, all contests based upon any cause affecting the validity of the will must be commenced within the time limited, after which the probate is binding upon all except persons under disability: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

Undue influence upon the part of a son, to whom the testatrix left the major portion of her estate, is not shown, and findings setting aside the will are unwarranted, where it appears that the contestant, a daughter, had been unable to get along with her mother for many years, infrequent visits usually ended in violent discord, while relations with her sons, who took care of her, especially the favored son, were harmonious and usually affectionate, such conduct on his part not being in law undue influence: *Converse v. Mix*, 63 Wash. 318, 115 Pac. 305.

As to undue influence, see note in 81 Am. St. Rep. 670.

Mental incapacity of an old lady to make her will is not shown by the fact that she was eccentric in the matter of dress, an ardent woman suffragist, and believed she was being persecuted for her eccentricities, where it appears that she had the business ability and judgment to amass and manage a considerable fortune, and retained her mental faculties until the last: *Converse v. Mix*, 63 Wash. 318, 115 Pac. 305.

As to delusions as indicating incapacity, see note in 2 L. R. A. 670.

Incapacity to make a will cannot be established by showing that the testator was fre-

quently under the influence of intoxicants: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078.

As to drunkenness as indicating incapacity, see note in 39 L. R. A. 220.

Where a testatrix, dying without issue, had separated from her husband three years before her death, her next of kin, in order to contest the will, must show that the husband was dead or divorced at the time of her death, there being no presumption from the lapse of such period of time: *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912.

As to presumption of death, see note in 104 Am. St. Rep. 198.

While ordinarily the burden of proof is upon the contestant of a will claiming undue influence, sufficient is shown to put the executor to his proof that there was no undue influence, where it was shown that the will was in the handwriting of the sole beneficiary, that although he knew of a former will in favor of a son, he kept its repudiation secret, and that he took care to have a physician act as witness in order to preserve proof of mental capacity, in view of former wills in favor of, and an admitted attachment for, the son: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

As to presumptions and burden of proof of alleged undue influence, see note in 31 Am. St. Rep. 680.

The contestant of a will, who petitioned for the probate of a prior will, cannot, upon winning his contest, withdraw his petition for probate of the will proposed by him, nor waive a lesser share under such will to take a greater share under the statutes of descent: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

Where the testatrix's father, who would have inherited the estate if no will had been made, was so far insane as to be incapable of managing his own affairs until his own death, his son as his heir may maintain a contest of the will, being a "person interested" in the will, within the meaning of the statute respecting a will contest: *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912.

As to who may contest a will, see note in 130 Am. St. Rep. 187.

§ 1309.

See notes to § 1307.

Probate of a will in common form cannot be collaterally attacked or set aside after the time limited therefor by law because of the fact that the will appears on its face not to have been executed in the manner required by law: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

§ 1313.

Costs and attorneys' fees for contesting the probate of a will may be allowed as a "benefit" to the estate, where the contestants were successful and the expenses when al-

lowed reduce their residuary share in the estate: *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433.

The costs and expenses incurred for attorneys' fees in contesting the probate of a will are not a claim against the estate of the deceased which must be presented to the administrator for allowance, and they are properly allowed, when the will is held void, as a judgment against the estate, under this section, after a citation to the administrator and a hearing before the court: *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433.

§ 1314.

Under this section, both witnesses must testify to its provisions from their own knowledge of its contents, and not from statements made by the testator: *In re Needham's Estate*, 70 Wash. 229, 126 Pac. 429.

As to what must be shown to effect probate of a lost will, see note in 110 Am. St. Rep. 454.

§ 1317.

Where a nonresident testator dies leaving real estate in this state, it is necessary that his will be probated here: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

The probate of a foreign will upon a foreign certificate of probate is not ancillary to the foreign proceeding in such sense that the final distribution of real property located in this state passing under the will would not be a final construction of the will: *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

As to probate of foreign will, see note in 113 Am. St. Rep. 211.

§ 1319.

Where old people called their children together and the parties agreed upon a division of the real property, deeded to the children with a life estate reserved, the deeds being delivered to the county auditor to be recorded after the grantors' deaths, and, at the same time, the grantees in one of the deeds made a deed of a certain tract to three grandchildren of the old people, at their request, containing a proviso "that this deed shall be void and of no effect until our death," the transaction amounts to a testamentary disposition by the old people, and not by the grantors in the last deed: *Simmons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

A change in the custody of such deeds, from the county auditor to a son of the grantors, does not amount to a recall of the deeds: *Simmons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

As to the nature and essentials of wills, see note in 89 Am. St. Rep. 486.

A will will not be set aside for undue influence, where the testator had testament-

ary capacity, and at the time of making the will was free and unrestrained in exercising his volition, and the evidence only raises a suspicion that the principal beneficiary had some opportunity to exercise undue influence, which was denied, especially where other favored beneficiaries had no such opportunity: *In re Patterson's Estate*, 68 Wash. 377, 123 Pac. 515.

Where a widow was not required by a will to make an election between her community interest and the provision made for her in the will, it is immaterial whether her acts in dealing with the estate would have amounted to an election if the will had required it: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974.

Undue influence will operate to defeat a will, although the testatrix was mentally competent, where there was coercion, imposition, fraud or influence impelling the testatrix to act in fear, desire for peace, or something which she was unable to restrain: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

Undue influence in the execution of a will need not be shown by direct evidence, but it is competent to show the relations of the parties, the surrounding circumstances, habits and inclinations of the testatrix, and the fact that provision had been made for a son in four or five wills previously executed: *In*

re Tresidder's Estate, 70 Wash. 15, 125 Pac. 1034.

In such a case, undue influence is sufficiently shown where, in addition to such facts, it appears that the testatrix, then on her death-bed, had, on the day before, executed a will making provision for a son, the next day executing the contested will making her husband her sole beneficiary, with a clause asking that he make provision for the son "as requested" by her, that the testatrix was in a very weak condition, and had a great attachment for her son and frequently expressed an intention to leave him her property: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

As to facts raising the presumption of undue influence, see note in 21 Am. St. Rep. 94.

A testatrix is not shown to have sufficient capacity to execute a will ten days before she was declared insane, where, prior to the execution, she had shown grave symptoms of the affliction, from the first she declined more or less rapidly, and ten days after the will was executed she was found unsafe to be at large, and was confined and finally died from the effects of her infirmity: *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912.

As to mental incompetency on part of testator, see notes in 1 L. R. A. 161, and 6 L. R. A. 167.

§ 1320-1. Wills Made Outside the State.

A last will and testament, executed without this state in the mode prescribed by the law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state: Provided, Said last will and testament is in writing and subscribed by the testator. [L. '11, p. 9, § 1.]

§ 1322.

Under this section a will may be revoked by a writing executed with the solemnity of a will, although the revocation is not a will in the technical sense of making a disposition of any property: *In re Peirce's Estate*, 63 Wash. 437, 115 Pac. 835.

As to revocation of will and the various methods of effecting it, see note in 28 Am. St. Rep. 344.

§ 1331.

This section refers to the testimony and not merely to the petition offering the will; and failure to offer the proofs within six months is not excused by delay in consequence of the several pleas of the next of kin, in view of sections 1297, 1302, providing that the court may immediately receive the proofs when the will is exhibited: *In re Greenleaf's Estate*, 69 Wash. 478, 125 Pac. 789.

As to nuncupative wills, see note in 67 Am. St. Rep. 572.

§ 1339.

Where a will devised property to two individuals, one of whom was not a trustee, and provided that if either refused to accept the trust, another be appointed in his stead by the court probating the will and settling the estate, the will is not a "nonintervention" will, since it is necessary under *Balinger's Code*, section 6196, that the intention to dispense with administration be shown by express words or necessary implication: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

The intention of the parties to make provision for their children, with all the aspects of a contract which is irrevocable by the survivor after the death of the other, is clearly shown, and the widow makes an election which she cannot subsequently repudiate by claiming a community interest in lands, devised by mutual wills to their children, where it appears that husband and wife, following a policy to advance one thousand dollars to each of their children, there being

three minors still unprovided for, executed mutual wills devising to two minor sons specified tracts of community property, each charged with the payment of five hundred dollars to a minor daughter, that wills instead of deeds were made on the advice of an attorney because of the minority of the sons and their supposed inability to contract for the charges thereon, and that, at the same time, a deed of property was made to another child, and a writing signed by the heirs, releasing all claims to the estate in consideration of the advances; and where, on the death of the husband, the widow offered his will for probate and accepted the benefits of devises to her of portions of the husband's separate and community lands, and bequests of personal property, which she converted to her own use: *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255.

A will devising all of the testator's real estate, "and all interest therein, community or otherwise," of which he dies seised or to which he shall have the power of disposition by will, in trust to pay the net income to his wife during life or widowhood, does not show any intent to devise the wife's half of the community property, and hence does not put her to an election between her community interest and the provision made for her in the will, in view of the rule that the necessity for an election must appear upon the face of the will itself, and the presumption that the testator intended to dispose of his own property only, in the absence of any designation of specific property: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974.

For the purpose of forcing an election, extrinsic evidence is not admissible to establish the intent to dispose of property over which the testator had no testamentary power of disposition: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974.

As to the doctrine of election by widow to take or reject provision by will, see note in 92 Am. St. Rep. 695.

Specific bequests of money are not to be included among "all other just debts" directed to be paid in a certain way, but are to be paid from cash on hand at the time of the testator's death, bequeathed under a residuary clause: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105.

A legacy of one thousand dollars, to be credited on a note due from the legatee, is a specific legacy to be credited as of the date of the death of the deceased: *Martin v. Barger*, 62 Wash. 672, 114 Pac. 505.

Under a will making specific legacies to minors to be paid at the age of majority, and giving one-half of the income to plaintiff "during widowhood," hers is a specific legacy, not subordinate to those of the minors, and entitles her to the full income until the minors are paid, and then on the reduced estate until she remarries; and it is immaterial that a direction is made that none of the real estate shall be sold until

five years after the testator's death, since that only postpones fulfillment in case of deficiency of personal assets: *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856.

As to what specific legacies are and the law governing them, see notes in 95 Am. St. Rep. 356, and 140 Am. St. Rep. 577.

A clause in a will asking the sole beneficiary to "make provision for my son R. as requested by me," must be construed in the light of several former wills in favor of R. and the circumstances surrounding its execution: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

As to the general requirements of precatory words in wills, see note in 106 Am. St. Rep. 500.

The rule of *ejusdem generis*, as applied to wills, yields to the rule that a will is to be construed to give effect to the intent of the testator, and to avoid intestacy, and when the circumstances show that it would defeat the intention; so that a clause in a will "and in fact all personal property," following a bequest of livestock, farm implements, household furniture and effects, bequeathed to one of the testator's daughters, is not to be restricted by the rule of *ejusdem generis*, but covers six thousand two hundred and forty-five dollars and thirty cents cash handed to the daughter the day before his death, and not otherwise disposed of in the will, where the intent to will all of his property appears by bequests of fifty dollars to each of certain other children followed by a clause that in times past he had given them their portion of their inheritance, and the balance of the will showed careful attention to every detail of his parental duties and an intent not to die intestate: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105.

As to the failure, in will, to mention or identify the subject matter of a bequest, see note in 36 L. R. A., N. S., 618.

Where a will gave plaintiff, during widowhood, one-half of the income of an estate, amounting to several hundred dollars a month, and made specific legacies to certain minors to be paid at majority out of the whole estate, without interest, there is no consideration for a contract between plaintiff and the executrix whereby the plaintiff was to receive but one hundred dollars a month out of the income, the balance to accumulate as a fund out of which to pay the legacies, the principal of the estate being ample to pay them, and her legacy not being subordinate, since the contract is neither a benefit to the plaintiff, nor a detriment to the executrix: *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856.

The contract could not be considered an advantage to the plaintiff from the fact that, if she lived to her full expectation of life, and did not remarry, she would in the end receive a greater income from the estate by providing the accumulations with which to pay the legacies of the minors, it being a violation of public policy to enforce a

condition of widowhood: *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856.

As to devise, etc., during widowhood, see note in 92 Am. St. Rep. 700.

§ 1341.

Upon the death of a minor, intestate and without issue, estate inherited from his mother descends to his sisters, under this section, subdivision 6: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

As to the general rule of succession, see note in 112 Am. St. Rep. 727.

Property only descends to and vests in the heirs subject to administration, and may be divested by the process of administration: *Bickford v. Stewart*, 55 Wash. 278, 34 L. R. A., N. S., 623, 104 Pac. 263.

As to liability of heir for debt of ancestor, see note in 112 Am. St. Rep. 1018.

§ 1342.

See notes to § 5917.

Under our statute, upon the death of a wife, one-half of the community property descends to the children, who become tenants in common with their father: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

As to descent of community property, see note in 12 Am. St. Rep. 90.

§ 1344.

An action for rent may be maintained against the executors of a deceased joint tenant, without showing the insolvency of the survivor, as required at common law, in view of this section, and the reform procedure of the code providing a single form of action, to be prosecuted by and against the real parties in interest, or their executors or administrators in case of actions on contract, and prescribing the form of judgments and the relief to be granted in actions against joint debtors, etc.: *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890.

As to liability of tenants in common for rents, see note in 52 Am. St. Rep. 925.

§ 1366.

Under this section, providing that the fee title to lands shall vest in the heirs or devisees immediately upon the death of the ancestor, subject to debts, and section 1368, providing that no real estate shall be liable for the ancestor's debts unless letters be granted within six years after his death, administration upon community real estate is not necessary thirteen years after the death of the wife: *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 Pac. 357, 109 Pac. 305.

As to effect of lapse of time on administration, see note in 81 Am. St. Rep. 559.

Upon the probate of a will in favor of a husband, which was void as to the testator's

children because they were not named or provided for in the will, a decree of final distribution awarding all the property to the husband, upon published notice as required by statute, is conclusive and binding upon the children, if unquestioned and unappealed from, notwithstanding this section: *In re Ostlund's Estate*, 57 Wash. 359, 135 Am. St. Rep. 990, 106 Pac. 1116.

An administrator of community real estate, appointed without any necessity for administration, after the expiration of the six years within which letters must be granted in order to charge the land with the debts of the deceased, cannot maintain an action to recover the land, title to which had, by this section, vested in the heirs: *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 Pac. 357, 109 Pac. 305.

As to conclusiveness of probate of will, see note in 113 Am. St. Rep. 213; also note in 21 L. R. A. 680.

§ 1368.

See notes to § 1366.

§ 1389.

The power to grant letters of administration being purely statutory, intestacy is a necessary prerequisite to the granting of general letters of administration in this state, under this and the next section; hence the superior court is without jurisdiction to grant letters of administration to the wife upon the community property, after appointing executors and admitting to probate the will of her deceased husband, devising and bequeathing his half interest in the community property and his separate estate, and naming his executors: *In re Guye's Estate*, 54 Wash. 264, 132 Am. St. Rep. 1111, 103 Pac. 25.

As to appointment of executors, see note in 132 Am. St. Rep. 1115.

The right to administer upon an estate is statutory, with no discretion in the court where proper application is made: *State ex rel. Mann v. Superior Court*, 52 Wash. 149, 100 Pac. 198.

Under this section, the general words in the proviso, "no relatives or next of kin," must be construed to mean no relatives or next of kin specified in the enacting clause as entitled to letters, and other relatives have no prior right and cannot object to the appointment of any suitable person: *In re Hoss' Estate*, 59 Wash. 360, 109 Pac. 1071.

Assignments of claims after the death of the decedent do not entitle the assignee to letters of administration as a "creditor" of the decedent: *In re Hoss' Estate*, 59 Wash. 360, 109 Pac. 1071.

Under this section creditors have no more than a privilege to pray for letters if the others do not exercise their preference, and the court may appoint the nominee of one

of the preferred classes, although the statute does not expressly give the right of nomination, in view of the provision that creditors cannot exercise their right until after the lapse of forty days, and the implication of power in the court to exercise its discretion, and the provision authorizing the appointment of any suitable person if the heirs in writing waive their right: *Larson v. Stewart*, 69 Wash. 223, 124 Pac. 382.

As to the right to administer on an estate and who may apply for letters, see note in *Ann. Cas.* 1913B, 1162.

Upon the death of either spouse, the entire community estate, and not the deceased's portion, is subject to probate: *Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420, 121 Pac. 841.

As to the liability of community property for debts, see note in 19 L. R. A. 233.

The widow is entitled to have administration of community personal property in the county of the domicile of the deceased at the time of his death: *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060.

An appointment of a suitable person as executor cannot be collaterally attacked by a third person, as having been made before the expiration of the forty days in which the widow and next of kin could apply where they waived their right by failing to apply within the forty days: *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398.

As to collateral attack on administrator, see note in 81 Am. St. Rep. 535; also note in *Ann. Cas.* 1912A, 983.

§ 1420.

Under this section, authorizing the appointment of a special administrator under certain conditions "to collect and preserve the effects of the deceased," sections 1421, 1422, requiring that he account for all goods, chattels, "debts" and effects and collect and preserve all goods, chattels and "debts," section 1423, providing that his duties shall cease upon granting letters testamentary or of administration, and section 1424, providing that he shall not be liable to an action by any creditor of the deceased, the word "debts" includes only debts owing to the deceased; and the object being only to preserve the estate pending formal administration, and every provision of law relating to claims against the estate being elsewhere treated, a claim presented to and rejected by a special administrator is of no effect and insufficient to prevent the running of the statute of nonclaim, section 1479 providing that no action shall be maintained on a claim against the estate unless it shall have been first presented to the executor or administrator, which is mandatory: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395.

§§ 1421-1424.

See note to § 1420.

§ 1444.

The probate court has no jurisdiction to order an allowance to a widow, upon the settlement of an estate under a "nonintervention" will, within this section; and the statutory provisions with reference to the widow's use of the homestead and other articles, exemptions, and a money allowance, in the case of estate settled through probate proceedings have no application, the two methods of settlement being distinct: *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041.

§ 1460.

One innocently coming into the possession of property under claim of ownership by an alleged gift from the deceased is not liable for double damages under this section: *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857.

§ 1465.

Under this section and section 1466, an order appraising and setting aside a homestead upon the widow's petition, filed in the probate case, is a proceeding within the administration of the estate requiring no personal service upon the administrator as in the case of an original proceeding; but notice to the attorney authorized to represent the administrator in the administration of the estate confers jurisdiction to make the appraisal and order, which is final and conclusive, if not resisted: *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81.

As to the effect of order setting apart probate homestead to widow, see note in 129 Am. St. Rep. 794.

Under this and the next section, an order setting aside to the widow a homestead from community property vests in her the title in fee, if the court had jurisdiction to make the order: *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81.

§ 1466.

See note to § 1465.

Under sections 1466, 1467, and 1571, authorizing allowances for the support of the widow which are preferred over all claims except funeral charges and costs of administration, the court may classify and allow, as preferred, claims for caring for the widow at a hotel and hospital, doctor's and nurse's charges, and her brother's expenses in a trip from the east to care for her, where the deceased and widow were fatally injured in an accident while temporarily in the state, in view of the gravity and manifest necessities of the case: *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

§ 1467.

See note to § 1466.

The jurisdiction of the court to make allowances for the widow's support which are preferred to claims of other creditors does not depend upon the notice to all creditors required on final settlement, as against creditors who had actual notice; nor as to other persons having claims, in view of the opportunity of such claimants to be heard on final settlement: *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

As to notice of distribution in probate proceedings as jurisdictional, see note in 37 L. R. A. 368.

Upon an ancillary administration in this state upon the estate of a resident of Kentucky dying in this state, the court may make allowances for the support of the widow while being cared for in this state, without having the claims passed upon by the probate court of Kentucky: *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

Creditors filing claims in an ancillary administration in this state, and asking their allowance by the courts of this state, are estopped to question the jurisdiction of the court to classify and allow the claims filed: *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

As to effect of ancillary appointment after inception of suit by foreign executor, see note in 4 L. R. A., N. S., 651.

§ 1474.

Where a claim against an estate was rejected January 2d, because not filed within one year, and on solicitation of the claimant seeking a reconsideration, the administrator took the matter up with his attorneys, and wrote on January 20th that the attorneys' "position is the same as mine—that I cannot allow the claim," the claimant was not misled or prejudiced in bringing an action within three months from the rejection of the claim, which dates from January 2d, and not January 20th: *Farmers & Merchants' Bank v. Lilly*, 66 Wash. 309, 119 Pac. 749.

§ 1477.

In action to establish a claim against the estate of a deceased partner, there is sufficient evidence of payment of an account stated between the partners, where, on statement of the account, the deceased agreed to leave a check for the amount with an attorney, there was evidence that the parties shortly after met and discussed or passed a check, and the widow of the deceased testified that the plaintiff called on the deceased a few days later claiming he had not been paid sufficient money, when they went over their books again and agreed that the previous settlement was correct, especially in view of a delay of two years and failure to

commence suit during the lifetime of the deceased: *Zonig v. Boehme*, 60 Wash. 500, 111 Pac. 566.

The administrator of a deceased contractor, the principal on a bond, may, on rejection of the claim, be joined as a party defendant with the surety in an action on the bond, the proceedings for presenting claims against the estate and payment of judgments in course of administration making no difference in the nature of actions against administrators: *Spokane v. Costello*, 57 Wash. 183, 106 Pac. 764.

An action not being commenced so as to toll the statute of limitations until the complaint is filed, an action upon a claim against an estate which was rejected January 2d is not commenced within three months thereafter, as required by this section, when the complaint was not filed until April 6th following: *Farmers & Merchants' Bank v. Lilly*, 66 Wash. 309, 119 Pac. 749.

§ 1479.

See note to § 1420.

It is not a necessity for a surety on a contractor's indemnity bond to file a claim against the contractor's estate, where it merely seeks to foreclose a mortgage given by the contractor as security for the execution of the indemnity bond: *Macdonald v. O'Shea*, 58 Wash. 169, Ann. Cas. 1912A, 417, 108 Pac. 436.

An objection that a claim against an estate was not properly entitled and was insufficient to support an action is of no avail where the title was not misleading, the verification conformed to the statute, and the claim was rejected: *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890.

The presentment of a claim against an estate under the statute of nonclaim is not entirely a matter of abatement, but a fact essential to a cause of action thereon, so that objection that no claim was filed may be first raised during the progress of the trial by the objection that the complaint does not state facts sufficient to constitute a cause of action: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395.

An executor or administrator has no power to waive the statute of nonclaim (overruling *Neis v. Farquharson*, 9 Wash. 508): *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395.

Under this section, the presentation of a claim is a condition precedent to an action to foreclose a mechanic's lien against property of the estate, for materials furnished to a contractor under a contract made with the deceased during his lifetime: *Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420, 121 Pac. 841.

The necessity of presenting a claim is not affected by the fact that there is no privity between the materialman and the owner, the lien not depending on contract and being

limited to the reasonable value of the services: *Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420, 121 Pac. 841.

§ 1483.

A judgment against an administrator should contain directions for its payment in course of administration, as required by this section, but failure to do so is not ground for reversal, where it can be so understood, or amended on appeal: *Spokane v. Costello*, 57 Wash. 183, 106 Pac. 764.

§ 1498.

The rule of caveat emptor applied to administrator's sales where no rights of persons under disability are involved applies only to want of power to sell, and does not prevent reliance on the title of the deceased at the time of his death, as disclosed by the records: *Golden v. Pilchuck Tribe No. 42*, Improved Order of Red Men, 71 Wash. 581, 129 Pac. 93.

As to the application of caveat emptor to judicial sales, see note in 135 Am. St. Rep. 913.

§ 1499.

Under sections 1499, 1500, and 1589, personal notice to the heirs is not necessary to confer jurisdiction upon the court to enter a final order of distribution which is binding and conclusive on them, although erroneous: *In re Ostlund's Estate*, 57 Wash. 359, 135 Am. St. Rep. 990, 106 Pac. 1116.

§ 1500.

See notes to § 1499.

§ 1530.

Upon an administrator's sale of mortgaged property to pay off the mortgage, in which, upon petition and notice therefor, the court ordered a sale of other property in case of a deficiency, a sale accordingly to pay the deficiency, with deed issued, confirmed by the court, is not void (as against parties claiming under a title not derived from the deceased) by reason of the fact that this section requires, in case of such a deficiency, that the mortgagee file a claim for the balance payable in due course of administration, since the court had jurisdiction, and section 1694 provides that no sale shall be void or called in question by one claiming adversely to the title of the deceased or under a title not derived from the deceased, for any irregularity, if it appears that the administrator was licensed to make the sale by an order of a court having jurisdiction of the estate, if a deed in legal form was executed and delivered, the omission of statutory proceedings for a deficiency sale in due course of administration being in such case an irregularity only: *Jones v. Seattle*

Brick & Tile Co., 56 Wash. 166, 105 Pac. 238.

§ 1536.

A railroad fill upon a street changing the grade and interfering with access, to the damage of the abutting owner of improved property, who owns the fee of the street, is a trespass, for which the right of action survives, under this section, providing that executors and administrators may maintain actions for trespass committed on the estate of the deceased during his lifetime: *Seward v. Spokane, Portland & Seattle R. Co.*, 64 Wash. 516, 117 Pac. 263.

§ 1540.

Under this section, the widow of the deceased has no interest in the action as an heir, although the property conveyed by the deceased was community personalty, of which the husband had sole control under section 5917, since it cannot be said that she did not receive the benefit of the conveyance: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

The rights of an executor to set aside the fraudulent conveyances of the decedent for the benefit of creditors, under this section, are the same as though the creditors were prosecuting the action against the fraudulent transferee during the lifetime of the deceased: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

As to right of executor to recover property fraudulently conveyed by his decedent, see note in 135 Am. St. Rep. 330.

§ 1547.

An allowance of thirteen thousand dollars for the fees of an attorney for an executor is excessive, and eight thousand seven hundred and fifty dollars is sufficient, where it appears that the estate consisted of a city building, its rents, issues and profits, of the value of six hundred thousand dollars, that the attorney was learned in the law, and of thirty years' experience, that he probated the will, made an exhaustive inquiry as to the community nature of the estate, devoted considerable time to the question of the inheritance tax, attended to two suits, carried the estate to final settlement, was paid seventeen hundred and fifty dollars up to the time of the final account, and seven thousand dollars thereafter upon contest of the final account, which had once been vacated upon condition that the executor be allowed to credit on his account all subsequent disbursements, such order being conclusive upon the estate as to the items paid: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

In determining the amount of an attorney's fee to be allowed an executor, the court will take into consideration the value of the estate and the responsibility involved:

Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253.

It being the duty of an administrator to investigate and report upon all claims of creditors of the estate, an administrator is entitled to an allowance for attorneys' fees required for the investigation of a third person's claim to ownership of a half interest in the estate which was based upon mutual accounts and dealings between the deceased and his brother for whom it was alleged deceased held the property in trust, since investigation might prove the claimant to be a creditor, and since the law takes an interest in distributing the estate to the legal heirs: *In re Lichtenberg's Estate*, 58 Wash. 585, 109 Pac. 48.

Allowances to administrators for attorneys' fees are largely discretionary, and no abuse of discretion appears, considering the value of the estate and all the circumstances, where fifteen hundred dollars was allowed for the probating of a will and investigating a third person's claim to a half interest in an estate of the value of sixty-two thousand eight hundred and sixty dollars, the attorneys having examined books and correspondence, and consulted with New York counsel for claimant during a period of a week or ten days: *In re Lichtenberg's Estate*, 58 Wash. 585, 109 Pac. 48.

As to the right of executor or administrator to compensation for legal services, see note in *Ann. Cas.* 1913A, 1273.

Expenses incurred by the executors of a nonintervention will, who were the chief beneficiaries thereof, in defending a suit for an accounting and partition brought by parties claiming part of the estate, are not properly chargeable against the estate, as they were incurred in their own interests and not as executors: *In re Lotzgesell*, 62 Wash. 352, 118 Pac. 1105.

The superior court, sitting in probate, may exercise its equity powers, and having framed and tried an issue to try title, may, on final decree, allow administrators' and guardians' fees not covered by the pleadings on such issue: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

Where a man allowed his property to be brought into probate as community property and to remain there several years, employing attorneys and availing himself of the services of an administrator and guardian ad litem, the fees and expenses are properly charged to the property, although it was found in an equitable issue, framed to try title, that it was not community property, and that there was no property of the deceased for distribution: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

As to the rights of an executor or administrator to extra compensation for extraordinary services, see note in *Ann. Cas.* 1913A, 1267.

§ 1549.

This section applies to nonintervention wills, as well as to others: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

An executor having a legal right to probate a will without the consent of a widow, the burden of proof is upon her to show an alleged waiver of his statutory commissions under an agreement to accept a flat salary: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

§ 1562.

There is a general appearance in probate, which waives jurisdictional objections to an order classifying claims and directing preferred allowances because of want of notice of final settlement provided by this section, where the parties had actual notice of the hearing, asked and obtained a continuance, and stipulated for a hearing at a later date, at which they had full opportunity to be heard: *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

§ 1566.

An order in probate upon the statutory published notice, settling the executor's final account and fixing the amount of his compensation at a sum in excess of the statutory allowance, is within the jurisdiction of the court, and if erroneous is reviewable on appeal as a final judgment; hence it cannot be vacated in the court below for error except upon a proper showing; and it is not sufficient that an applicant for the vacation of the decree alleges that she had no actual notice of the hearing for final settlement, where she had notice of the decree in ample time to have appealed therefrom: *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847.

§ 1571.

See note to § 1466.

§ 1580.

Upon the distribution of an estate it is necessary to acquire jurisdiction over heirs or devisees of the deceased, or their descendants who died subsequently to the death of the deceased: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

As to jurisdiction necessary to be had over persons entitled to property in course of distribution, see note in 41 Am. St. Rep. 140.

§ 1587.

A distributee upon final settlement of an estate, and his successors in interest, are not bona fide purchasers by reason of the fact that they had no notice of the interests of an heir which was not in the record chain of title; but they are bound to notice the interests of all who successively acquire title

by inheritance or will: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

A final decree of distribution in probate, setting off half of the property as the community property of the widow, and passing half to the distributees in the will, is conclusive if unappealed from, and cannot be collaterally attacked by showing that the property was the separate property of the deceased and that all passed under the will: *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

Where a final decree of distribution was entered in 1903, setting aside the undivided half of the property to the widow as her community property, and the other half to the devisees named in the will, all notices having been given and its integrity not questioned until 1910, parties and third persons dealing with it on the faith of the record are estopped to defeat intervening equities by the claim that it was the separate property of the deceased and as such subject to restrictions in the will, in view of the presumption that property standing in the name of married persons is community property: *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

§ 1589.

See notes to § 1499.

A decree of distribution of an estate cannot affect the interests of a minor unless jurisdiction over him be acquired by service of notice upon his general guardian, if he have one, and if not, then by the appointment of a guardian ad litem: *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

§ 1603.

This act is within the inherent legislative power of the state to control the inheritance and descent of property, and does not violate the constitutional inhibition against the taking or sale of property without due process of law: *Bickford v. Stewart*, 55 Wash. 278, 34 L. R. A., N. S., 623, 104 Pac. 263.

Where, upon the partition of an estate, an agent for absentees was appointed in probate to receive and care for their portion of the estate, distributed to them, and later, by a suit in equity, the distribution was set aside and a different tract of land distributed to the absentees in lieu of the first, the agent still retains authority to act under the appointment in probate as to the later parcel finally awarded: *Bickford v. Stewart*, 55 Wash. 278, 34 L. R. A., N. S., 623, 104 Pac. 263.

Where an agent for absentees was appointed in probate, under this section, to receive their portion of the inherited estate distributed to them, and the appointment was later continued in a suit in equity in-

stituted for a redistribution, a sale by the agent under order of court pursuant to section 1605, is not affected by the fact that the petition for sale was filed in the equity case, since that court had then acquired and exercised probate jurisdiction over the estate: *Bickford v. Stewart*, 55 Wash. 278, 34 L. R. A., N. S., 623, 104 Pac. 263.

This act is not ineffective as to the sale by reason of failing to provide a method of sale, where it provides for sale by the agent "under order of court" and all the procedure required for administrator's sales was followed: *Bickford v. Stewart*, 55 Wash. 278, 34 L. R. A., N. S., 623, 104 Pac. 263.

§ 1605.

See notes to § 1603.

§ 1610.

An option to purchase land contained in a lease, the lessee being the owner of premises thereon, may be specifically enforced, in probate, after death of the lessor, under this section: *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9.

As to specific performance of an option under a lease, see note in 118 Am. St. Rep. 598; and see note in Ann. Cas. 1913A, 362.

As to parties to suit for specific performance, see note in 50 L. R. A. 512.

§ 1622.

A finding that the residence of a child was at King county is warranted, where it appears that its mother had been staying there before leaving for New York, intending to return to take up new work there, and left the child there with relatives of the father, although prior thereto she had spent some time with her own parents in Kitsap county: *In re Wells*, 60 Wash. 518, 111 Pac. 778.

As to change of ward's domicile, see note in 89 Am. St. Rep. 278.

Construing this act as a whole, the court is given jurisdiction to appoint a guardian of the local estate of a nonresident insane person, especially in view of the inherent chancery powers of the court to protect the estates of nonresident incompetent persons, the statute being merely cumulative and concurrent: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

Jurisdiction to appoint a guardian for the estate of a nonresident insane person is limited to property within this state: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

Under this section the superior court may appoint a nonresident guardian of the local estate of a nonresident insane person: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

As to the appointment of foreign and ancillary guardians, see note in 33 L. R. A. 761.

A guardian may be appointed of the estate of one who, following an accident, suffered a nervous shock and ill-health, seemed to have forgotten his own identity, and displayed marked symptoms of mental alienation and suddenly disappeared, since which nothing had been heard of him after diligent search for over a year: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

As to what incapacity will justify appointment of guardian, see note in 13 L. R. A. 757.

§ 1623.

Notice of application to appoint a guardian for an insane person is properly served on her personally and on the person having her in charge at a hospital: *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285.

Notice of application for the appointment of a guardian for an insane person may be served by a private person: *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285.

As to the necessity of lunacy proceedings to the alleged lunatic, see note in 23 L. R. A. 737.

§ 1624.

In proceedings for the appointment of a guardian for an incompetent person, appearance in person and by attorney cures any defect in service of process: *In re Ervay*, 64 Wash. 138, 116 Pac. 591.

This section provides that in proceedings for the appointment of a guardian of an incompetent person, it shall not be necessary for the prosecuting attorney to appear at the hearing, if the incompetent is represented by an attorney of his own selection; hence, in such case, an appearance by the prosecuting attorney is unnecessary: *In re Ervay*, 64 Wash. 138, 116 Pac. 591.

As to waiver of notice in such cases, see note in 23 L. R. A. 742.

§ 1652.

Where a mother, having no estate of her own, acted as guardian for her minor son, and filed a report making no charge for support up to that time, but afterward converted the estate, the report shows that she did not intend to charge for support previous to the report, and in the absence of other evidence overcomes the presumption to the contrary; and the surety on her bond cannot offset against its liability a charge in favor of the guardian for support prior to the filing of the report: *In re Mackall*, 60 Wash. 655, 111 Pac. 884.

§ 1654.

The evidence is insufficient to show that one who had been an inmate of an insane

asylum for a few months, and at times somewhat deranged, was insane, where it appears that for over three years before the commencement of the action she had held a responsible position of trust as a housekeeper, and witnesses testified to her complete sanity during such time: *Huntington v. Love*, 56 Wash. 674, 106 Pac. 185.

As to presumption and burden of proof where one is alleged to be insane, see note in 140 Am. St. Rep. 348.

The jurisdiction of the superior court to appoint a guardian of the local estate of an insane person does not depend upon his domicile, but the appointment may be made when his whereabouts is unknown: *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626.

A guardian should be appointed for an incompetent person where it appears that she was the victim of designing persons who obtained all her ready cash, and a general power of attorney, and large sums of money, and that her considerable fortune will be taken from her unless her affairs are conducted through the courts: *In re Ervay*, 64 Wash. 138, 116 Pac. 591.

§ 1671.

Where a person who had been adjudged insane was discharged as restored to capacity and his guardian discharged and he thereupon sold real estate for two thousand five hundred dollars, the fact that two days later it was resold by the purchaser for four thousand one hundred dollars does not indicate that the sale was invalid for want of mental capacity: *Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 957.

Under this section, no notice to the ward is necessary to authorize a discharge of the guardian, since the court has jurisdiction through the appointment and qualification of the guardian, and the proceeding is not an adversary proceeding requiring notice: *Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 957.

As to the court's discretion to remove guardian, see note in Ann. Cas. 1912B, 977.

§ 1685.

A guardian's deed of real estate without any order of court is a nullity: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 648.

As to notice of application by guardian for leave to sell infant's real estate as jurisdictional, see note in 8 L. R. A., N. S., 1215.

§ 1693.

An administratrix whose property was included in the inventory of the estate, and who petitioned for its sale as properly belonging to the estate, and made a deed conveying the same in terms upon payment of the price bid, is estopped to deny the validity of the deed or to assert her individual

ownership or title thereto, especially where she agreed with creditors that it be sold as property of, and represented to the purchaser that it belonged to, the estate: *Caruthers v. Whitney*, 56 Wash. 327, 134 Am. St. Rep. 1114, 105 Pac. 831.

The act of an executor and trustee, in permitting his wife to acquire, at a discount, claims of creditors of the estate, to pay for property sold to creditors pursuant to a plan to satisfy claims and save the estate from insolvency, cannot be objected to by residuary legatees of the cestui que trust, the widow of the deceased, who for four years prior to her death acquiesced in the proceeding with full knowledge of all the facts, while she and all such purchasers profited greatly by the increased value of the property taken by them, since the sale to the trustee's wife was not absolutely void, but only voidable: *Lewis v. Hill*, 61 Wash. 304, 112 Pac. 373.

An irregular administrator's sale is valid as against the two sole heirs, where one of them participated as administrator, both petitioned for the sale as made, and the sale was confirmed with their consent, and the full value paid to the estate and distributed to the heirs: *Cunningham v. Richardson*, 68 Wash. 24, 122 Pac. 368.

§ 1694.

See notes to § 1530.

§ 1698.

Upon the hearing of consolidated applications for the adoption of an orphan by relatives of the mother, and for guardianship by relatives of the father, the infant having no estate, it is not an abuse of discretion to deny the adoption and grant the guardianship, where both parties are suitable to have the care of the child: *In re Wells*, 60 Wash. 518, 111 Pac. 778.

As to conflict of laws relative to the adoption of children, see note in 65 L. R. A. 186.

Evidence of an attempted adoption of a child by a foundling hospital is competent to show the intention and good faith of foster parents receiving the child from the hospital and adopting it: *In re Fields*, 56 Wash. 259, 105 Pac. 466.

Evidence of a founder of a foundling hospital and of the superintendent, that a child brought there by the mother was abandoned and a written release signed, is sufficient, although contradicted, to sustain findings that the child was abandoned by the mother: *In re Fields*, 56 Wash. 259, 105 Pac. 466.

An abandonment of a child is shown where habeas corpus proceedings by the mother to secure possession of the child were voluntarily dismissed in 1898, and the child was left in the possession of adoptive parents for ten years: *In re Fields*, 56 Wash. 259, 105 Pac. 466.

As to validity of an adoption, see note in 39 Am. St. Rep. 215.

Under this section, a ruling will not be reviewed except for abuse of discretion: *In re Wells*, 60 Wash. 518, 111 Pac. 778.

§ 1701.

A preliminary order for the temporary custody of an abandoned child until notice could be given the mother and a hearing had, under this section, the statute contemplating an early hearing by giving such cases precedence, is no defense to habeas corpus by the mother to recover possession of her child, where no process was served on her as required by the statute and no further proceedings were had or final order made: *State ex rel. Stitt v. Reynolds*, 60 Wash. 12, 110 Pac. 633.

§ 1706.

On habeas corpus by a mother to recover custody of a child, held under temporary order in pending proceedings, this section making the final order prima facie evidence that the abandoned child was properly surrendered to the society has no application; and the court should hear the habeas corpus proceedings on the merits: *State ex rel. Stitt v. Reynolds*, 60 Wash. 12, 110 Pac. 633.

As to defective commitment as ground for the writ of habeas corpus, see note in 100 Am. St. Rep. 35.

§ 1716.

See notes to §§ 1002, 1262, 7768, 8629.

FINALITY OF DETERMINATION.—

Appeal does not lie where a verdict was directed for defendant until entry of final judgment dismissing the case: *Gilliland v. German-American State Bank*, 59 Wash. 292, 109 Pac. 1020.

As to necessity of perpetuation in the record, see note in 46 L. R. A., N. S., 646.

An appeal from an order dismissing a case as to part of the defendants, or from an order refusing to vacate such judgment, will be dismissed where all the errors alleged could have been reviewed on appeal from the final judgment, as the case cannot be heard piecemeal: *Hays v. O'Brien*, 56 Wash. 67, 105 Pac. 162.

An order overruling a demurrer is not appealable: *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772.

An order sustaining a demurrer to a petition to vacate a judgment is not final or appealable, no further disposition of the case having been made: *Zellar v. Siemens*, 58 Wash. 116, 107 Pac. 1054.

As to the necessity that a judgment be final in form, see note in 109 Am. St. Rep. 149.

An order sustaining demurrers to a petition to vacate a default judgment because not commenced within the time limited by

law, is appealable as a final order: *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

An order refusing a new trial is not appealable: *Lefever v. Blattner*, 57 Wash. 637, 107 Pac. 835.

As to order of court refusing a new trial, see note in 28 L. R. A., N. S., 131.

Where a new trial was granted upon the sole ground that the verdict was excessive, the plaintiff refusing to accept a reduction and make a remission, plaintiff's appeal cannot be dismissed on the ground that an order granting a new trial is not appealable: *Jones v. Spokane, Portland & Seattle R. Co.*, 69 Wash. 12, 124 Pac. 142.

An order striking parts of an affirmative defense but leaving an issue to be tried is not appealable, since the order did not determine the action or prevent a final judgment, within the meaning of this section: *Methow Canal Co. v. Barton*, 71 Wash. 401, 128 Pac. 627.

OPENING OR VACATING JUDGMENTS OR ORDERS.—An order quashing the service of summons and vacating a default judgment, leaving the case pending for further proceedings, is not appealable, as it can be reviewed on appeal from the final judgment: *Wilson v. McGillivray*, 58 Wash. 291, 108 Pac. 620.

An order vacating a judgment is not appealable as a final order: *Molloy v. Union Transfer, Moving & Storage Co.*, 60 Wash. 331, 111 Pac. 160.

An order vacating an order requiring a guardian to file a new account is not appealable, since it is not a final order: *In re Sroufe's Estates*, 65 Wash. 258, 118 Pac. 18.

The denial of a motion to vacate a default judgment for want of jurisdiction, in that the application must be by petition and service of original process, is final and appealable and conclusive on the parties, if not appealed from; and the same is true of the denial of a petition to vacate because service had been made upon the attorney for the plaintiff in the action: *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

An order denying a motion to modify a decree is not appealable where the motion was based only on errors reviewable on appeal from the final judgment: *Robertson Mortgage Co. v. Magnolia Heights Co.*, 65 Wash. 260, 117 Pac. 1121.

AFFECTING PROVISIONAL REMEDIES.—An appeal from an order denying a temporary injunction will not be dismissed where the parties stipulated that it should be considered as a final order for the purposes of the appeal: *Allen & Nelson Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622.

As to appealability of order made on motion to dissolve temporary injunction, see note in Ann. Cas. 1912C, 898.

An order directing a receiver's sale of all the assets of a corporation is appealable as a final order in the proceeding: *Boothe v.*

Summit Coal Min. Co., 59 Wash. 610, 110 Pac. 536.

AFFECTING SUBSTANTIAL RIGHTS AND INTERLOCUTORY ORDERS: See 4 Remington's Digest, "Appeal and Error," §§ 63-72; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501; *Wilson v. McGillivray*, 58 Wash. 291, 108 Pac. 620; *Knisell v. Brunet*, 60 Wash. 610, 111 Pac. 894; *Sumner Iron Works v. Wolten*, 61 Wash. 689, 112 Pac. 1109; *Lowe v. Lowe*, 53 Wash. 50, 101 Pac. 704; *In re Sixth Avenue West*, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

An order requiring a witness to show cause why he should not be punished for contempt in failing to appear for examination is interlocutory and not appealable as a final order: *State ex rel. Peterson v. Superior Court*, 67 Wash. 370, 121 Pac. 836.

As to appealability of judgment in contempt under appeal statutes, see notes in 3 Ann. Cas. 759 and 17 Ann. Cas. 321.

RIGHT TO APPEAL: See 4 Remington's Digest, "Appeal and Error," §§ 91-106; *Pickering v. Richardson*, 57 Wash. 117, 106 Pac. 614; *Cairns v. Donahey*, 59 Wash. 130, 109 Pac. 334; *Eby v. Larkin*, 53 Wash. 454, 102 Pac. 236; *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226; *State ex rel. Hallett v. Seattle Lighting Co.*, 60 Wash. 81, 30 L. R. A., N. S., 492, 110 Pac. 799; *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772; *Konnerup v. Allen*, 56 Wash. 292, 105 Pac. 639; *Masoero v. Campbell & Co.*, 53 Wash. 583, 102 Pac. 423; *Sound Timber Co. v. Beard*, 54 Wash. 82, 102 Pac. 890; *Graff v. Tacoma*, 61 Wash. 186, 112 Pac. 250; *Whipple v. Lee*, 58 Wash. 253, 108 Pac. 601; *State ex rel. Linhoff v. Seattle etc. R. Co.*, 62 Wash. 124, 113 Pac. 260; *Trumbull v. Jefferson County*, 60 Wash. 479, 140 Am. St. Rep. 943, 111 Pac. 569; *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

The state cannot appeal from a judgment in a criminal case directing an acquittal on the ground of the insufficiency of the evidence, under this section, subdivision 7, limiting appeals by the state to cases wherein the indictment or information is set aside or found insufficient or the error does not affect the merits: *State v. Wright*, 60 Wash. 277, 111 Pac. 18.

The railroad commission has such an interest in defending its orders concerning railroad service and facilities made in proceedings instituted by it, as to entitle it to appeal to the supreme court from orders of the superior court reversing the orders of the commission, under this section, giving the right of appeal to any party aggrieved by the final order in any action or proceeding: *State ex rel. Great Northern R. Co. v. Railroad Comm.*, 60 Wash. 218, 110 Pac. 1075.

Where, in an action to foreclose a second subcontractor's lien, plaintiff recovered judgment against the first subcontractor, who was given judgment against the principal contractor for any sum he might be compelled to pay on plaintiff's judgment, the principal contractor is ultimately liable and may appeal from plaintiff's judgment against the subcontractor: *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

A receiver in bankruptcy in possession of mortgaged premises may appeal from an order granting a writ of assistance or refusing to vacate it, although he was not a party to the foreclosure suit, since he is in privity with the mortgagor: *State ex rel.*

Biddle v. Superior Court, 63 Wash. 312, 115 Pac. 307.

An appeal in an action to determine the title to office will be dismissed, where prior to the hearing on appeal the term of office has expired leaving no subject matter in controversy except the issue of costs: *Wilson v. Fraser*, 67 Wash. 347, 121 Pac. 829.

An appeal from an order appointing a receiver for an insolvent corporation will be dismissed on the ground of a cessation of the controversy where, since the order appealed from, the corporation confessed its insolvency and consented to the appointment of a receiver in an action in the federal court: *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

§ 1718. Time of Taking.

In civil actions and proceedings, an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within ninety days after the entry of final judgment. [L. '13, p. 350, § 3.]

TIME OF TAKING: See 4 Remington's Digest, "Appeal and Error," §§ 172-185; *O'Brien v. American Casualty Co.*, 57 Wash. 598, 107 Pac. 519; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 19 Ann. Cas. 1199, 30 L. R. A. N. S., 926, 104 Pac. 820; *Lindsay v. Scott*, 56 Wash. 206, 105 Pac. 462.

Where the clerk entered in the journal a judgment of dismissal on March 14, 1910, pursuant to section 77, and a motion for a new trial was denied March 19th, the time for taking an appeal commenced to run from the latter date, and is not enlarged by the fact that a formal judgment was signed on November 9 and filed March 14, 1911: *Woody v. Seattle Electric Co.*, 65 Wash. 539, 118 Pac. 633.

As to the computation of time for appeal as affected by motion for a new trial, see note in 3 Ann. Cas. 630.

Where, upon motion to dismiss at the conclusion of plaintiff's evidence, the court took the matter under advisement, filed with the clerk a written memorandum of its ruling ordering the action dismissed, and subsequently signed and entered a formal decree dismissing the action, the first order is in no sense the final judgment, and the time for taking an appeal begins to run from the entry of the formal decree: *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292.

As to time for perfecting appeals generally, see note in 15 Ann. Cas. 689.

FORM AND REQUISITES OF NOTICE: See 4 Remington's Digest, "Appeal

and Error," §§ 210-213; *Beebe v. Northwestern Dairy Co.*, 61 Wash. 294, 112 Pac. 365; *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229; *Lefever v. Blattner*, 57 Wash. 637, 107 Pac. 835.

A notice of appeal from an order refusing to vacate a judgment cannot be amended so as to make it a notice of appeal from the judgment: *State v. Tenney*, 63 Wash. 486, 115 Pac. 1080.

One notice of appeal and one appeal bond is all that is required although there are two judgments dismissing the several defendants in the case: *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963.

§ 1719.

PARTIES TO BE SERVED: See 4 Remington's Digest, "Appeal and Error," §§ 164-169; *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130; *Exposition Amusement Co. v. Raeco Products Co.*, 55 Wash. 314, 104 Pac. 509; *Robertson Mortgage Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795; *Lowe v. Lowe*, 53 Wash. 50, 101 Pac. 704; *Anderson v. Osborn*, 62 Wash. 400, 114 Pac. 160; *Beckman v. Brommer*, 57 Wash. 436, 107 Pac. 190.

A purchaser at a sheriff's sale of property becomes a party of record, upon whom notice of appeal must be served: *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312.

An affidavit that a party received notice of the appeal does not show such service of the notice as is required to give juris-

diction of the appeal: *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312.

Upon appeal from a judgment in an action to quiet title, defendants who appeared and filed an answer amounting to a disclaimer asking no costs or relief, and setting up no title or interest as required by section 794, are not necessary parties to the appeal upon whom notice of appeal need be served, where they ceased to have any interest in the controversy, were treated as if in default in all subsequent proceedings, and were not mentioned in the decree except in the caption: *Soderberg v. McRae*, 67 Wash. 104, 120 Pac. 878.

Where the assignee of one of the defendants was adjudged entitled to a deed of one of the lots involved, he became a party to the suit, upon whom notice of appeal must be served: *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312.

As to parties entitled to notice of appeal, see note in 13 Ann. Cas. 181.

§ 1720.

Parties joining in an appeal without any appealable interest cannot resist a voluntary dismissal: *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

Failure of parties joining in an appeal to give a separate appeal bond within five days is fatal to their appeal: *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312.

§ 1721.

NECESSITY AND SUFFICIENCY OF BOND: See 4 Remington's Digest, "Appeal and Error," §§ 189-206; *Bridge v. Calhoun, Denny & Ewing*, 57 Wash. 272, 106 Pac. 762; *Hassett v. Fraternal Brotherhood*, 59 Wash. 161, 109 Pac. 305; *Swift v. Saulsberry*, 59 Wash. 163, 109 Pac. 305; *Carson v. Bunn*, 59 Wash. 266, 109 Pac. 797; *Okanogan Valley Bank v. Evans*, 59 Wash. 267, 109 Pac. 795; *Gilliland v. German-American State Bank*, 59 Wash. 292, 109 Pac. 1020.

Respondent cannot urge error in not adding interest to a verdict for damages, in the absence of any cross-appeal duly perfected by the filing of an appeal bond as required by this section: *Smith v. Diamond Ice and Storage Co.*, 65 Wash. 576, 38 L. R. A., N. S., 994, 118 Pac. 646.

An appeal will be dismissed where the bond on appeal was given by one as principal who was not a party to the action, and conditioned that he would pay any judgment that might be rendered against him, and against whom no judgment could be rendered: *Canal Lumber Co. v. Kong Yick Investment Co.*, 67 Wash. 126, 120 Pac. 882.

§ 1722.

See notes to § 8629.

SUPERSEDEAS BOND: See 4 Remington's Digest, "Appeal and Error," §§ 232-244; *Hinckley v. Casey*, 54 Wash. 34, 102 Pac. 1051; *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.*, 55 Wash. 1, 103 Pac. 426; *Bilger v. State*, 60 Wash. 454, 111 Pac. 771; *Boothe v. Summit Coal Mining Co.*, 59 Wash. 610, 110 Pac. 536.

An appeal from a judgment for twenty-three dollars costs must be dismissed where the bond on appeal, in the sum of two hundred dollars, is conditioned also as a supersedeas bond: *Smith v. Porter*, 66 Wash. 349, 119 Pac. 824.

While the discretionary action of the trial court in denying an order staying a prohibitory injunction pending appeal to the supreme court will not be reversed on appeal, the supreme court has power, in aid of its appellate jurisdiction, to grant a supersedeas suspending the injunction pending the appeal, where it is necessary to maintain the status quo and preserve the fruits of the appeal; and such a case is presented where, upon appeal from a perpetual injunction against the operation of a logging road over respondent's lands, the damages to the land, if the order is affirmed, could be easily ascertained and is amply covered by a bond, while if the judgment is reversed, the damages to the appellant by reason of enforced suspension of its operations would be a great and indeterminate loss: *Campbell Lumber Co. v. Deep River Logging Co.*, 68 Wash. 431, 123 Pac. 596.

The supreme court will not grant a supersedeas on appeal from a judgment in mandamus directing the submission of amendments to a city charter where it would unreasonably delay the taking of a popular vote, since it is a matter involving popular right in which the writ of *audita querela* would not issue: *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.

This section, authorizing a stay of proceedings on appeal, upon the giving of a bond conditioned to pay all damages suffered by the delay, has no application to an appeal from a judgment in mandamus directing city commissioners to call an election upon amendments to the city charter proposed by the electors, since there can be no damages to measure and no liability on the supersedeas bond: *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.

§ 1723.

This section, providing for a supersedeas on appeal from a final judgment in a cause wherein a "temporary injunction has been granted," does not authorize a supersedeas where a temporary restraining order was

issued without notice until a hearing could be had, and upon an order to show cause why a temporary injunction should not issue, the parties appeared and agreed to an early trial on the merits, and a continuance was had upon the application for the injunction pendente lite, leaving the restraining order in statu quo, and after trial, final judgment was entered dismissing the case, and no injunction was issued and no agreement made that the restraining order should stand as a temporary injunction: *State ex rel. Ferguson v. Grady*, 71 Wash. 1, 127 Pac. 305.

Under statutes giving ample power to the court to enforce its judgments by execution against the person and to order commitment until full performance of the judgment, a court having directed the deposit in court of a stock certificate valued at seventy thousand dollars, and upon appeal from such order, having fixed the supersedeas bond in double the value of the property, may attach the person of the defendant for contempt upon failure to deposit the stock or give the bond; and upon appeal from an order of commitment for contempt, may fix the supersedeas bond in the sum of seventy thousand dollars, since such bond is more than a mere supersedeas of punishment for contempt but is in aid of execution, and has the same effect as the first supersedeas: *State ex rel. Sargent v. Superior Court*, 71 Wash. 495, 128 Pac. 1077.

§ 1725.

An appeal will be dismissed where no name appears as a surety on the face of the appeal bond nor among the signatures and the justification affidavit on the back does not purport to be made by a surety: *Wenatchee Orchard & Irr. Co. v. Thompson*, 60 Wash. 643, 111 Pac. 874.

Where the bond on appeal is not executed by any surety, failure to except to the same below does not preclude the respondent from moving to dismiss the appeal for want of any bond on appeal: *Wenatchee Orchard & Irr. Co. v. Thompson*, 60 Wash. 643, 111 Pac. 874.

An appeal will be dismissed where the bond on appeal contains no justification of any surety thereon, as required by this section: *Mirouski v. Noon*, 65 Wash. 568, 118 Pac. 735.

As to effect on appeal bond of failure of sureties to make affidavit of property qualification, see note in 12 Ann. Cas. 586.

§ 1729.

MATTERS TO BE SHOWN BY RECORD: See 4 Remington's Digest, "Appeal and Error," §§ 246-249; *Koth v. Kessler*, 59 Wash. 641, 110 Pac. 540; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Yatsuyanagi v. Shimamura*, 57 Wash. 42, 106 Pac. 503.

SCOPE AND CONTENTS OF RECORD: See 4 Remington's Digest, "Appeal and Error," §§ 250-257; *Exposition Amusement Co. v. Raeco Products Co.*, 55 Wash. 314, 104 Pac. 509; *Pease v. Clayton*, 62 Wash. 26, 112 Pac. 943; *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229.

Upon appeal from an order refusing leave to withdraw a plea of guilty, entered in the court below when the prosecuting witness had disappeared, the supreme court cannot consider affidavits showing that the prosecuting witness had returned: *State v. Cimini*, 53 Wash. 268, 101 Pac. 891.

An objection to a certain statement of counsel to the jury will not be considered on appeal where the record fails to show any such statement as claimed in the objection: *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

As to alleged improper remark by prosecuting attorney to jury, see note in 30 L. R. A., N. S., 795; also notes in 38 L. R. A., N. S., 1130, and 46 L. R. A., N. S., 652.

Where the original transcript failed to show the filing marks below that would make the appeal within time to give jurisdiction, it may be shown by a supplemental transcript that the time for taking an appeal was suspended by the pendency of a motion for a new trial seasonably made, and time for taking an appeal would run from the denial of the motion, and not the date of the judgment: *Wells & Morris v. Brown*, 67 Wash. 351, 121 Pac. 828.

Recitals in an order refusing to withdraw a plea of guilty import absolute verity on appeal as to matters that transpired before the judge: *State v. Cimini*, 53 Wash. 268, 101 Pac. 891.

Error cannot be predicated upon the instructions where the record on appeal does not include the instructions or any exception thereto: *State v. Morrow*, 63 Wash. 297, Ann. Cas. 1912D, 570, 115 Pac. 161.

Error cannot be predicated upon the instructions to the jury, where they are not set out in the record: *Asplund v. Great Northern B. Co.*, 63 Wash. 164, 114 Pac. 1043.

The vacation of a default judgment, heard upon affidavits, cannot be reviewed unless the affidavits are brought up on appeal by a statement of facts or bill of exceptions, where they are not attached to the motion and part of the record: *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627.

Where, in making up a proposed statement of facts, the trial judge ordered appellant's statement of his evidence in narrative form stricken out and the full stenographer's report thereof added, the appellant is not entitled to have the statement certified by adding the stenographer's report without striking out the objection-

able part as ordered: *State ex rel. Hofstetter v. Sheeks*, 65 Wash. 410, 118 Pac. 308.

The supreme court will not consider an appeal from an order where the record on appeal does not disclose the order or any action of the court in that regard: *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837.

Affidavits not made a part of the record cannot be considered on appeal: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

In the absence of a statement of facts to bring up the evidence on which a party was adjudged in contempt of court, it will be presumed that the evidence sustained the judgment and the order must be affirmed: *Gust v. Gust*, 71 Wash. 189, 128 Pac. 1.

In the absence of a statement of facts or bill of exceptions showing the evidence admitted at a trial on the merits, error cannot be predicated on refusing to require the complaint to be made definite and certain: *Ritchardson v. Ingalls*, 71 Wash. 291, 128 Pac. 638.

In the absence of the evidence, brought up either by a bill of exceptions or statement of facts, it will be presumed that the verdict was properly returned: *Stedman v. Keener*, 71 Wash. 462, 128 Pac. 1047.

Exceptions to findings of fact, filed within five days after recognition of the existence of the findings and decree, will be deemed to have been duly taken, in the absence of any objection thereto: *Schultz v. Schultz*, 71 Wash. 327, 128 Pac. 660.

§ 1730.

BRIEFS.—An appeal will not be dismissed because the briefs are filed one day too late: *Campbell v. Order of Washington*, 53 Wash. 398, 102 Pac. 410.

An appeal will not be dismissed for error in entitling the case in the brief, where no one has been misled: *Brewer v. Howard*, 59 Wash. 580, 110 Pac. 384.

The printing of irrelevant matter in appellant's reply brief is not ground for striking the opening brief or dismissing the appeal, but only for a rule against the reply brief: *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

A brief will not be struck out for failure to clearly assign the errors, where the errors

relied upon are sufficiently indicated: *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963.

A brief on appeal will not be struck out for improperly characterizing the rulings of the trial court, where it was more a thoughtless levity of speech than an abusive utterance: *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292.

An appeal will not be dismissed for failure to print all the findings of fact and conclusions of law in the brief, where appellant has sufficiently complied with the rule of court in respect thereto: *Peterson v. Lone Lake Lumber Co.*, 58 Wash. 72, 107 Pac. 857.

A motion to dismiss an appeal submitted on briefs which makes no showing of the facts or record relied on to support the same will not be considered on appeal: *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9.

Error in the exclusion of evidence and refusing to allow amendments to a complaint will not be considered on appeal where the opening brief neither states the offered evidence or amendments or refers to the pages of the record where they can be found: *Standard Lumber Co. v. Eagle Lumber Co.*, 63 Wash. 114, 114 Pac. 900.

Error in rulings on the evidence will not be considered when the brief makes no references or citations to the pages of the statement of facts disclosing the error: *Morrissey v. Schultz*, 68 Wash. 237, 122 Pac. 1065.

Claims of error not discussed in the briefs or mentioned in the oral argument will not be noticed on appeal: *Miller v. Spokane Bakery Co.*, 70 Wash. 4, 125 Pac. 1021.

Important and far-reaching constitutional questions are not sufficiently presented to call for a decision, when presented in a perfunctory manner within the compass of two pages of the brief, and without the citation of any authority, especially if moot questions, not controlling the real issues: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

ASSIGNMENT OF ERRORS.—Objection to the sufficiency of the information made upon oral argument will not be considered where it was not assigned as error in the brief: *State v. Hanover*, 55 Wash. 403, 104 Pac. 624.

An assignment of error in failing to sustain objections of appellant's counsel as shown by the statement of facts is too general: *Dalton v. Union Gap Irrigation Co.*, 69 Wash. 303, 124 Pac. 1128.

§ 1730-1. Abstracts of Record—Cost.

The appellant shall, at or before the time when he is required by rule or statute to serve his opening brief, cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error. Said abstract, in so far as it sets out testimony, shall be condensed into narrative form, without the questions and answers

except when necessary for the discussion of evidence. It shall be prepared without notice or hearing thereon, and if the opposite party be not satisfied with it, he may cause to be typewritten and served, without notice, either before or at the time of serving his answering brief, so much of the record and statement of facts, condensed as above, as he for his part may deem proper for the correction or supplementing of his opponent's abstract. Each party shall pay the cost of typewriting his abstract, and the prevailing party shall be entitled to recover his disbursements therefor as other costs. For any abuse in typewriting excessive or unnecessary matter in the abstract, the supreme court, without regard to which party may prevail, may impose the costs thereof upon the party committing such abuse. The supreme court shall also provide by rule the form of abstracts, the number thereof to be typewritten, and for other particulars thereof, including the time and place of filing the same. [L. '13, p. 349, § 1.]

For Rules of Court, see 71 Wash. xxxviii.

§ 1730-2. Effect of Act.

Nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions, and such statements and bills shall be transmitted to the supreme court to be referred to in any controversy concerning the accuracy of the abstracts, as well as for reference to exhibits, and for such other uses as the supreme court may find proper in consideration of all matters on appeal. [L. '13, p. 350, § 2.]

§ 1731.

EFFECT OF TRANSFER: See 4 Remington's Digest, "Appeal and Error," § 228-1; Inland Nursery & Floral Co. v. Rice, 56 Wash. 21, 104 Pac. 1117.

Appeal by the state from an order fixing bail does not operate as a stay of proceedings, in the absence of statute so providing; and the court has jurisdiction to and must accept bail pending the appeal, in view of this section: State ex rel. Moorehead v. Chapman, 64 Wash. 140, 116 Pac. 592.

As to right to release on bail pending appeal under a general statute, see note in 37 L. R. A., N. S., 693; also note in 39 L. R. A., N. S., 768.

Under this section the trial court has no jurisdiction to modify a decree of divorce after appeal taken: Gust v. Gust, 71 Wash. 75, 127 Pac. 566.

§ 1732.

An application for a writ of certiorari and a motion to advance the hearing of an appeal will not be considered until the record on appeal has been made up and filed in the supreme court: Kennedy Drug Co. v. Keyes Drug Co., 58 Wash. 499, 109 Pac. 56.

§ 1733.

Where a court has erroneously found that one tenant in common has priority in the right to redeem from a mortgage foreclosure sale and can maintain an action against the other to enforce the same, an appeal

therefrom will not be dismissed for want of any controversy, on the theory that redemption by either inures to the benefit of the other, since the argument goes to the merits of the case: McSorley v. Lindsay, 62 Wash. 203, 113 Pac. 267.

An affidavit not served at the time of the argument of a motion to dismiss an appeal will not be considered: Robertson Mortgage Co. v. Thomas, 63 Wash. 316, 115 Pac. 312.

An appeal will be dismissed as duplicitous, where two separate actions, brought by different plaintiffs, upon distinct indemnity bonds against different defendants, were, upon oral agreement, "tried together," and distinct judgments in different sums entered in each action, whereupon the defendants in the two actions joined in one notice of appeal from both judgments, giving one appeal and supersedeas bond, in double the aggregate of the two judgments, and two hundred dollars added, there never having been an order consolidating the two actions: Oerter v. Georger, 70 Wash. 110, 126 Pac. 103.

§ 1734.

An appeal will be dismissed where the judgment was in favor of one of the plaintiffs, and the bond on appeal was given to the other plaintiffs, as obligees, who had no interest in the judgment; and there being in effect no bond to the adverse party, the same cannot be amended by the filing of a new bond under this section, allowing

amendments of defects or informalities in a bond: *Bruhn v. Steffins*, 66 Wash. 144, 119 Pac. 29.

NECESSITY AND SUFFICIENCY OF OBJECTIONS IN LOWER COURT: See 4 Remington's Digest, "Appeal and Error," §§ 108-162; *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 132 Am. St. Rep. 1127, 103 Pac. 814; *Snohomish River Boom Co. v. Great Northern R. Co.*, 57 Wash. 693, 107 Pac. 848; *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045; *Ness v. Bothell*, 53 Wash. 27, 101 Pac. 702; *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914; *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 110 Pac. 804; *National Bank of Commerce v. Kilsheimer & Co.*, 59 Wash. 460, 110 Pac. 15; *Tecklenburg v. Everett R. Light & Water Co.*, 59 Wash. 384, 34 L. R. A., N. S., 784, 109 Pac. 1036; *Britton v. Washington Water Power Co.*, 59 Wash. 440, 140 Am. St. Rep. 858, 33 L. R. A., N. S., 109, 110 Pac. 20; *Urquhart v. Coss*, 60 Wash. 249, 110 Pac. 1001; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

Error cannot be predicated upon failure to require the state to elect between the acts charged, where no request for an election was made below: *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

The relevancy of evidence of a waiver of proofs of loss after the expiration of the time fixed in the policy, under pleadings raising an issue as to waiver before the expiration, not having been raised at the trial, except by objection that it was "immaterial," cannot be first made on appeal, counsel not having suggested surprise on account of the admission of the testimony: *Hatcher v. Sovereign Fire Assur. Co.*, 71 Wash. 79, 127 Pac. 588.

Error cannot be predicated on improper testimony, admitted without objection or exceptions to instructions given or refused: *Keil v. Gray's Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113.

Error cannot be predicated upon misconduct of the party and counsel, in a personal injury case, in exciting the sympathy of the jury by showing that the plaintiff was a widow with children, where the evidence was admitted without objection of any kind until after verdict: *Keough v. Seattle Elec. Co.*, 71 Wash. 466, 128 Pac. 1068.

Misconduct of counsel in asking improper questions cannot be urged as error where no timely objection was made below: *Keough v. Seattle Elec. Co.*, 71 Wash. 466, 128 Pac. 1068.

As to necessity of objection to testimony at the trial, see note in *Ann. Cas.*, 1912B, 1231.

After a trial on the merits without objection, it cannot be urged on appeal that the action should have been tried at law as one for damages and not as one for equi-

table relief: *Payne v. Lindsey Co.*, 71 Wash. 293, 128 Pac. 678.

In an action to foreclose a mortgage, dismissed without prejudice, the defendant cannot object, for the first time on appeal, that the court should have retained jurisdiction to reform the mortgage to correct a technical error: *Van Alstine v. Gray*, 71 Wash. 607, 129 Pac. 106.

INSTRUCTIONS AND REQUESTS: See 4 Remington's Digest, "Appeal and Error," § 129; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *State v. Peacock*, 58 Wash. 41, 27 L. R. A., N. S., 702, 107 Pac. 1022; *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 28 L. R. A., N. S., 455, 108 Pac. 1095.

Error cannot be predicated upon an instruction as to the effect of a prior act of intercourse upon the credibility of the prosecuting witness, in that it did not state the effect upon the girl's consent to the act complained of, where no request was made therefor, and the instruction given was favorable to the defendant: *State v. Aton*, 67 Wash. 485, 121 Pac. 980.

Error cannot be assigned in refusing to instruct that mortality tables are of little weight as evidence of life expectancy when the health of the deceased was not shown, where no question was made as to the amount of the verdict, but only as to the right of recovery: *Barach v. Carlson*, 70 Wash. 124, 126 Pac. 94.

Error cannot be predicated upon the giving of an instruction requested by defendant: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Error in refusing a continuance is waived where the party thereupon took a voluntary dismissal: *Furman v. Bon Marche*, 71 Wash. 238, 128 Pac. 210.

Error in failing to give instructions as to the right of self-defense cannot be urged in the absence of any request therefor: *State v. Bowinkelman*, 66 Wash. 396, 119 Pac. 824.

It is not prejudicial error to refuse to give an instruction as to the prima facie effect of a certificate of the state labor commissioner on the inspection of machinery to be guarded, under the factory act, to which the party was entitled, where by other instructions an equal burden was put on the party, the jury being told that the burden was upon the plaintiff to establish one or more of his allegations of negligence, that negligence was never presumed, and must be proven by the fair preponderance of the evidence, and the court read the first section of the factory act and otherwise fully covered the law of the case: *Rommen v. Empire Furniture Mfg. Co.*, 66 Wash. 48, 118 Pac. 924.

Refusing requests for instructions because not made within the time required by a rule of court is not prejudicial error, where the instructions given sufficiently stated the law

of the case: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

SCOPE AND EXTENT IN GENERAL
—THEORY AND GROUNDS: See 4 Remington's Digest, "Appeal and Error," §§ 365-373; *Nelson v. McPhee*, 59 Wash. 103, 109 Pac. 305; *State v. Mays*, 57 Wash. 540, 21 Ann. Cas. 830, 107 Pac. 363; *Seattle & Northern R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27; *Snarski v. Washington State Colonization Co.*, 53 Wash. 221, 101 Pac. 839; *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

—CORRECT DECISION BASED UPON ERRONEOUS GROUNDS.—Where the sustaining of a demurrer was correct on any ground, the decision will be affirmed: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

In an equity case, where no findings are made, a decision will be affirmed if correct under the evidence and the whole record upon any ground, although based upon an erroneous proposition of law; and the successful party need not appeal therefrom to secure a correction of the error on affirming the judgment: *Rohlinger v. Coletta Land & Orchard Co.*, 64 Wash. 348, 116 Pac. 1095.

Where errors involving a new trial are expressly waived, and the only question is whether the evidence warrants the judgment, it is immaterial that the decision of the trial court was based upon an erroneous ground, if it was correct upon any theory of the evidence: *Durante v. Great Northern R. Co.*, 64 Wash. 395, 116 Pac. 870.

A nonsuit granted upon an erroneous ground will be affirmed if correct upon any ground: *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833.

Where the record on appeal is insufficient to secure a review of an order denying the vacation of a judgment, error cannot be predicated on the fact that the order recited an insufficient legal reason for denying the motion: *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190.

TRIAL DE NOVO.—The requirement of a trial de novo on appeal to the superior court only requires a trial upon the matters in issue: *In re Littlefield*, 61 Wash. 150, 112 Pac. 234.

WHAT MAY BE REVIEWED, IN GENERAL: See 4 Remington's Digest, "Appeal and Error," §§ 374-380; *State ex rel. Oregon R. & Nav. Co. v. R. R. Comm.*, 52 Wash. 17, 100 Pac. 179; *Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191; *Lownsdale v. Gray's Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833; *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772; *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193; *McPherson v. Seattle Elec. Co.*, 53 Wash. 358, 101 Pac. 1084; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160.

The question of the jurisdiction of the trial court to hear and determine an elec-

tion contest does not become a "moot" question by reason of the fact of the expiration of the six months after which certain officers are required to burn the ballots which are assumed to constitute the evidence to determine the contest, as the supreme court cannot, in advance of the trial of the contest, consider the existence of the evidence by which plaintiff intends to support his case: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

Where the final order of distribution amounted to a construction of the will and was unappealed from and conclusive, the supreme court will not construe the will at the request of a portion of the parties, where there are objecting parties whose rights could not be affected by the decision: *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

Where, under section 466, a motion in the original action to vacate a default judgment on service by publication was made within one year, and denied for want of jurisdiction in that the proceeding must be by petition and original process, and a petition, called an amended petition, was filed under sections 467 and 468, and dismissed because served only on plaintiff's attorney, whereupon another amended petition was served and filed and demurrers thereto sustained because not served within the time limited by law, the so-called amended petition was a new and independent proceeding, and an appeal from an order of dismissal on sustaining demurrers to the petition does not bring up for review the prior order: *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

PARTIES ENTITLED TO ALLEGE ERROR: See 4 Remington's Digest, "Appeal and Error," §§ 384-388; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888; *Nelson v. Bromley*, 55 Wash. 256, 104 Pac. 251; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 28 L. R. A., N. S., 1244, 104 Pac. 801; *Conner v. Seattle, Renton & Southern R. Co.*, 56 Wash. 310, 134 Am. St. Rep. 1110, 25 L. R. A., N. S., 930, 105 Pac. 634; *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 28 L. R. A., N. S., 455, 108 Pac. 1095; *Lively v. Husebye*, 60 Wash. 47, 110 Pac. 673; *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162; *Easterly v. Eatonville Lumber Co.*, 60 Wash. 647, 111 Pac. 876.

Upon appeal by accused from a conviction, the state cannot urge error in that his sentence was under the wrong statute, and too light: *State v. McDowell*, 61 Wash. 398, Ann. Cas. 1912C, 782, 32 L. R. A., N. S., 414, 112 Pac. 521.

A plaintiff, dismissed from a case with prejudice, cannot have error thereon reviewed on an appeal by defendants, where the record fails to disclose that he took any appeal: *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51.

In an action against the maker and indorser of a promissory note, indorsed as security, the maker cannot complain of error in entering judgment on the note without requiring the surrender of the notes of the indorser for which the note in suit was collateral, as it does not affect the appellant: *Canadian Bank of Commerce v. Seson Co.*, 68 Wash. 434, 123 Pac. 602.

The granting of a new trial, unless a reduced verdict was accepted by the plaintiff, is not prejudicial error of which the defendant can complain, although the court did not find the first amount to be excessive: *Schneider v. South Tacoma Mill Co.*, 65 Wash. 590, 118 Pac. 750.

Where plaintiff, in proceeding to register a title under the Torrens act, moved a dismissal without prejudice, which was granted except as to a specified portion of the relief, on appeal by the plaintiff, error in denying registration, which was unappealed from, cannot be reviewed: *Krutz v. Dodge*, 66 Wash. 178, Ann. Cas. 1913C, 869, 119 Pac. 188.

One seeking, by an alternative prayer in the complaint, a partition of interests in a will contest, cannot allege error in the separation of interests in that the will contemplated the management of the property as a whole: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974.

It cannot be claimed that the trial court's threat of punishment for contempt for refusal to produce papers prejudiced the jury, where the party refused to obey the order of the court in the presence of the jury and did not ask that the jury be excused when inviting the controversy: *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470.

The remark of defendant's counsel, in an action for rescission of a contract for annual passes, that he would consent that the court reach a just measure of damages, will not be held to waive the right to appeal from an erroneous judgment for damages, where it appears from the certificate of the trial judge that he was not influenced by the remark, and where the plaintiff was not content with the damages awarded, but appealed from the refusal to grant rescission, and the defendant also appealed: *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A., N. S., 559, 123 Pac. 998.

In an action for breach of warranty of the soundness of a horse, defendant is estopped to allege error in an instruction as to the measure of damages based upon the purchase price instead of its actual value, where he objected to any evidence of its actual value as a matter not in issue, and took an exception not calculated to direct attention to the error and raised the point for the first time in his reply brief: *Abrahamson v. Cummings*, 65 Wash. 35, 117 Pac. 709.

Upon a controversy between the county commissioners and a city of the third class, over the right of the commissioners to establish election precincts in the city for the purpose of general elections, the supreme court will not, at the instance of the city, determine whether the commissioners' action is binding upon the city as to its municipal elections, as the same is a moot question in which the commissioners have no interest: *Hillyard v. Board of County Commrs.*, 69 Wash. 423, 125 Pac. 363.

Objection to the jurisdiction of a state court to appoint a receiver for an insolvent railroad company, on the ground that the federal court has appointed receivers for it, will not be considered on appeal, where pending the appeal, the federal court recognized the prior assumption of jurisdiction by the state court, and for that reason alone had discharged its receivers and dismissed the bill: *Crawford v. Seattle, Renton & Southern R. Co.*, 71 Wash. 77, 127 Pac. 594.

An appeal from an order imprisoning a party for contempt of court will be dismissed, where it appears on the hearing that he has been discharged and has complied with the order adjudging the contempt: *Gust v. Gust*, 71 Wash. 189, 128 Pac. 1.

RESPONDENTS: See 4 Remington's Digest, "Appeal and Error," § 388; *McPherson v. Seattle Elec. Co.*, 53 Wash. 358, 101 Pac. 1084; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Huntington v. Love*, 56 Wash. 674, 106 Pac. 185; *Koschnitzky v. Hammond Lumber Co.*, 57 Wash. 320, 106 Pac. 900; *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110.

On appeal from an order granting a new trial for error of law only, the respondent cannot urge the insufficiency of the evidence to sustain the verdict: *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416.

AMENDMENTS REGARDED AS MADE: See 4 Remington's Digest, "Appeal and Error," § 389; *Ness v. Bothell*, 53 Wash. 27, 101 Pac. 702; *Campbell v. Order of Washington*, 53 Wash. 398, 102 Pac. 410; *Peyser v. Western Dry Goods Co.*, 53 Wash. 633, 102 Pac. 750; *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148; *Brown v. Haley*, 56 Wash. 218, 105 Pac. 478; *Spokane Merchants' Assn. v. Parry*, 60 Wash. 204, 110 Pac. 991; *Holden v. Romano*, 61 Wash. 458, 112 Pac. 489.

A somewhat indefinite complaint for damages to property, by reason of the negligent construction of a fill in a street, will be deemed amended on appeal to conform to proof, admitted without objection, that the injury resulted from defective plans of the city, rather than defective workmanship: *Potter v. Spokane*, 63 Wash. 267, 115 Pac. 176.

Where evidence was admitted without objection, the complaint might have been amended to conform to the proof, and the supreme court will consider the amendment as made: *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014.

Upon an objection that evidence was not admissible under a general denial, the supreme court may on appeal regard the pleadings as amended to conform to the proof: *Williams v. Wright*, 68 Wash. 341, 123 Pac. 446.

Upon appeal, pleadings will be deemed amended to correspond to proofs admitted without objection as within the issues raised by the pleadings: *Perkins v. Lyons*, 68 Wash. 498, 123 Pac. 793.

As to right to question sufficiency of complaint for the first time on appeal, see note in 3 Ann. Cas. 545.

Where the case was tried on the merits to the court with full opportunity to each party to present the evidence, error cannot be assigned on technical objections to the pleadings, which will be considered as amended: *Richardson v. Brotherhood of Locomotive Firemen etc.*, 70 Wash. 76, 126 Pac. 82.

A reply denying "each and every material allegation" of an affirmative defense will be considered sufficient on appeal, where no objection or motion to make more specific was made below and it was there treated as sufficient before verdict: *Said v. Twin City Light & Traction Co.*, 70 Wash. 585, 127 Pac. 191.

In an equity case, a defective plea of *res judicata* will be deemed amended on appeal to conform to proof: *Peterson v. Wheeler*, 66 Wash. 519, 120 Pac. 83.

In an action on contract, plaintiff cannot be allowed recovery on quantum meruit on claim therefor first made in the supreme court, without any evidence of the reasonable value of the service: *Perolin Co. v. Young*, 65 Wash. 300, 118 Pac. 1.

The supreme court may treat the complaint as amended and consider all questions that were deemed within the issues and determined on the merits in the lower court: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

As to estoppel of party to appeal to assume attitude inconsistent with that taken by him in lower court, see note in 8 Ann. Cas. 487.

PRESUMPTIONS: See 4 Remington's Digest, "Appeal and Error," §§ 393-398; *Lively v. Husebye*, 60 Wash. 47, 110 Pac. 673; *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772; *Pierce v. Pierce*, 52 Wash. 679, 101 Pac. 358.

In the absence of the evidence it will be presumed sufficient to support a decree, although the findings were defective and incomplete: *Nelson v. McPhee*, 59 Wash. 103, 109 Pac. 305.

Where the accused, after overruling a demurrer to the information, announced himself ready for trial, it will be presumed that a plea had been entered even if not shown by the record: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal: *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047.

The trial of an action to try title as an equitable case, and refusing to submit all the issues to a jury, is harmless where the evidence was insufficient to overcome the legal presumptions flowing from deed: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal: *Morgan v. Bankers' Trust Co.*, 66 Wash. 617, 119 Pac. 1116.

As to presumption in favor of a judgment, see note in 11 L. R. A. 159.

As to conclusiveness of prior decisions on subsequent appeals, see note in 34 L. R. A. 325.

DISCRETION OF LOWER COURT: See 4 Remington's Digest "Appeal and Error," §§ 400-406; *Lawson v. Black Diamond Coal Min. Co.*, 53 Wash. 614, 102 Pac. 759; *In re Hopkins*, 54 Wash. 569, 103 Pac. 805; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Moore v. Marsh*, 59 Wash. 151, 109 Pac. 606; *Galena Nat. Bank v. Ripley*, 55 Wash. 615, 26 L. R. A., N. S., 993, 104 Pac. 807; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *Lindsay v. Scott*, 56 Wash. 206, 105 Pac. 462; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798; *Money v. Seattle, Renton & Southern R. Co.*, 59 Wash. 120, 109 Pac. 307.

An order granting on general terms a motion for a new trial based on several grounds, without specifying on what ground the ruling is made, will not be disturbed on appeal if within the discretion of the trial court upon any ground, it not appearing to have been granted solely upon questions of law; and the supreme court will not anticipate and decide questions of fact raised for guidance on a retrial: *Holloway v. Savage*, 68 Wash. 614, 123 Pac. 1021.

As to whether order for new trial granted improperly on one ground will be sustained when it might properly have been granted on another ground, see note in Ann. Cas. 1913B, 495.

The trial court having exercised its discretion to refuse a new trial, the supreme court is not justified in granting a new trial

upon conflicting evidence that made a case for the jury: *Mallett v. Seattle, Renton & Southern R. Co.*, 66 Wash. 251, 119 Pac. 743.

Where the evidence is conflicting, the supreme court will not review an order granting a new trial because of insufficiency of the evidence, where there was no clear abuse of discretion: *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

An order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed on appeal where there was a substantial conflict in the testimony: *McGraw v. Manhattan Co.*, 66 Wash. 388, 119 Pac. 822.

Where a new trial is granted upon one specified legal ground, no other will be considered on appeal: *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416.

The supreme court will not interfere with the discretion of the trial court in granting a new trial for insufficiency of conflicting testimony, except for clear abuse of discretion: *Bank of Commerce v. Newberry*, 71 Wash. 422, 128 Pac. 1064.

As to the necessity for a motion for a new trial in order to have a review, on appeal, of sufficiency of evidence, see note in 4 Ann. Cas. 304.

Failure to order a sale of mortgaged property in parcels is not reversible error where abuse of discretion is not shown by the record: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

An order granting a new trial for insufficiency of the evidence to sustain the verdict will not be disturbed where the evidence of witnesses, seen and heard by the trial judge, is conflicting, and no clear abuse of discretion appears: *Thomas & Co. v. Hillis*, 64 Wash. 288, 116 Pac. 854.

An order granting a new trial will not be reversed on appeal unless abuse of discretion clearly appears, where the order was not made on a misconception of law: *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88.

The denial of new trial for insufficiency of the evidence, where it was palpably conflicting, is not an abuse of discretion, and will not be disturbed on appeal: *Morris v. Seattle etc. R. Co.*, 66 Wash. 691, 120 Pac. 534.

The setting aside of a verdict as excessive will not be reviewed on appeal except for clear abuse of discretion: *Jones v. Spokane etc. R. Co.*, 69 Wash. 12, 124 Pac. 142.

As to power of appellate court to interfere with verdict for excessive damages, see note in 26 L. R. A. 384; also 34 L. R. A. 343.

The refusal to grant a continuance will not be reviewed except for abuse of discretion: *Nye v. Manley*, 69 Wash. 631, 125 Pac. 1009.

The grant of a new trial for errors of law is not a matter of discretion, and the supreme court will determine its correctness independently of the judgment of the

trial court: *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416.

As to review of order of court below as the granting or refusing new trial, see note in 28 L. R. A., N. S., 130.

VERDICTS—WHEN SET ASIDE.—A special finding of the jury contrary to undisputed evidence and unsupported by any testimony must be disregarded: *Muehlman v. Spokane & Inland Empire R. Co.*, 58 Wash. 327, 108 Pac. 764.

Where there is no evidence to sustain the verdict, it will be set aside on appeal: *Anderson v. Osborn*, 62 Wash. 400, 114 Pac. 160.

Although a verdict for one thousand dollars for insults to a passenger was set aside as excessive, a second verdict for twelve hundred dollars on much the same evidence will not be set aside for excessiveness, where it is not probable that a third trial would result differently: *Caldwell v. Northern Pac. R. Co.*, 62 Wash. 420, 113 Pac. 1099.

— **WHEN NOT SET ASIDE:** See 4 Remington's Digest, "Appeal and Error," §§ 413, 414; *Green v. Dungan*, 61 Wash. 64, 111 Pac. 1102; *Newcomb v. Puget Sound and Queen City Boiler Works*, 54 Wash. 419, 103 Pac. 456; *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612; *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563; *Georig v. Peterson*, 53 Wash. 183, 101 Pac. 829; *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476; *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 28 L. R. A., N. S., 455, 108 Pac. 1095; *Berger v. Metropolitan Press Printing Co.*, 61 Wash. 35, 111 Pac. 872; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 28 L. R. A., N. S., 1244, 104 Pac. 801; *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184; *Easterly v. Eatonville Lumber Co.*, 60 Wash. 647, 111 Pac. 876; *Merrill v. Stevens & Co.*, 61 Wash. 28, Ann. Cas. 1912B, 1011, 112 Pac. 353; *Sexsmith v. Brown*, 61 Wash. 164, 112 Pac. 337; *Collins v. Hazel Lumber Co.*, 54 Wash. 524, 103 Pac. 798; *Johnson v. Washington Water Power Co.*, 62 Wash. 619, 114 Pac. 453; *Cedar Rapids Nat. Bank v. Myhre Brothers*, 57 Wash. 596, 107 Pac. 518; *Meadow v. Northwestern Gas & Elec. Co.*, 55 Wash. 47, 103 Pac. 1107; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; *Olmstead v. Olympia*, 59 Wash. 147, 109 Pac. 602; *Ankeny v. Young Bros.*, 58 Wash. 634, 109 Pac. 109; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Barnum v. Seattle, Renton etc. R. Co.*, 61 Wash. 157, 112 Pac. 85.

A verdict will not be disturbed on appeal for want of definite evidence on a point upon which witnesses testified by references to a plat, indicating thereon, so that their

testimony may have been clear to the jury while left in confusion in the record: *Cordrey v. Washington Stevedore Co.*, 65 Wash. 381, 118 Pac. 324.

A verdict of guilty will not be disturbed on appeal on the ground that an alibi was established, where the evidence is conflicting and the verdict is sustained by substantial evidence: *State v. Dalton*, 65 Wash. 663, 118 Pac. 829.

A conviction for assault with a weapon likely to do bodily harm will not be disturbed on appeal on the ground that the assault was justified, where that depends upon the credibility of witnesses and the evidence was conflicting: *State v. Copeland*, 66 Wash. 243, 119 Pac. 607.

A verdict supported by conflicting evidence will not be disturbed on appeal, especially when the trial court refused to do so: *Critler v. Jacobson & Lindstrom*, 66 Wash. 322, 119 Pac. 819.

A verdict will not be disturbed on appeal where the evidence is conflicting and sufficient to sustain a finding either way: *Fronhofer v. Inland Navigation Co.*, 67 Wash. 171, 121 Pac. 45.

An award in condemnation will not be reversed on appeal as inadequate where it is well within the evidence of disinterested witnesses, and the trial court refused to interfere after hearing and seeing the witnesses: *Walla Walla v. Dement Brothers Co.*, 67 Wash. 186, 121 Pac. 63.

A verdict will not be set aside as contrary to the evidence, or as excessive, where there was competent evidence to support it: *Brennan v. Healy*, 67 Wash. 258, 121 Pac. 59.

The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal, where there is substantial evidence to support it: *Parker v. Minnesota Linseed Oil Paint Co.*, 67 Wash. 348, 121 Pac. 824.

A verdict upon conflicting evidence will not be disturbed on appeal when supported by substantial evidence: *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853.

A verdict for damages to land by flooding, approved by the trial court, will not be set aside on appeal as excessive, where it cannot be said to be the result of passion or prejudice: *Brisky v. Leavenworth Logging, Boom & Water Co.*, 68 Wash. 386, 123 Pac. 519.

The verdict of a jury assessing damages in a condemnation proceeding will not be set aside as excessive, where there was evidence which, if believed, would justify the award: *Selah & Moxee Canal Co. v. Belaire*, 68 Wash. 409, 123 Pac. 604.

A conviction of abortion need not be disturbed on appeal when supported by evidence of accomplices whose credibility was for the jury: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

Where there is competent and substantial evidence to sustain plaintiff's case, its

weight and sufficiency is for the jury: *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810.

A verdict supported by conflicting evidence will not be disturbed on appeal: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

A verdict upon conflicting evidence establishes the facts, although the appellate court may think the opposite view better sustained by the evidence: *Elliott v. Seattle, Renton & Southern R. Co.*, 68 Wash. 129, 39 L. R. A., N. S., 608, 122 Pac. 614.

The credibility of the evidence sustaining a judgment will not be considered on appeal: *Union Elevator & Warehouse Co. v. Farmers' Warehouse Co.*, 69 Wash. 664, 125 Pac. 960.

A verdict will not be disturbed when still sustained by the preponderance of the evidence after appellant's propositions of law are resolved in his favor: *Rots v. Monaghan*, 69 Wash. 407, 125 Pac. 158.

Objections to the form of the verdict cannot be urged on appeal where counsel waived the same below when the verdict was received: *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940.

The question of agency is usually one of fact for the jury, whose verdict on conflicting evidence will not be disturbed: *Klodek v. May Creek Logging Co.*, 71 Wash. 573, 129 Pac. 99.

FINDINGS—FORM AND SUFFICIENCY IN GENERAL.—In an action tried before the court without a jury, insufficiency of the findings is immaterial where the evidence justifies the judgment: *Blair v. Wilkeson Coal & Coke Co.*, 54 Wash. 334, 103 Pac. 18.

Upon appeal the supreme court will not recast conflicting and confusing findings of the trial court, in order to harmonize them: *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084.

REVIEW OF FINDINGS: See 4 Remington's Digest, "Appeal and Error," §§ 416-420; *Hackett v. Scott*, 59 Wash. 390, 109 Pac. 1030; *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633; *Bock v. Sorenson*, 53 Wash. 558, 102 Pac. 428; *Del Notaro v. Douglas*, 55 Wash. 493, 104 Pac. 774; *Kinder v. Poulsen*, 59 Wash. 289, 109 Pac. 795; *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367; *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116; *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449; *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88; *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497; *Catlin v. Sheldon*, 56 Wash. 423, 105 Pac. 828; *Matsger v. Page*, 62 Wash. 170, 113 Pac. 254; *Brown & Bros. Mercantile Co. v. Sherrod*, 53 Wash. 132, 101 Pac. 481; *In re Third, Fourth and Fifth Avenues, Seattle*, 55 Wash. 519, 104 Pac. 799; *Fidelity & Deposit Co. v. Oliver*, 57 Wash. 31, 106 Pac. 483; *Sparks v. Bemis Bros. Bag Co.*, 62 Wash. 625, 114 Pac. 442; *Holden v. Romano*, 61 Wash. 458, 112 Pac.

489; *Barkley v. American Sav. Bank & Trust Co.*, 61 Wash. 415, 112 Pac. 495.

Error cannot be urged in failing to allow defendant's entire cross-claim for damages for delay, where the same was put in issue, the evidence was not all brought up on appeal, the statement of facts recites that evidence was introduced tending to support the findings of fact made by the court, and the court found that the cross-claim for damages was not proven except as to the items allowed: *Seattle Turning and Scroll Works v. Eckloff*, 63 Wash. 82, 114 Pac. 893.

Upon an issue as to whether a marriage ceremony was performed between an Indian woman and a white man, findings will not be disturbed on appeal where the evidence was so contradictory that it is difficult to reach a conclusion without a personal view and hearing of the witnesses: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078.

Findings upon conflicting evidence will not be disturbed on appeal unless manifestly unjust: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

Findings upon conflicting and irreconcilable evidence will not be disturbed on appeal: *Seattle Merchants' Assn. v. Germania Fire Ins. Co.*, 64 Wash. 115, 116 Pac. 585.

A finding of a rescission of a contract on May 5th will not be disturbed because the only evidence of a rescission was on the 2d and 3d, it not appearing that the court attached importance to the date: *Fries v. Lockwood*, 64 Wash. 221, 116 Pac. 640.

Upon a square issue of fact, affirmed on one side and denied on the other, findings on conflicting evidence will not be disturbed on appeal unless against the clear preponderance of the evidence: *Veysey Brothers v. Bishop Mill Co.*, 64 Wash. 238, 116 Pac. 843.

Where findings are supported by the preponderance of the evidence, they will not be disturbed on appeal: *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

The findings of a trial judge upon a tedious accounting upon numerous involved items will not be disturbed on appeal if supported by the evidence and a correct construction of the contract: *Roy & Roy Mill Co. v. Hitchcock-Kelly Shingle & Lumber Co.*, 65 Wash. 317, 118 Pac. 1119.

Findings on conflicting evidence will not be disturbed on appeal where the evidence does not so preponderate on one side or the other as to warrant interference: *Mohr v. Pierce County*, 65 Wash. 370, 118 Pac. 321, 119 Pac. 747.

Findings supported by the evidence, although conflicting, will not be disturbed on appeal where the trial judge had the advantage of seeing and hearing the witnesses and also of a view of the premises: *Taylor v. Finch Investment Co.*, 65 Wash. 435, 118 Pac. 330.

Upon a direct controversy between the evidence of the parties, both of whom are about equally corroborated, findings of the

trial judge, who heard and saw the witnesses, will not be disturbed on appeal: *Sumner Iron Works v. Winkleman Lumber Co.*, 66 Wash. 14, 118 Pac. 886.

Findings upon conflicting testimony, supported by the evidence, will be sustained on appeal: *Brown v. Rogers*, 66 Wash. 239, 119 Pac. 1135.

Where the evidence is not brought up, findings of fact, complete and sufficient as to every essential fact in the case, and not excepted to, are conclusive; and it cannot be assumed that the evidence supports the decree: *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177.

Findings outside the issues in a divorce case do not vitiate a decree supported by other findings: *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119.

Findings upon conflicting evidence will not be disturbed on appeal if sustained by sufficient evidence, where the trial judge heard and saw the witnesses: *Hillman v. Donaldson*, 67 Wash. 410, 121 Pac. 866.

Where the evidence is brought up on appeal, the findings will not be given a technical construction, but the case will be considered on its merits: *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

Findings upon conflicting evidence will not be disturbed on appeal, when sustained by a preponderance of the evidence: *Hofstetter v. Sound Trustee Co.*, 67 Wash. 537, 122 Pac. 6.

Findings of the trial court in a divorce case will not be disturbed, where they depend upon the weight of conflicting evidence: *Broгна v. Broгна*, 67 Wash. 687, 122 Pac. 1.

Findings upon conflicting evidence will not be disturbed if sustained by any evidence: *Falls City Machinery & Supply Co. v. Goodstein*, 69 Wash. 549, 125 Pac. 786.

Findings in favor of the plaintiff upon conflicting evidence will not be disturbed on appeal, when supported by evidence, and there was not such preponderance in defendant's favor as to entitle him to a dismissal: *Sherman v. Pittwood*, 71 Wash. 515, 128 Pac. 1048.

Findings of the trial court will not be disturbed on appeal, where they are sustained by the fair preponderance of the evidence: *Brounty v. Majors*, 71 Wash. 571, 129 Pac. 93.

Findings upon conflicting evidence, where the trial court saw and heard the witnesses, will not be disturbed on appeal, when sustained by the evidence: *Ward v. Gaffney*, 70 Wash. 119, 126 Pac. 83.

Findings upon conflicting evidence will not be disturbed on appeal if sustained by the preponderance of the testimony: *Moses Land Scrip etc. Co. v. Stack-Gibbs Lumber Co.*, 70 Wash. 121, 126 Pac. 103.

Findings on conflicting evidence where the witnesses were heard below at first hand are entitled to much weight on appeal: *Blake-*

Rutherford Farms Co. v. Holt Mfg. Co., 70 Wash. 192, 126 Pac. 418.

Findings upon conflicting evidence will not be disturbed on appeal, especially where the evidence as brought up contains references to exhibits that are unintelligible: **Otis Elevator Co. v. Johnson**, 70 Wash. 339, 126 Pac. 894.

Findings upon conflicting evidence, by a trial judge who saw and heard the witnesses, will not be disturbed on appeal: **Stocking v. Boyer**, 70 Wash. 615, 127 Pac. 194.

The findings are conclusive where no statement of facts is brought to the supreme court, and if they support the judgment, it must be affirmed: **Dabney v. Stearns**, 70 Wash. 579, 127 Pac. 192.

Findings based on conflicting testimony, but amply sustained by the evidence, will not be disturbed on appeal: **Rice v. Ahlman**, 70 Wash. 6, 126 Pac. 64.

FINDINGS, WHEN REVERSED.—In an equity case tried de novo on appeal, the supreme court is not bound by the findings of the trial court: **Cushing v. Heuston**, 53 Wash. 379, 102 Pac. 29.

Upon a trial de novo in the supreme court, findings upon conflicting evidence will be set aside where the supreme court is convinced that the evidence preponderates in favor of the appellant and undisputed circumstances support his witnesses: **Dougherty v. Soll**, 70 Wash. 407, 126 Pac. 924.

On appeal in an equity case, the supreme court is not bound by the findings of the lower court, especially where written evidence conflicts with oral testimony resting on memory, as there is a trial de novo on appeal: **Pacific Lumber & Timber Co. v. Dailey**, 60 Wash. 566, 111 Pac. 869.

A finding that a corporation purchasing a business of another assumed all obligations incurred in the business cannot be predicated alone on allegations that were denied, there being no evidence on the subject: **Hal-lidie Co. v. Washington Brick etc. Co.**, 70 Wash. 80, 126 Pac. 96.

Upon reviewing an order dissolving an attachment, the supreme court is not called upon to follow the findings of the lower court upon disputed questions of fact, where the hearing was entirely upon affidavits: **Holt Mfg. Co. v. Thomas**, 69 Wash. 488, 125 Pac. 772.

FINDINGS OF REFEREE.—The findings of a referee upon conflicting evidence sustained by the trial court will not be disturbed on appeal: **Miller v. Caughren**, 59 Wash. 554, 110 Pac. 32.

Error cannot be predicated upon the failure of a commissioner to take the oath, where his report is only advisory and the court heard other evidence: **Jaggy v. Rooney**, 61 Wash. 381, 112 Pac. 367.

Error cannot be predicated upon a referee's allowance of an amendment to the pleadings, where the party was not misled and offered evidence on the issue, and did

not make the specific objection in opposing affirmation of the referee's report: **Walsh Lumber Co. v. Chaney**, 67 Wash. 583, 122 Pac. 10.

HARMLESS ERROR—PREJUDICE, AND RIGHTS AFFECTED: See 4 Remington's "Appeal and Error," §§ 423-434; **Burbank v. Pioneer Mut. Ins. Assn.**, 60 Wash. 253, 110 Pac. 105; **Biggs v. Hoffman**, 60 Wash. 495, 111 Pac. 576; **Buttz v. Cook**, 62 Wash. 90, 113 Pac. 282; **Sound Inv. Co. v. Bellingham Bay Land Co.**, 53 Wash. 470, 102 Pac. 234; **Eastern Outfitting Co. v. Manheim**, 59 Wash. 428, 35 L. R. A., N. S., 251, 110 Pac. 23; **White v. Ratliff**, 61 Wash. 383, 112 Pac. 502; **Blucher v. Earles**, 61 Wash. 84, 111 Pac. 1057; **Knust v. Bullock**, 59 Wash. 141, 109 Pac. 329; **Aries v. Mut. Life Ins. Co.**, 54 Wash. 269, 103 Pac. 50; **Thornton v. Dow**, 60 Wash. 622, 32 L. R. A., N. S., 968, 111 Pac. 899; **Hemmingson v. Carbon Hill Coal Co.**, 62 Wash. 28, 112 Pac. 1111; **Shaw v. Lobe**, 58 Wash. 219, 29 L. R. A., N. S., 333, 108 Pac. 450; **McKivor v. Savage**, 60 Wash. 135, 110 Pac. 811; **Buttz v. Cook**, 62 Wash. 90, 113 Pac. 282; **Jones v. Nelson**, 61 Wash. 167, 112 Pac. 88; **Gottschalk v. Meisenheimer**, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79.

Error in refusing a dismissal without prejudice as to all the lands sought to be registered under the Torrens act cannot be said to be harmless merely because the title to the land was not adjudicated, the statute requiring the court to enter a dismissal without prejudice when asked for: **Krutz v. Dodge**, 66 Wash. 178, Ann. Cas. 1913C, 869, 119 Pac. 188.

Error in denying a change of venue is not prejudicial, where, on trial de novo, the judgment must be sustained in any event: **Stahl v. Schwartz**, 67 Wash. 25, 120 Pac. 856.

A decision, based upon an erroneous ground, will be sustained if correct upon any ground: **Hammond v. Mau**, 69 Wash. 204, 40 L. R. A., N. S., 1142, 124 Pac. 377.

It is error without prejudice for the court, in a prosecution for attempt to rob, to inadvertently instruct the jury that the crime of attempted robbery includes the lesser offense of grand larceny, where no finding was made thereon and the error did not enter into the verdict: **State v. Baker**, 69 Wash. 589, 125 Pac. 1016.

Upon appeal from an order decreeing an accounting, a judgment preserving to the parties property of the value of five thousand dollars, which in case of reversal would be a total loss by reason of a reversion, will not be disturbed for technical errors: **Rice v. Ahlman**, 70 Wash. 6, 126 Pac. 64.

Failure to strictly adhere to the correct rule of damages in propounding questions to a witness is harmless where the same testimony would have been elicited had the questions been asked in the correct form: **Pur-**

cell v. Warburton, 70 Wash. 129, 126 Pac. 89.

In an action tried to the court, it is not prejudicial error to refuse to compel the plaintiff to elect between a cause of action upon an implied contract for services rendered, and a second cause of action upon a promissory note alleged to have been given as collateral security for the account due for services, where judgment was asked only upon the first cause of action and the note was ignored at the trial and in the decision: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

Error in requiring an election is harmless, where from the record it is evident that the action was properly dismissed because the contract sued on had been mutually abandoned: *Lamar v. Anderson*, 71 Wash. 314, 128 Pac. 672.

In an action tried to the court, it is not material whether the court used the proper measure of damages, where there was ample evidence to warrant the court's finding of damages: *Guinn v. Roelfs*, 71 Wash. 342, 128 Pac. 653.

AS TO PLEADINGS: See 4 Remington's Digest, "Appeal and Error," §§ 437-440; *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200; *Pack v. Peabody*, 58 Wash. 76, 107 Pac. 839; *Dickerman v. Reeder*, 59 Wash. 405, 109 Pac. 1060; *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752; *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

Upon an application to withdraw a plea of guilty, it is not prejudicial error to receive affidavits as to the guilt of the accused, as they are immaterial: *State v. Cimini*, 53 Wash. 268, 101 Pac. 891.

The failure of a complaint to state a cause of action is immaterial where evidence was admitted without objection broadening the issue and establishing a cause of action: *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash. 689, 116 Pac. 284.

Error in excluding a counterclaim is not prejudicial to the plaintiff, and will not be considered on plaintiffs' appeal, in the absence of a cross-appeal by defendant: *Perolin Co. v. Young*, 65 Wash. 300, 118 Pac. 1.

Defendant owners, in an action to foreclose a mechanic's lien, cannot allege error in failure to sustain a demurrer to the cross-complaint of the defendant contractor as premature, where the defect was not disclosed on the face of the cross-complaint, the contractor was properly made a party and compelled to answer, and the plaintiffs joined issue thereon seeking affirmative relief against the contractor, and went to trial on the merits: *Seattle Turning and Scroll Works v. Eckloff*, 63 Wash. 82, 114 Pac. 893.

In an action upon a note, error in ruling upon a cross-complaint relating to a second

note not yet matured is harmless where the issues thereon were tried out upon a supplemental complaint and answer after maturity of the second note: *Gibson v. Feeney*, 66 Wash. 531, 120 Pac. 97.

On appeal from justice court, an order purporting to amend the complaint upon which the accused was tried in justice court will not be held to deprive the accused of any substantial right, where the complaint had been amended in justice court by agreement before plea thereto, and accused was actually tried on the same charge as in the justice court, and the defendant pleaded not guilty after the so-called amendment: *State v. McKinney*, 66 Wash. 176, 119 Pac. 179.

INTERLOCUTORY PROCEEDINGS.—In an action of unlawful detainer, it is not prejudicial error that the court refused to quash the writ of restitution, where the defendant had not been disturbed in his possession, and upon final judgment for plaintiff, appealed and gave a supersedeas bond conditioned that he would abide the judgment of the court: *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 Pac. 281.

SELECTION AND IMPANELING OF JURORS.—It is not prejudicial error, in polling a jury, for the court to make additional inquiries as to how each juror found on certain questions: *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

Comment on the facts pending a motion to quash the jury panel cannot be assigned as error, when the jury had not been called to the box and the record does not show that any juror was present: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

CONDUCT OF TRIAL—MISCONDUCT OF JUDGE: See 4 Remington's Digest, "Appeal and Error," §§ 443, 444; *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383; *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814; *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *State v. McDowell*, 61 Wash. 398, Ann. Cas. 1912C, 782, 32 L. R. A., N. S., 414, 112 Pac. 521; *Hewitt v. Seattle*, 62 Wash. 377, 32 L. R. A., N. S., 632, 113 Pac. 1084.

An objection that the regular superior court judge of the county, who was a witness for the state, was guilty of improper conduct in mingling with the other witnesses and manifesting an interest in the prosecution, comes too late when first made on motion for a new trial: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

Language of the judge calculated to prejudice the jury is not ground for a reversal where the record shows it was not in the presence of the jury: *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810.

— ARGUMENTS AND CONDUCT OF COUNSEL: See 4 Remington's Digest,

"Appeal and Error," § 445; *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072; *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752; *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515.

Prejudicial error cannot be predicated on an improper insinuation of the prosecuting attorney on cross-examination of the defendant's witness, where an objection thereto was promptly sustained and the jury were instructed to disregard it: *State v. Smails*, 63 Wash. 172, 115 Pac. 82.

Error cannot be predicated upon improper argument of counsel to the jury, where it was not preserved in the record on appeal, and no motion was made below to strike it or to instruct the jury to disregard it: *State v. Smails*, 63 Wash. 172, 115 Pac. 82.

The statement of the prosecuting attorney in his opening to the jury, on a trial for embezzlement of twenty-two thousand dollars, that he expected to prove the embezzlement of one hundred and fifty-three dollars and thirty-three cents and other similar embezzlements not covered by the indictment, and the refusal of the court to sustain exception thereto or withdraw the same, is not prejudicial error requiring a new trial, where no evidence thereof was offered at the trial: *State v. Boone*, 65 Wash. 331, 118 Pac. 46.

Error cannot be predicated upon remarks of the prosecuting attorney, made upon objecting to a motion in the presence of the jury, where no request was made to instruct the jury as to their effect: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

As to reversal on the ground of improper remarks by counsel to or in presence of the jury, see note in 46 L. R. A. 641.

The arbitrary interruption by the court of proper argument of counsel, as going beyond the instructions, will be held harmless error, unless it appears from the whole record that otherwise a different verdict would probably have been returned: *International Mercantile & Bond Co. v. Shaw-Wells Co.*, 67 Wash. 369, 121 Pac. 834.

It is not prejudicial error that counsel in argument to the jury made an improper remark, which, on objection, the court instructed the jury to disregard: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

ADMISSION OF EVIDENCE: See 4 *Remington's Digest*, "Appeal and Error," §§ 447-456; *Hase v. Seattle*, 57 Wash. 230, 107 Pac. 515; *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *Collins v. Hazel Lumber Co.*, 54 Wash. 524, 103 Pac. 798; *Tindall v. Northern Pac. R. Co.*, 58 Wash. 118, 107 Pac. 1045; *Horton v. Seattle*, 61 Wash. 301, 112 Pac. 366; *State v. Leroy*, 61 Wash. 405, 112 Pac. 635; *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515; *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Hastie v. Jenkins*, 53 Wash. 21, 101 Pac. 495; *Parks*

v. Elmore, 59 Wash. 584, 110 Pac. 381; *Smith v. Smith*, 56 Wash. 461, 105 Pac. 1030; *Hawkes v. Hoffman*, 56 Wash. 120, 24 L. R. A., N. S., 1038, 105 Pac. 156; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496; *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072; *Lawson v. Black Diamond Coal Mining Co.*, 53 Wash. 614, 102 Pac. 759; *Eichbaum v. Caldwell Bros. Co.*, 58 Wash. 163, 107 Pac. 434; *Hackett v. Scott*, 59 Wash. 390, 101 Pac. 1030; *State v. Poyner*, 57 Wash. 489, 107 Pac. 181; *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208; *State v. Leroy*, 61 Wash. 405, 112 Pac. 635; *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593; *Hewitt v. Seattle*, 62 Wash. 377, 32 L. R. A., N. S., 632, 113 Pac. 1084; *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446; *Sipes v. Puget Sound Elec. R.*, 54 Wash. 47, 102 Pac. 1057; *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612; *Quinn v. Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Mrozevich v. Western Steel Corp.*, 61 Wash. 668, 112 Pac. 925.

The erroneous admission of an unidentified photograph of the scene of the accident is so prejudicial as to require a reversal, where undue prominence was given to it by statements of the trial judge declaring it to be identical with an exhibit used on a former trial, when it was not, and manifesting uncalled for feeling and accusing appellant's counsel with bad faith: *Pantages v. Seattle Electric Co.*, 63 Wash. 159, 114 Pac. 1044.

It is not prejudicial error that by inadvertence a witness gave part of his testimony without being sworn, where it was immediately withdrawn, and repeated after the witness was sworn: *State v. Morrow*, 63 Wash. 297, Ann. Cas. 1912D, 570, 115 Pac. 161.

Where the accused withdrew objections to testimony expecting the answers to be favorable, he cannot predicate error thereon: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

In a prosecution for practicing medicine without a license, it is not error that, on cross-examination of the prosecutrix, who was asked if the defendant took her temperature, the court refused to strike out the answer, "No she used a vibrator on me," especially where the defendant later testified to having used a vibrator: *State v. Greiner*, 63 Wash. 46, 114 Pac. 897.

Upon a prosecution for maintaining a nuisance by the sale of liquors without a license, error in admitting evidence to show that the liquor was kept in the place is harmless where there was no dispute upon that question: *State v. Falkenstine*, 64 Wash. 432, 117 Pac. 254.

Error in the admission of secondary evidence of the contents of a letter is harmless where the loss of the letter was subse-

quently established: *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086.

Error in the admission of incompetent evidence is harmless where there is a trial de novo on appeal: *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086.

The erroneous admission of evidence which might have affected the verdict will not be held harmless because the conviction was sustained by other evidence, unless it is clearly shown that it was non-prejudicial: *State v. Nist*, 66 Wash. 55, Ann. Cas. 1912C, 409, 118 Pac. 920.

In an action for wrongful death, it is not prejudicial error to allow the widow to testify as to the number of her children and how the deceased supported them, when it is not claimed that the damages are excessive: *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

In a prosecution for assault, the exclusion of evidence of the character of the wound, taken in connection with a remark of the prosecuting attorney that the person assaulted had since died, is not prejudicial in that the jury might be led to believe that death resulted from the assault, where the jury were instructed that the remark could be considered only to account for the absence of the party as a witness, and especially where the wound was described by the attending physician: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

In an action for services as a trained nurse, the admission of irrelevant evidence as to articles furnished by the plaintiff is not prejudicial, where there was no evidence of their value and the instructions only permitted recovery for the reasonable value of the service: *Brennan v. Healy*, 67 Wash. 258, 121 Pac. 59.

Error in the admission of evidence in a case tried by a court without a jury is harmless, where no finding is or need be predicated thereon: *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147.

The admission of immaterial evidence is harmless where it could not have misled the jury: *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853.

In a prosecution for violating the local option law, it is harmless to receive in evidence the certificate of federal internal revenue collector, that a special tax stamp had been issued to defendant as a retail liquor dealer, where defendant testified that he had purchased such a tax stamp: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

Upon a prosecution for obtaining property upon false pretenses as to the identity of a person, it is not prejudicial error to exclude evidence of a witness as to whether he had met the person at a certain time in a certain city, in the absence of any offer to show whether the witness knew him as the party he was represented to be or whether he was generally known in that city by such name, and where the defendant had testified that he did know

the man by that name in that city: *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

In an action for breach of written warranty of a traction engine, the admission of oral evidence as to negotiations merged in the written agreement is not prejudicial, where the oral representations did not go beyond the implied warranty that the machine was adapted to the purpose for which it was sold: *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418.

In a personal injury case, error, if any, in permitting the plaintiff to testify that he had a wife and three children is not prejudicial, where it was shown by other evidence that he had a home and wife: *Eoff v. Spokane, Portland & Seattle R. Co.*, 70 Wash. 270, 126 Pac. 533.

Where the jury gave plaintiff a verdict for thirty-five thousand dollars for the alienation of the affections of her husband, aged nearly fifty years, by a woman of fifty-six, it cannot be said that an instruction to disregard the wealth of the parties cured error in admitting evidence tending to show the defendant's great wealth: *Phillips v. Thomas*, 70 Wash. 533, 42 L. R. A., N. S., 582, 127 Pac. 97.

The admission of account-books in evidence cannot be alleged as error where the items considered in the account were credits favorable to appellant and reduced the claim: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

Error cannot be predicated on the admission of improper evidence going to the question of damages where it is not claimed that the verdict was excessive: *Keough v. Seattle Elec. Co.*, 71 Wash. 466, 128 Pac. 1068.

In a prosecution for editing printed matter tending to encourage disrespect for the law, it is not prejudicial error that certain improper evidence was received to prove that the article tended to have that effect, where the printing was admitted and clearly on its face had that effect and incited the commission of crime, since it became the duty of the court to instruct the jury what the effect of the article was as a matter of law: *State v. Fox*, 71 Wash. 185, 127 Pac. 1111.

EXCLUSION OF EVIDENCE: See 4 Remington's Digest, "Appeal and Error," §§ 457-459; *Maughlin Mill Co. v. Hamilton*, 61 Wash. 66, 111 Pac. 1067; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 643; *Silver v. London Assurance Corp.*, 61 Wash. 593, 112 Pac. 666; *Brown v. Seattle*, 57 Wash. 314, 106 Pac. 1113; *Shaw v. Woodland Shingle Co.*, 61 Wash. 56, 111 Pac. 1070; *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414; *Sanpere v. Sanpair*, 57 Wash. 524, 107 Pac. 369; *Buttz v. Cook*, 62 Wash. 90, 113 Pac. 282.

On a trial for robbery, error in excluding the accused's explanation of what he did between the time of the transaction and his arrest is not prejudicial, where there was no evidence of flight: *State v. Brache*, 63 Wash. 396, 115 Pac. 853.

The exclusion of evidence is harmless where it was admitted later, or where its subsequent admission was error favorable to the appellant: *State v. Phillips*, 65 Wash. 324, 118 Pac. 43.

It is not prejudicial error to exclude evidence of reputation in an action for malicious prosecution, where the cause of action for injury to reputation was abandoned by the plaintiff: *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888.

Error in excluding a question as to whether the defendant prevented a female from leaving a house of prostitution is cured by permitting her to answer whether anyone had done so: *State v. State*, 66 Wash. 625, 120 Pac. 76.

It is not prejudicial error to exclude the evidence of a physician as to the condition of a fracture at the time of the injury, where he made a physical examination just before the trial and testified as to its condition at that time, and the excluded evidence would have added nothing material: *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832.

On a trial de novo, error in the exclusion of a deposition which is brought up on appeal is harmless: *Metcalf v. Sackman*, 66 Wash. 580, 120 Pac. 84.

It is harmless to exclude the answer to a question which would not have changed the result: *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73.

Error in the exclusion of evidence is not prejudicial where the fact was clearly proven by other evidence: *Warren v. Kearney*, 63 Wash. 369, 115 Pac. 739.

Error in excluding evidence is cured where the fact was established by other evidence: *State v. King*, 67 Wash. 651, 122 Pac. 323.

In an equity case, it is not reversible error to exclude evidence where the facts so far as material were shown by other evidence: *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189.

In an action tried to the court, errors of law in the rejection or admission of evidence are not prejudicial, where the result would not have been different: *Moses Land Scrip etc. Co. v. Stack-Gibbs Lumber Co.*, 70 Wash. 121, 126 Pac. 103.

Error in excluding evidence is cured where it was subsequently admitted: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Error cannot be predicated upon sustaining an objection to two questions because united as one, one of which was improper, where appellant did not avail himself of an opportunity to sever the questions: *State v. Counort*, 69 Wash. 361, 41 L. R. A., N. S., 95, 124 Pac. 910.

Error in the exclusion of evidence is not prejudicial where from the whole record it appears that the fact was established by other evidence: *Klodek v. May Creek Logging Co.*, 71 Wash. 573, 129 Pac. 99.

INSTRUCTIONS TO JURY: See 4 Remington's Digest, "Appeal and Error," §§ 460-465; *Pealer v. Gray's Harbor Boom Co.*, 54 Wash. 415, 103 Pac. 451; *State v. Poyner*, 57 Wash. 489, 107 Pac. 181; *Engelking v. Spokane*, 59 Wash. 446, 29 L. R. A., N. S., 481, 110 Pac. 25; *Coffer v. Erickson*, 61 Wash. 559, 112 Pac. 643; *McAdam v. Russell*, 61 Wash. 176, 112 Pac. 345; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563; *Averbuch v. Great Northern R. Co.*, 55 Wash. 633, 104 Pac. 1103; *LaBee v. Sultan Logging Co.*, 59 Wash. 341, 109 Pac. 1023; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453; *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149; *Manvell v. Weaver*, 61 Wash. 23, 111 Pac. 890; *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245; *Myhra v. Chicago, M. & P. S. R. Co.*, 62 Wash. 1, 112 Pac. 939; *State v. Wilson*, 58 Wash. 123, 108 Pac. 1.

Upon a conviction of murder in the second degree, error in instructions in defining deliberation and premeditation is immaterial: *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

As to effect of erroneous instruction as to higher degree of crime where jury are properly instructed as to, and find verdict for, lower degree, see note in 14 Ann. Cas. 968.

A needlessly long instruction will not be held prejudicial, as a matter of law, as singling out the evidence of the accused, when the appellate court is unaided by the evidence and the instruction appears correct in the abstract: *State v. Letica*, 61 Wash. 629, 112 Pac. 748.

In a charge on the subject of self-defense, the inapt use of the expression "justified by necessity," is not reversible error where the instruction, considered as a whole in the light of other instructions, falsely states the law, although, if considered alone, it might be prejudicial: *State v. Letica*, 61 Wash. 629, 112 Pac. 748.

In an action for slander in charging incest, in which the defendant pleaded in justification that the charges were true, and that was the principal issue and the fact of publication was not seriously denied, it is not prejudicial error that the court instructed the jury that they must find for the defendant if the charges were true, "otherwise for the plaintiffs," where, by other instructions, the burden of proving the

complaint was placed upon the plaintiff: *Warren v. Kearney*, 63 Wash. 369, 115 Pac. 739.

Where the jury is not misled, it is not prejudicial error that the instructions were not given in the usual order and that those consistent with the plaintiff's theory were given last: *Warren v. Kearney*, 63 Wash. 369, 115 Pac. 739.

In instructions defining the charge of practicing medicine without a license, it is not error to state the legal effect of the complaint, rather than follow its language: *State v. Greiner*, 63 Wash. 46, 114 Pac. 897.

Error in instructions to the jury cannot be reviewed on appeal in the absence of evidence or any statement of facts on appeal from which it can be ascertained that the instructions were prejudicial to the appellant under the testimony produced and the verdict rendered: *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047.

As to refusal to charge as requested when the substance of the request occurs elsewhere in the instructions, see note in 69 L. R. A. 213.

Upon a charge of murder, an erroneous instruction as to premeditation is harmless where the jury found that there was no premeditation, and convicted defendant of murder in the second degree: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

On a trial for murder, it is harmless to instruct as to first and second degree assault, which may not be included in the charge, where the defendant requested the instructions, and where the jury found a verdict of murder in the second degree: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

As to effect of erroneous instructions as to higher degree of crime when jury are properly instructed as to, and find verdict for, lower degree, see note in 14 Ann. Cas. 968.

In an action against a city for injuries sustained through a defective sidewalk, error in instructions as to the city's actual notice of the defect is not prejudicial, where there was ample evidence of constructive notice to sustain the verdict: *Owen v. Seattle*, 64 Wash. 10, 116 Pac. 261.

As to instructions in actions against township for defects in highway, see note in 13 L. R. A., N. S., 1275.

Error in instructing that the measure of damages for the breach of warranty of soundness of a horse is the difference between the purchase price and the value at the time of sale if it had been as warranted, instead of its actual value and the value if it had been as warranted, is harmless, where the evidence showed that the purchase price was the actual value at the time of the sale: *Abrahamson v. Cummings*, 65 Wash. 35, 117 Pac. 709.

The refusal of requests for instructions is not error where they were covered by the general charge: *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311.

In a criminal case, error cannot be assigned on the giving of instructions, in the absence of any exceptions thereto: *State v. Lewis*, 65 Wash. 485, 118 Pac. 626.

Where, upon a trial for perjury, the court instructed the jury that all the testimony given by the accused in a civil action was material to the issue thereon, and the same was not excepted to, it became the law of the case, and error cannot be predicated on other instructions authorizing the jury to convict if they find that the accused gave the testimony as charged or "some substantial part of it": *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

As to necessity for objection as well as exception in order to save giving of instruction for review, see note in Ann. Cas. 1912B, 1231.

Technically erroneous expressions in a charge to a jury are harmless where the instructions as a whole fairly state the law: *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

Nonobservance of a local rule of court with respect to copies of the instructions requested is not ground for reversal: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

In an action for personal injuries sustained through alleged defects in a work car which jumped the track, it is not such error as to warrant the granting of a new trial to instruct the jury that the plaintiff could not recover if the jumping of the track was the result of a dangerous rate of speed combined with an unsafe condition of the car, without distinguishing between a dangerous rate of speed for a car in good condition and one in bad condition, where in numerous other instructions the jury were told that the plaintiff could not recover even if the car was in an unsafe condition, unless the jumping of the track was the result of such unsafe condition: *Cheichi v. Northern Pac. R. Co.*, 66 Wash. 36, 118 Pac. 916.

In a personal injury case, an irrelevant instruction going only to the measure of damages is not prejudicially erroneous, where the verdict was reduced by the trial judge in a substantial degree: *Lynch v. Northern Pac. R. Co.*, 67 Wash. 113, 120 Pac. 882.

Upon breach of a logging contract by defendant, an instruction that the defendant could counterclaim for damages sustained by reason of plaintiffs' failure to fully perform the contract is error favorable to the defendant of which he cannot complain: *Palmer v. Huston*, 67 Wash. 240, 121 Pac. 452.

It is harmless error to give an instruction as to plaintiff's right to recover, although negligent, if the defendant had the last clear chance to avoid the accident, there being no evidence warranting its submission, where the jury by a special verdict found that the plaintiff was not guilty of contributory negligence: *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351.

In an action upon a joint contract in which there was a verdict against all the defendants, it is harmless error to give instructions permitting a joint or several judgment when no several contract had been pleaded or proved: *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001.

It is not prejudicially erroneous to instruct that if certain facts were true, officers of a corporation would have implied authority to contract for the company, instead of stating that the facts would be prima facie evidence of their authority, where the officers' denial of authority amounted only to a denial of any formal conferring of authority, and the facts referred to consisted of the only evidence in the case upon the question of the apparent authority of the officers: *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001.

Error in instructing that the negligence of the driver of a team could not be imputed to the plaintiff is harmless where there was no evidence of any negligence on the part of the driver: *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, 123 Pac. 1086.

Upon appeal in a criminal case, an admittedly erroneous instruction cannot be disregarded as an inadvertence, or as incorrectly reported, as the record is conclusive: *State v. Rubenstein*, 69 Wash. 38, 124 Pac. 135.

In an action for personal injuries, it is not prejudicially erroneous to instruct that the jury may take into consideration "the age and condition in life" of the plaintiff, as referring to his financial condition, where there was no evidence of his financial worth: *Grimes v. Cathcart*, 69 Wash. 519, 125 Pac. 764.

Error in giving a written instruction after the close of the argument, when the law requires that it be given before argument, is harmless where it covered inconsequential matter, was correct in the abstract, and without prejudice: *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89.

An instruction briefly stating the issues and adding that defendant denies "other material" allegations is not prejudicial in leaving the jury to determine what were the material allegations, where other instructions fully informed the jury as to what facts would sustain or defeat the recovery, and the jury had the pleadings for their guidance: *Morran v. Chicago, Milwaukee & Puget Sound R. Co.*, 70 Wash. 114, 126 Pac. 73.

As to the propriety of instruction referring jury to the pleadings to determine issues, see note in *Ann. Cas.* 1912C, 227.

Instructions must be considered as a whole, and a case will not be reversed for failure to incorporate all points in a single instruction if covered in the balance of the charge: *Morran v. Chicago, Milwaukee & Puget Sound R. Co.*, 70 Wash. 114, 126 Pac. 73.

An instruction submitting an issue as to whether a scaffold was built under direction of "defendant's foreman" is not objectionable in assuming that a certain employee was such foreman where, by other instructions, the jury were told what facts would establish whether he was defendant's foreman or plaintiff's fellow-servant: *Morran v. Chicago, Milwaukee & Puget Sound R. Co.*, 70 Wash. 114, 126 Pac. 73.

Instructions to the jury become the law of the case, so far as respondent is concerned: *Girocamo v. Tribble*, 70 Wash. 25, 126 Pac. 67.

Prejudicial error may not be predicated on instructions that do not fit the facts of the particular case, where other proper instructions were given so that the law of the case was before the jury: *Melius v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 64, 127 Pac. 575.

A cause will not be reversed for the giving of instructions requested by both sides, hostile in theory and confusing, where the jury was not misled, although the court should have adopted a theory of its own, or given the instructions requested by one side only: *Melius v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 64, 127 Pac. 575.

It is not prejudicial error that instructions were given to the jury after the argument, in disregard of the statute: *Wheeler v. Hotel Stevens Co.*, 71 Wash. 142, 127 Pac. 840.

In an action for malpractice, an instruction on the subject of the degree of care required, referring to it as such care and skill as the plaintiff "should expect," or as the public had a "right to expect," is not prejudicial error, where in the same instruction defendants' undertaking was specifically stated to be to use "reasonable care and skill," and also later instructions stated the rule in the language requested by the appellants: *Williams v. Wurdemann*, 71 Wash. 390, 128 Pac. 639.

In an action for personal injuries, revived on behalf of heirs after the death of the plaintiff, error in an instruction that the heirs could recover such a sum as the plaintiff could have recovered if she were alive at present, is cured when, upon objections made, it was explained to cover only such pain and suffering as the plaintiff suffered up to the time of her death: *Thompson v. Seattle, Renton & Southern R. Co.*, 71 Wash. 436, 128 Pac. 1070.

DISMISSAL OR DIRECTION OF VERDICT.—In an action of ejectment, error, if any, in refusing to direct a nonsuit for failure to prove that the defendant was in possession, is cured, where the defendant's testimony in his own behalf supplied the defect: *Gough v. Center*, 57 Wash. 276, 106 Pac. 774.

A verdict in favor of defendants cures error in refusing to sustain a challenge to the sufficiency of the evidence: *Aldrich v.*

Inland Empire Tel. & Tel. Co., 62 Wash. 173, 113 Pac. 264.

Defendants may urge their motion for nonsuit in the appellate court, although they proceeded with the trial, where it was erroneously overruled and the defect was not cured by the proofs subsequently submitted: *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282.

As to right of plaintiff to appeal, from voluntary judgment of nonsuit, see note in 9 Ann. Cas. 639.

JUDGMENT OR ORDER.—A tax foreclosure judgment against a lot not in existence is without prejudice to the defendant: *Sound Inv. Co. v. Bellingham Bay Land Co.*, 53 Wash. 470, 102 Pac. 234.

A technical objection to the form of a judgment, in consolidated actions, which simply avoids a multiplicity of suits, is not ground for reversal: *Sweeney v. Archibald*, 60 Wash. 595, 111 Pac. 788.

As to amount in controversy for purposes of appeal from judgment in consolidated action, see note in 15 Ann. Cas. 492.

Upon appeal from an order refusing to vacate a judgment of commitment to the insane ward of the penitentiary, errors leading up to the final judgment of commitment cannot be reviewed: *State v. Tenney*, 63 Wash. 486, 115 Pac. 1080.

Want of jurisdiction to enter a judgment of commitment to the insane ward of the penitentiary, because of the unconstitutionality of the statute, is error reviewable on appeal from the judgment, and hence cannot be raised on appeal from an order refusing to vacate the judgment: *State v. Tenney*, 63 Wash. 486, 115 Pac. 1080.

In an action by bailors for the value of goods lost, it is harmless error that judgment was rendered in favor of both plaintiffs when the evidence showed that only one of them was interested in the goods: *Nowell v. Seattle Transfer Co.*, 63 Wash. 685, 116 Pac. 287.

A sentence of not less than nine and not more than ten years for sodomy will not be interfered with as excessive, there appearing no gross abuse of discretion: *State v. Douglass*, 66 Wash. 71, 118 Pac. 915.

As to excessive sentence as ground for reversal, see note in 45 L. R. A. 150.

An objection that a cost bill was not properly itemized and verified is unavailing in the supreme court, in the absence of a showing that the costs allowed were not necessarily expended: *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023.

As to review of chancery decree for costs only, see note in 9 Ann. Cas. 100.

§ 1737.

FORMER DECISION AS LAW OF CASE: See 4 Remington's Digest, "Appeal and Error," §§ 472-476; *State ex rel. North Shore Boom & Driving Co. v. Nicomen Boom*

Co., 53 Wash. 499, 102 Pac. 394; *Loeper v. Loeper*, 56 Wash. 647, 106 Pac. 183; *Wittler-Corbin Mach. Co. v. Martin*, 53 Wash. 65, 101 Pac. 494; *Helmer v. Title Guaranty & Surety Co.*, 55 Wash. 558, 104 Pac. 783; *Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720; *Butler v. Supreme Court of Forresters*, 60 Wash. 171, 110 Pac. 1007; *Fransioli v. Tacoma*, 60 Wash. 463, 111 Pac. 564; *Manvell v. Weaver*, 61 Wash. 23, 111 Pac. 890; *Berger v. Metropolitan Press Printing Co.*, 61 Wash. 35, 11 Pac. 872; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Starr v. Long Jim*, 59 Wash. 190, 109 Pac. 810.

A decision on appeal that a demurrer was properly overruled, and that certain evidence was improperly excluded, becomes the law of the case, and error cannot be assigned thereon upon a second appeal: *O'Brien v. McKelvey*, 66 Wash. 18, 118 Pac. 885.

A decision on a former appeal that the facts made a case for the jury becomes the law of the case, and is conclusive on a second appeal, taken after a reversal and remanding the case for judgment upon the verdict: *Provine v. Seattle*, 70 Wash. 326, 126 Pac. 927.

Where the supreme court has held, on a former appeal of a case, that the failure of a city to plead a prior judgment precluded any recovery against the defendant, the decision will be followed as the law of the case on a second appeal: *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038.

Where, upon a former appeal, the supreme court held that the title to property was separate and subject only to defeasance by matters not in the record, and on a retrial there was presented only a question of law as to the effect of deeds, the former decision is conclusive: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

A decision upon a former appeal that an action was commenced within time limited by statute and was not barred by laches, is conclusive on the second appeal: *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840.

As to the conclusiveness of prior decisions upon subsequent appeals, see note in 34 L. R. A. 321. See, also, note in 40 L. R. A. 825.

Upon a retrial after remittitur, the decision of the supreme court becomes the law of the case, although the opinion was elaborated upon the denial of a petition for rehearing without an opportunity to be heard thereon: *Chehalis v. Cory*, 64 Wash. 367, 116 Pac. 875.

The decision of the supreme court becomes the law of the case upon a retrial, where all the material questions were raised on the first trial: *Pattison v. Seattle, Renton & Southern R. Co.*, 64 Wash. 370, 35 L. R. A., N. S., 660, 116 Pac. 1084.

Where, on a former appeal, it was decided that the lessee was estopped to question the validity of an unacknowledged lease, under

the allegations of the pleadings, the validity of the lease is established as the law of the case if the facts pleaded are proved on the second trial: *Forrester v. Reliable Transfer Co.*, 65 Wash. 602, 118 Pac. 753.

Upon a former appeal, the reversal of a judgment for defendant, notwithstanding a verdict for the plaintiff, upon the ground that the evidence made a case for the jury, establishes the facts as found by the verdict as the law of the case; and on remand, a new trial for insufficiency of the facts to sustain the verdict is properly denied, either as conclusively settled or as within the discretion of the trial court: *Budman v. Seattle Electric Co.*, 67 Wash. 133, 120 Pac. 877.

As to the right of appellate court, upon granting new trial, to limit issues to be determined by the jury, see note in Ann. Cas. 1912D, 593.

DECISION IN GENERAL: See 4 Remington's Digest, "Appeal and Error, §§ 447-482; *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787; *Exposition Amusement Co. v. Raeco Products Co.*, 55 Wash. 314, 104 Pac. 509.

The maxim *stare decisis* cannot be evoked as to matters merely discussed in an opinion, but not involved as essential elements: *Ingham v. Harper & Son*, 71 Wash. 286, 128 Pac. 675.

As to the limitations upon the doctrine of *stare decisis*, see notes in 27 Am. Dec. 628, and 73 Am. St. Rep. 98.

RENDITION, FORM, AND ENTRY: See 4 Remington's Digest, "Appeal and Error," §§ 487-490; *Allen v. Hanson*, 62 Wash. 284, 113 Pac. 768; *Hutchins v. Wertheimer*, 51 Wash. 539, 99 Pac. 577; *O'Connor v. Force*, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014; *Real Estate Inv. Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057; *Thornton v. Dow*, 60 Wash. 622, 32 L. R. A., N. S., 968, 111 Pac. 899; *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1912A, 1, 113 Pac. 625; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144.

Upon reversing a nonsuit, granted at the close of plaintiffs' case, the case must be remanded for a new trial, notwithstanding that the testimony of the defendant, when called as a witness for the plaintiff, indicates that the plaintiff would be entitled to judgment, since the defendant cannot be foreclosed from making his defense: *McIntyre v. Johnson*, 6 Wash. 567, 120 Pac. 92.

As to what is and the general effect of reversal, see note in 96 Am. St. Rep. 125.

Where, upon reversing the action of the board of equalization in refusing to deduct the assessed value of real estate from the assessed value of national bank stock, the board has adjourned and been dissolved, and the county treasurer has the tax-rolls, the supreme court will order the clerical correction of the rolls, where nothing else is required to protect appellant's rights: *Dex-*

ter Horton National Bank v. McKenzie, 69 Wash. 314, 124 Pac. 915.

As to the restitution of persons disposed under a judgment subsequently reversed, see note in 17 Am. St. Rep. 264.

This section does not authorize the court, upon appeal from a judgment which was void because of a prior final judgment in the cause, to review or modify the first judgment which was not appealed from: *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434.

As to effect of reversal of joint judgment where all the defendants do not appeal, see note in 10 Ann. Cas. 80.

The fact that cruel punishment is inflicted does not warrant the reversal of a conviction, since the conviction would be affirmed with directions to enforce the legal part of the sentence: *State v. Feilen*, 70 Wash. 65, 126 Pac. 75.

As to form and extent of relief in case of excessive sentence, see note in 45 L. R. A. 150.

Upon reversing a case in which judgment for plaintiff was entered at the conclusion of defendant's evidence on an issue raised by new matter in the answer, a new trial should be allowed in order to allow the plaintiff an opportunity to meet the defendant's testimony: *Scandinavian-American Bank v. Washington Hotel & Imp. Co.*, 70 Wash. 223, 126 Pac. 438, 128 Pac. 222.

Where, in eminent domain proceedings to raise the waters of a lake for a reservoir, there was no evidence as to the height of the dam necessary, nor as to how much land would be flooded, the case will be remanded for a hearing and findings thereon: *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

As to right of appellate court, on granting of new trial, to limit the issues the jury are to consider, see note in 7 Ann. Cas. 116.

Where the trial court exceeds its power in imposing a sentence, the supreme court will not order a new trial, but will remand the case for the proper sentence: *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102.

As to power of reviewing court to remand criminal case for proper judgment, see note in 3 Ann. Cas. 1024.

Upon reversing a case for error in admitting evidence which goes only to the amount of the verdict and not to the right of recovery, and the proper amount can be determined from the record, a new trial will not be awarded, but the judgment will be modified, with costs to appellant: *Anderson v. Seattle Lighting Co.*, 71 Wash. 161, 127 Pac. 1108.

As to the power and duty of the appellate court as to inadequacy of damages as ground for setting aside verdict, see note in 47 L. R. A. 33.

Where, in a divorce case, the record was unsatisfactory, and there was only a partial trial on ex parte affidavits and a failure to make complete findings, the cause will be

remanded for a retrial rather than a trial de novo on appeal: *Schultz v. Schultz*, 71 Wash. 327, 128 Pac. 660.

Where, in condemnation proceedings, the judgment awarded to a defendant a sum deposited in court, and upon appeal by the other defendants the judgment was reversed and the cause remanded with directions to enter an order directing payment of the money to the other defendants, the same is a final determination of the merits, and the lower court cannot refuse to enter the order on the ground of want of jurisdiction, and because the money had been withdrawn by order of court prior to pendency of the appeal; and mandamus will issue to compel the lower court to enter the order as directed: *State ex rel. Smith v. Superior Court*, 71 Wash. 354, 128 Pac. 648.

In an action for rescission of a trade of land for a horse, on a second trial the issue is properly restricted to the single issue as to the value of a horse, where, on appeal, the supreme court remanded the case for determination of that question only; and evidence as to the value of the land is properly excluded: *Kleeb v. McInturff*, 71 Wash. 419, 128 Pac. 1076.

§ 1738.

Damages will not be granted because of the taking of an appeal for delay only, under this section, upon confession of a motion to dismiss and failure to prosecute the appeal, where the record is not brought up and there is nothing further to show that the appeal was taken only for delay, it not being the practice to allow other than statutory costs or any special allowance for attendance: *Hallidie Mach. Co. v. Hayden-Coeur D'Alene Irr. Co.*, 56 Wash. 11, 105 Pac. 140.

§ 1739.

See notes to § 831.

Where the supreme court inadvertently omitted to enter judgment for costs against both sureties, the remittitur will be recalled and the proper judgment entered: *Dyer v. Dyer*, 68 Wash. 463, 123 Pac. 774.

Upon motion to recall a remittitur to enter proper judgment for the costs allowed against sureties on an appeal bond, the surety cannot urge an offset on account of expense incurred: *Dyer v. Dyer*, 68 Wash. 463, 123 Pac. 774.

As to the liability of sureties on appeal, see note in 38 Am. St. Rep. 702.

§ 1740.

A rehearing will not be granted to enable the petitioner to present a question not raised on the original hearing or considered by the court: *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

A rehearing will not be granted to consider a new question not involved on the original hearing or even referred to in the briefs on appeal: *King v. Upper*, 57 Wash. 130, 31 L. R. A., N. S., 606, 106 Pac. 612, 1135.

Curative statutes which do not impair the obligations of contracts and are intended to be retroactive, are applicable to pending cases, and will be considered by the supreme court, on petition for rehearing, although enacted after the filing of a decision: *State ex rel. Bussell v. Abraham*, 64 Wash. 621, 117 Pac. 501.

After declaring a law unconstitutional the supreme court may, on rehearing, consider the effect of a retroactive statute, enacted to cure the defects prior to the entry of final judgment, to the same extent as if it had been enforced on the first hearing: *State ex rel. Bussell v. Abraham*, 64 Wash. 621, 117 Pac. 501.

§ 1741.

MANDATE AND PROCEEDINGS IN LOWER COURT: See 4 Remington's Digest, "Appeal and Error," §§ 492-495; *Kath v. Brown*, 53 Wash. 480, 132 Am. St. Rep. 1084, 102 Pac. 424; *State ex rel. North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 53 Wash. 499, 102 Pac. 394; *Sound Inv. Co. v. Bellingham Bay Land Co.*, 53 Wash. 470, 102 Pac. 234; *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 434, 105 Pac. 846; *Dalgarno v. Trumbull*, 61 Wash. 658, 112 Pac. 928; *Gould v. White*, 62 Wash. 406, 114 Pac. 159; *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; *Portland & Seattle R. Co. v. Skamania Boom Co.*, 59 Wash. 191, 109 Pac. 814.

RECALL OF REMITTITUR.—After an appeal has been heard, the opinion filed, a petition for rehearing denied, and the remittitur transmitted to the superior court, appellate jurisdiction ceases, and the court cannot, by consent of the parties, recall the remittitur after the term to consider the effect of a subsequent statute: *State ex rel. Burke v. Board of County Commrs.*, 61 Wash. 684, 112 Pac. 929.

See, also, notes to § 1739.

§ 1744.

See notes to § 6226.

On appeal from a judgment denying a writ of mandamus to compel a gas company to install separate meters, the appellant cannot, in order to avoid costs, have a writ to compel the installation of one general meter, where that service was tendered the appellant and rejected at the trial below: *State ex rel. Hallett v. Seattle Lighting Co.*, 60 Wash. 81, 30 L. R. A., N. S., 492, 110 Pac. 799.

A reduction of one hundred dollars from a four hundred dollar judgment is such a substantial reduction as to carry costs on appeal: *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497.

Where a judgment in consolidated actions to foreclose logger's lien was given against defendant for five hundred and thirty-four dollars and eighty-nine cents for an eloignment of logs valued at fifteen hundred dollars, and on appeal the judgment was sustained in part, modified in part and reversed in part, seven lien claims to the extent of two hundred and twelve dollars and fifteen cents being sustained and an eloignment fund of only six hundred and sixty dollars in value, and the costs below on the seven claims not appearing in the record, the supreme court will apportion the costs in such arbitrary sum as appears from the whole record to be equitable; since the unsuccessful plaintiffs should not be charged with defendants' entire costs, which were largely incurred in an unsuccessful attack upon the seven claims sustained: *Akers v. Lord*, 71 Wash. 299, 128 Pac. 672.

COSTS ON APPEAL: See 4 Remington's Digest, "Costs," §§ 61-81; *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; *Olympia Brewing Co. v. Pioneer Mut. Ins. Assn.*, 53 Wash. 16, 101 Pac. 371; *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *McCormick v. Sorenson*, 58 Wash. 107, 137 Am. St. Rep. 1047, 107 Pac. 1055; *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Smith v. Smith*, 56 Wash. 461, 105 Pac. 1030; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135.

On reversing a judgment as to one defendant and affirming as to another, where there was no segregation of the appeals, plaintiff will recover one-half of its costs, and pay to the successful defendant one-half of the appellant's costs: *Hallidie Co. v. Washington Brick etc. Mfg. Co.*, 70 Wash. 80, 126 Pac. 96.

Upon the reduction of an excessive judgment entered through the error of respondent, appellant will be allowed the costs on appeal: *National Grocery Co. v. Simmons*, 63 Wash. 264, 115 Pac. 306.

On appellant's obtaining a substantial reduction of the judgment, he will be entitled to costs on appeal: *Muzzini Society v. Corgiat*, 63 Wash. 273, 115 Pac. 93.

In an action to vacate a judgment for want of jurisdiction and cancel an assessment for benefits, in which the trial court erroneously rejected respondents' offer of evidence to overcome the presumption of jurisdiction, upon objection made by the city, but also erroneously vacated the judgment as void upon its face, upon appeal by the city and reversal with remand to receive the evidence excluded at appellant's instance, the costs on appeal are within the

discretion of the appellate court, under this section, and will be awarded to the respondents, since they were forced into the appellate court wholly without fault: *Michaelson v. Seattle*, 63 Wash. 230, 115 Pac. 167.

As to liability for costs in appeals from condemnation proceedings, see note in 36 L. R. A., N. S., 624.

§ 1747.

Upon a trial for murder, in which the defendant is acquitted of first degree murder by a verdict for manslaughter, the defendant is entitled to bail pending his appeal, under this section: *State ex rel. Moorehead v. Chapman*, 64 Wash. 140, 116 Pac. 592.

As to bail as a matter of defendant's right or court's discretion, see notes in 1 Ann. Cas. 12 and 9 Ann. Cas. 619.

§ 1749.

Upon reversal of a conviction for robbery because the information failed to allege the right of the person robbed to control and dominion over the property taken, the accused is not entitled to a discharge, but the case will be remanded for further proceedings. *State v. Hall*, 54 Wash. 142, 102 Pac. 888.

Upon reversal of a conviction for assault with a deadly weapon, for insufficiency of the evidence as to the higher offense, the evidence establishing assault only, the case will be remanded for sentence for simple assault, as that is embraced within the offense charged: *State v. Lillie*, 60 Wash. 200, 110 Pac. 801.

§ 1766.

This section authorizes only a judgment in rem against the property attached, even if the decedent was a resident of the state; and where the attached property is not sufficient to satisfy the judgment, no other execution can issue against other property of the defendant as in the case of personal judgments: *Clifford v. Pateros Transfer Co.*, 71 Wash. 665, 129 Pac. 369.

§ 1774.

A change of venue lies from a police justice to a justice of the peace, in prosecutions for the violation of a town ordinance, under this section, and section 7748, providing that a police justice in towns of the fourth class shall be governed by the general laws relating to justices of the peace: *State ex rel. Hall v. Wicker*, 60 Wash. 238, 110 Pac. 992.

As to venue in criminal cases, see note in 44 Am. St. Rep. 79.

§ 1823. Writ of Garnishment—When may Issue.

The justices of the peace in the various precincts in this state may issue writs of garnishment, returnable to their respective courts, where the plaintiff sues for a debt which is just, due and unpaid; or where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have the writ of garnishment issued. [L. '11, p. 637, § 1.]

§ 1824. Affidavit for Garnishment—Requisites.

Before the issuance of the writ of garnishment, the plaintiff or someone in his behalf, shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that he has reason to believe and does believe that the garnishee is indebted to the defendant or that he has in his possession or under his control personal property or effects belonging to the defendant, or that the garnishee is a corporation and that the defendant is the owner of shares of the capital stock thereof, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee. [L. '11, p. 637, § 2.]

§ 1825. Issuance of Writ—Contents.

When the foregoing requisites have been complied with, the justice of the peace shall, without additional fee, docket the case in the name of the plaintiff, as plaintiff, and of the garnishee as defendant, and shall immediately issue a writ of garnishment, directed to the garnishee commanding him to appear before the justice who issues the writ, at a certain place, day and hour, which shall not be less than six nor more than twenty days from the date of the issuance of the writ, to answer on oath in what amount, if any, he was indebted to the defendant when such writ was served upon him, and what personal property or effects, if any, of the defendant he had in his possession or under his control when such writ was served upon him; and where it appears from the affidavit for the writ that the garnishee is a corporation in which the defendant is the owner of shares, the writ of garnishment shall further require the garnishee to answer what number of shares, if any, the defendant owned in such corporation when such writ was served upon it. The writ of garnishment shall be served at least five days before the time for answer mentioned therein. [L. '11, p. 637, § 3.]

§ 1826. Form for Writ.

Said writ shall be substantially in the following form:

The State of Washington, to — Greeting:

Whereas, in the justice court in and for — precinct, — county, state of Washington, before —, justice of the peace, in a certain cause wherein — is plaintiff and — is defendant, the plaintiff claiming an indebtedness (or having a judgment, as the case may be) against the said — of — dollars, besides interest and costs of suit, has applied for a writ of garnishment against you:

Now, therefore, you are hereby commanded to be and appear before the said justice at his office — in said county, on the — day of — 19—, at — o'clock in the — noon of said day, then and there to answer upon oath in what amount, if any, you were indebted to the said — when this writ was served upon you, and what personal property or effects, if any, of

the said — you had in your possession or under your control when this writ was served upon you (and if the garnishee be a corporation in which the defendant is alleged to be the owner of shares, then the writ shall proceed: And further to answer what number of shares, if any, the said — owned in —, a corporation, when this writ was served upon you.)

Dated this — day of —, 19—.

— —,
Justice of the Peace.

[L. '11, p. 638, § 4.]

§ 1834. Default of Garnishee—Judgment—Dismissal of Action.

Should the garnishee fail to answer the writ by the time prescribed therein, the court shall, upon application of the plaintiff therefor, declare and enter the default of the garnishee and shall thereafter render judgment as follows:

In case the plaintiff has a judgment against the defendant, judgment shall be rendered against the garnishee for the full amount of such judgment with all accruing interest and costs.

In case judgment has not been rendered in the principal action at the time when the default of the garnishee is declared and entered, final judgment shall not be rendered against the garnishee until the final judgment in the principal action is entered; and if the plaintiff recovers judgment against the defendant, the court shall enter judgment against the garnishee for the full amount of the judgment awarded to the plaintiff against the defendant; but if the plaintiff fails to recover judgment against the defendant, the garnishee shall be discharged without costs. [L. '11, p. 639, § 5.]

§ 1888.

See notes to § 4003.

§ 1919.

Upon appeal from a municipal court in a prosecution for the violation of a city ordinance, there is a trial de novo and judgment on the last conviction, authorizing the superior court to enter a greater fine than that imposed by the lower court: State v. Hagimori, 57 Wash. 623, 107 Pac. 855.

Upon appeal from justice court in a criminal case, the superior court cannot allow an amended complaint to be filed, over ob-

jection by the accused: State v. Hamshaw, 61 Wash. 390, 112 Pac. 379.

Upon appeal from a conviction in justice court, the prosecution must be dismissed if the complaint does not state a crime: State v. Hall, 64 Wash. 99, 116 Pac. 593.

§ 1924.

An appeal from a conviction in a justice court should not be dismissed for lack of diligence in prosecuting the appeal for nearly a year, where it appears that defendant had no intention to abandon the appeal or hinder or delay the trial: State v. Hall, 64 Wash. 99, 116 Pac. 593.

§ 1986-a. Term of Confinement—Effect of Discharge.

Each boy or girl committed to the State Training School in the manner provided by law, shall remain there until he or she arrives at the age of twenty-one years unless sooner paroled or legally discharged. The discharge of any boy or girl having arrived at the age of twenty-one years shall be a complete release from all penalties incurred by conviction of the offense for which he or she was committed. [L. '13, p. 345, § 1.]

§§ 1987–2004.

Repealed. See L. '13, p. 532, § 19.

§ 1987-1. Scope of Act—"Dependent Children."

This act shall be known as the "Juvenile Court Law" and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for or contribute to, the delinquency or dependency of such children.

For the purpose of this act the words "dependent child" shall mean any child under the age of eighteen years:

(1) Who is found begging, receiving or gathering alms, whether actually begging or under the pretext of selling, or offering anything for sale; or

(2) Who is found in any street, road or public place for the purpose of so begging, gathering or receiving alms; or

(3) Who is a vagrant; or

(4) Who is found wandering and not having any home or any settled place of abode, or any proper guardianship, or any visible means of subsistence; or

(5) Who has no parent or guardian; or who has no parent or guardian willing to exercise, or capable of exercising, proper parental control; or

(6) Who is destitute; or

(7) Whose home by reason of neglect, cruelty or depravity of its parents or either of them, or on the part of its guardian, or on the part of the person in whose custody or care it may be, or for any other reason, is an unfit place for such child; or

(8) Who frequents the company of reputed criminals, vagrants or prostitutes; or

(9) Who is found living or being in any house of prostitution or assignation; or

(10) Who habitually visits any billiard-room or pool-room; or any saloon, or place where spirituous, vinous, or malt liquors are sold, bartered, or given away; or

(11) Who persistently refuses to obey the reasonable and proper orders or directions of its parents or guardian; or

(12) Who is incorrigible; that is, who is beyond the control and power of its parents, guardian, or custodian by reason of the vicious conduct or nature of said child; or

(13) Whose father, mother, guardian or custodian is an habitual drunkard, or do not properly provide for such child, and it appears that such child is destitute of a suitable home or of adequate means of obtaining an honest living, or who is in danger of being brought up to lead an idle, dissolute or immoral life; or where such child is without proper means of support; or

(14) Who is an habitual truant, as defined in the school laws of the state of Washington; or

(15) Who uses intoxicating liquor as a beverage, or who uses tobacco in any form, or who uses opium, cocaine, morphine, or other similar drug, without the direction of a competent physician; or

(16) Who from any cause is in danger of growing up to lead an idle, dissolute or immoral life; or

(17) Who wanders about in the night-time without being on any lawful business or occupation; or

(18) Any child under the age of twelve years found peddling or selling any article, or singing or playing on any musical instrument for gain upon the public street, or giving any public entertainment, or who accompanies, or

is used in aid of, any person so doing: Provided, That this act shall not prohibit the giving of entertainments by regularly organized schools or societies where twelve or more musical instruments are used.

The words "delinquent child" shall include any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, county or city and county of this state defining crime; or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct; or who is found in or about railroad yards or tracks; or who jumps on or off trains or cars; or who enters a car or engine, without lawful authority.

For the purpose of this act only, all delinquent and dependent children within the state shall be considered wards of this state and their persons shall be subject to the custody, care, guardianship and control of the court as hereinafter provided. [L. '13, p. 520, § 1.]

§ 1987-2. Juvenile Courts—Terms—Records.

The superior courts in the several counties of this state shall have original jurisdiction in all cases coming within the terms of this act. In all trials under this act, any person interested therein may demand a jury trial, or the judge of his own motion, may order a jury to try the case. In counties containing thirty thousand or more inhabitants, the judges of the superior court shall, at such times as they may determine, designate one or more of their number whose duty it shall be to hear all cases arising under this act. A special session to be designated as the "Juvenile Court Session" shall be provided for the hearing of such cases and the findings of the court shall be entered in a book or books kept for the purpose, and known as the "Juvenile Record," and the court may, for convenience, be called the "Juvenile Court." [L. '13, p. 522, § 2.]

§ 1987-3. Probation Officers.

The court or judge designated as provided in section 1987-2, shall appoint or designate one or more discreet persons of good character to serve as probation officers during the pleasure of the court, said probation officers to receive no compensation from the public treasury. In case a probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said probation officer in advance when the child is to be brought before said court; it shall be the duty of said probation officers to make such investigation as may be required by the court. The probation officer or officers shall inquire into the antecedents, character, family history, environments and cause of dependency or delinquency of every alleged dependent or delinquent child brought before the juvenile court and shall make his report in writing to the judge thereof, shall be present in order to represent the interests of the child when the case is heard, shall furnish the court such information and assistance as the judge may require, and shall take such charge of the child before and after the trial as may be directed by the court. In counties containing thirty thousand or more inhabitants when it shall appear that there is a necessity for such county officer, the court may appoint one or more persons to act as probation officers, and one or more persons who shall have charge of detention rooms or house of detention, all of whom shall be paid as compensation for their services, such

sums as may be fixed by the board of county commissioners, and who shall be paid as other county officers are paid; all probation officers shall possess all the powers conferred upon sheriffs and police officers to serve process and make arrests for the violation of any state law or city ordinances, relative to the care, custody, and control of delinquent and dependent children. [L. '13, p. 522, § 3.]

§ 1987-4. Expenses of Probation Officers.

The probation officers, and assistant probation officers, and deputy probation officers in all counties of the state shall be allowed such necessary incidental expenses as may be authorized by the judge of the juvenile court, and the same shall be a charge upon the county in which the court appointing them has jurisdiction, and the expenses shall be paid out of the county treasury upon a written order of the judge of the juvenile court of said county directing the county auditor to draw his warrant upon the county treasurer for the specified amount of such expenses. [L. '13, p. 523, § 4.]

§ 1987-5. Petition to Take Charge of Child.

Any person may file with the clerk of the superior court a petition showing that there is within the county, or residing within the county, a dependent or delinquent child and praying that the superior court deal with such child as provided in this act: Provided, That in counties having paid probation officers, such officers shall, as far as possible, first determine if such petition is reasonably justifiable. Such petition shall be verified and shall contain a statement of facts constituting such dependency or delinquency, as defined in section 1987-1, and the names and residence, if known to the petitioner, of the parents, guardian, or custodian of such dependent or delinquent child. There shall be no fee for filing such petitions. [L. '13, p. 524, § 5.]

§ 1987-6. Summons—Hearing.

Upon the filing of an information, or the petition, the clerk of the court shall issue a summons requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, which time shall not be less than twenty-four hours after service. The parents of the child, if living, and their residence is known, or its legal guardian, if there be one or if there is neither parent nor guardian, or if his or her residence is not known, then some relative, if there be one, and his residence is known, shall be notified of the proceedings; and in any case the judge shall appoint some suitable person or association to act in behalf of the child. If the person summoned as herein provided, shall fail without reasonable cause to appear and abide the order of the court, or bring the child, he shall be proceeded against as for contempt of court. In case the summons cannot be served or the parties served fail to obey same, and in any case when it shall be made to appear to the court that said summons will be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of the child, or with whom the child may be, or against the child itself. On return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner. Pending the final disposition of the case, the child may be retained in the possession of the person having

charge of same, or may be kept in some suitable place provided by the city or county authorities, or by any association having for one of its objects the care of delinquent and dependent children. [L. '13, p. 524, § 6.]

§ 1987-7. Publication of Summons.

In any case where it shall appear by the petition or verified statement, that the person standing in the position of natural or legal guardian of the person of any child, is a nonresident of this state, or that the name or place of residence or whereabouts of such person is unknown, as well as in all cases where, after due diligence, the officer has been unable to make service of the summons or notice provided for in section 1987-6, the court may, by order, direct the clerk of the court to publish a notice four consecutive weeks in some newspaper printed in the county and having a general circulation therein. Such notice shall be directed to the parent, parents, or other person claiming the right to the custody of the child, if their names are known, and if unknown, the phrase "To Whom It May Concern" shall be used and apply to, and be binding upon, any such persons whose names are unknown. The name of the court, the name of the child (or children if of one family), the date of the filing of the petition and the date of hearing, which shall not be less than twenty days from the date of the last publication, and the object of the proceeding in general terms, shall be set forth and the whole shall be subscribed by the clerk. There shall be filed with the clerk an affidavit showing due publication of the notice and the cost of publication shall be paid by the county at not to exceed the rate paid by the county for other legal notices. The publication of notice shall be deemed equivalent to personal service upon all persons, known or unknown, who have been designated as provided in this section. [L. '13, p. 525, § 7.]

§ 1987-8. Commitment of Child—Support by Parent.

When any child under the age of eighteen years shall be found to be delinquent or dependent, within the meaning of this act, the court may, at any time, make an order committing the child to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected, or delinquent children: Provided, Such order may be temporary or permanent in the discretion of the court and may be revoked or modified as the circumstances of the case may thereafter require. In any case in which the court shall find the child dependent or delinquent, it may in the same or subsequent proceeding upon the parent or parents, guardian, or other person having custody of said child, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such persons or person to support the child or contribute to its support, and if the court shall find such person or persons able to support the child or contribute thereto, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution, or in any way in which a court of equity may enforce its decrees. If it be found, however, that the parent or parents or guardian of a dependent or delinquent child is unable to pay the whole expense of maintaining such child, and in cases where the child is committed to one of the institutions or asso-

ciations above mentioned, the court may, in the order providing for the custody of such child, direct such additional amount as may be necessary to support such child to be paid from the county treasury of the county for the support of such person. The amount so ordered to be paid from the treasury of said county shall not exceed in the case of any one person, the sum of twelve dollars per month; Provided, further, That no order for the payment of all or part of the expense of support and maintenance of a dependent or delinquent child from the county treasury shall be effective for more than six months, unless a new order is secured at the expiration of that period. [L. '13, p. 525, § 8.]

§ 1987-9. Award and Adoption of Children.

In any case where the court shall award a child to the care of any association or individual, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of the association or individual to whose care it is committed; such association shall have authority, with the assent of the court, to place such child in a family home, either temporarily or for adoption. With the written consent of the parents, or other person having the right, under the laws of this state, to dispose of a dependent or delinquent child, the court may make an order or decree of adoption transferring to any suitable person or persons, willing to receive such child, all the rights of the parent or other guardian. The order of the court made upon such consent will be binding upon the child and its parents or guardian, or other person, the same as if such person were in court and consented thereto, whether made a party to the proceedings or not. The estate or property rights of any child shall not be affected nor subject to guardianship by the provisions of this act. The jurisdiction of the court shall continue over every child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the care or custody of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change. [L. '13, p. 527, § 9.]

§ 1987-10. Private Hearings—Judgment of Conviction.

The hearings may be conducted in any room provided for the purpose in the courthouse, or building where sessions of the court are held and, as far as practicable, such cases shall not be heard in conjunction with other business of the court. At the hearing of any case involving a child, the court shall have power to exclude the general public from the room where the hearing is had, admitting thereto only such persons as may have a direct interest in the case. Any child may have a private hearing upon the question of its dependency or delinquency, and upon the request of said child, or either of its parents, or guardian, or custodian, such hearing may be had privately. An order of court adjudging a child dependent or delinquent under the provisions of this act shall in no case be deemed a conviction of crime. The probation officer's investigation record and report in each case, shall be withheld from public inspection, but such records shall be kept open to the inspection of such child, its parents, or guardian, or its attorney, and to such other persons as may secure a special order of the court therefor. Such records shall be kept as unofficial records of the court and shall be destroyed at any time in the discretion of any judge presiding in said court on or before the

child shall arrive at the age of twenty-one years. After acquiring jurisdiction over any child, the court shall have power to make an order with respect to the custody, care or control of such child, or any order, which in the judgment of the court, would promote the child's health and welfare. In any case of a delinquent or dependent child, the court may continue the hearing from time to time, and may commit the child to the care or guardianship of a probation officer, duly appointed by the court, and may allow such child to remain at its own home subject to the visitation of the probation officer, such child to report to the probation officer as often as may be required and subject to being returned to the court for further proceedings whenever such action may appear to be necessary, or the court may commit the child to the care and guardianship of the probation officer, to be placed in a suitable family home, in case provision is made by voluntary contribution or otherwise for the payment of the board of the child until a suitable provision may be made for the child in a home without such payment, or the court may commit the child to a suitable institution for the care of delinquent or dependent children. In no case shall a child be committed beyond the age of twenty-one years. A child committed to such institution shall be subject to the control thereof and the said institution shall have the power to parole such child, on such conditions as may be prescribed, and the court shall have power to discharge such child from custody, whenever, in the judgment of the court, his or her reformation shall be complete; or the court may commit the child to the care and custody of some association that will receive such child, embracing in its objects the care of neglected, delinquent, and dependent children. [L. '13, p. 527, § 10.]

§ 1987-11. Child not to be Detained in Jail.

No court or magistrate shall commit a child under sixteen years of age to a jail, common lock-up, or police station; but if such child is unable to give bail, it may be committed to the care of the sheriff, police officer, or probation officer, who shall keep such child in some suitable place or house or school of detention provided by the city or county, outside the inclosure of any jail or police station, or in the care of any association willing to receive it and having as one of its objects the care of delinquent, dependent or neglected children. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present. [L. '13, p. 529, § 11.]

§ 1987-12. Justice Court Cases Transferred to Juvenile Court.

When, in any county where a court is held as provided in section 1987-2, a child under the age of eighteen years is arrested with or without warrant, such child may, instead of being taken before a justice of the peace or police magistrate, be taken directly before such court; or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court, and the officer having the child in charge shall take the child before that court, and in any such case, the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as hereinbefore provided. In any such case, the court shall require notice to be

given and investigation to be made as in other cases under this act, and may adjourn the hearing from time to time for such purpose. If, upon investigation, it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code. [L. '13, p. 529, § 12.]

§ 1987-13. Detention Rooms.

Counties containing more than fifty thousand inhabitants shall, and counties containing a lesser number of inhabitants may, provide and maintain at public expense, a detention room or house of detention, separated or removed from any jail, or police station, to be in charge of a matron, or other person of good character, wherein all children within the provisions of this act shall, when necessary, be sheltered. [L. '13, p. 530, § 13.]

§ 1987-14. Construction of Act.

This act shall be liberally construed to the end that its purpose may be carried out, to wit: that the care, custody and discipline of a dependent or delinquent child as defined in this act shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can be properly done, the dependent or delinquent child as defined in this act shall be placed in an approved family and may become a member of the family, by adoption or otherwise. No dependent or delinquent child as defined in this act shall be taken from the custody of its parent, parents or legal guardian, without the consent of such parent, parents or guardian, unless the court shall find such parent, parents or guardian is incapable or has failed or neglected to provide proper maintenance, training and education for said child; or unless said child has been tried on probation in said custody, and has failed to reform, or unless the court shall find that the welfare of said child requires that his custody shall be taken from said parent or guardian. In this act, the words used in any gender shall include all other genders, and the word "county" shall include "city and county," the plural shall include the singular and singular shall include the plural. [L. '13, p. 530, § 14.]

§ 1987-15. Court may Change Order.

Any order made by the court in the case of a dependent or delinquent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper. [L. '13, p. 530, § 15.]

§ 1987-16. Fees not Allowable.

No fees shall be charged or collected by any officer or other person for filing petition, serving summons, or other process under this act. [L. '13, p. 531, § 16.]

§ 1987-17. Penalty for Delinquency of Child—Bond.

In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having custody of such child, or any other person who shall by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor, and upon conviction thereof, shall be pun-

ished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and the juvenile court shall have jurisdiction of all such misdemeanors: Provided, however, That the court may suspend sentence for a violation of the provisions of this section and impose conditions as to conduct in the premises of any person so convicted, and make such suspension to depend upon the fulfillment by such person of such conditions, and, in case of the breach of such conditions, or any thereof, the court may impose sentence as though there had been no such suspension. The court may also, as a condition of such suspension, require a bond in such sum as the court may designate, to be approved by the judge requiring same, to secure the performance by such persons on the conditions imposed by the court on such suspension. Such bond shall, by its terms, be made payable to the state of Washington, and any moneys received for a breach thereof shall be paid into the county treasury. [L. '13, p. 531, § 17.]

§ 1987-18. Board of Visitation.

In each county, the judge presiding over the juvenile court sessions, as defined in this act, may appoint a board of four reputable citizens, who shall serve without compensation, to constitute a board of visitation, whose duty it shall be to visit as often as twice a year all institutions, societies and associations within the county receiving children under this act, as well as all homes for children or other places where individuals are holding themselves out as caretakers of children, also to visit other institutions, societies and associations within the state receiving and caring for children, whenever requested to do so by the judge of the juvenile court: Provided, The actual expenses of such board may be paid by the county commissioners when members thereof are requested to visit institutions outside of the county seat, and no member of the board shall be required to visit any institutions outside the county unless his actual traveling expenses shall be paid as aforesaid. Such visits shall be made by not less than two members of the board, who shall go together or make a joint report. The board of visitors shall report to the court from time to time the condition of children received by or in charge of such institutions, societies, associations, or individuals. It shall be the duty of every institution, society, or association, or individual receiving and caring for children to permit any member or members of the board of visitation to visit and inspect such institution, society, association or home where such child is kept, in all its departments, so that a full report may be made to the court. [L. '13, p. 531, § 18.]

§ 1997.

Repealed. See L. '13, p. 532, § 19.

There is no power to award costs against a county, upon dismissing proceedings before the juvenile court against a delinquent child and her parent, in the absence of any express statutory authority therefor, whether the proceeding be civil or criminal in its nature: *Pierce County v. Magnuson*, 70 Wash. 639, 127 Pac. 302.

§ 2004.

Repealed. See L. '13, p. 532, § 19.

This section is not subject to the rule of ejusdem generis, in view of the evident intent of the legislature to make the same apply to others than those in loco parentis, and also in view of the rule that where particular words exhaust a class, following general words must refer to some larger class: *State v. Plastino*, 67 Wash. 374, 121 Pac. 851.

§ 2005.

A prosecution for conspiracy to create a monopoly in the sale of milk is not barred by the lapse of more than two years since

such a conspiracy was first attempted, where there was a renewed attempt within one year, and the prosecution was for the latter offense: *State v. Erickson*, 54 Wash. 472, 103 Pac. 796.

As to when a criminal prosecution is deemed commenced within statute of limitations, see note in 1 Ann. Cas. 319.

§ 2006.

This section is constitutional, and the repeal of the act of 1890, section 8, relating to the practice of medicine without a license, by the act of 1909, page 677, without any saving clause for the prosecution of offenses committed under the old law does not bar pending prosecutions: *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388.

The saving clause of this section is constitutional; and a pending prosecution for practicing medicine without a license is not affected by Laws of 1909, page 677, repealing former laws before trial and conviction

of the accused: *State v. Hanover*, 55 Wash. 403, 104 Pac. 624.

As to criminal law applied to practice of medicine, see note in 78 Am. St. Rep. 259.

This section passed at the extraordinary session of 1901, was a general saving clause applicable to the repeal or amendment of all criminal statutes unless a contrary intention is expressly declared therein, and is sufficient to continue in force the laws repealed by the Penal Code of 1909 during the interim between the passage and the taking effect of such Penal Code: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

Under the general saving clause in this section, it is not essential to a prosecution for a prior offense that it was pending when the Penal Code of 1909 took effect: *State v. Lorenzy*, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

§ 2007.

See notes to § 2320.

§ 2011-1. Corporation Charged With Crime.

Whenever an indictment or information shall be filed in any superior court against a corporation charging it with the commission of a crime, a summons shall be issued by the clerk of such court, signed by one of the judges thereof, commanding the sheriff forthwith to notify the accused thereof, and commanding it to appear before such court at such time as shall be specified in said summons. Such summons and a copy of the indictment or information shall be at once delivered by such clerk to said sheriff and by him forthwith served and returned in the manner provided for service of summons upon such corporation in a civil action. Whenever a complaint against a corporation, charging it with the commission of a crime, shall be made before any justice of the peace or municipal judge, a like summons, signed by such justice of the peace or municipal judge, shall be issued, which, together with a copy of said complaint, shall be delivered to the sheriff at once and by him forthwith served as herein provided. [L. '11, p. 106, § 1.]

§ 2011-2. Appearance by Corporation.

Upon such service being made such corporation shall appear at the time designated, by one of its officers or by counsel; and upon such appearance, and thereafter, the same course shall be pursued, as nearly as may be, as upon the appearance of an individual to indictment, information or complaint and warrant charging him with the same offense. Upon failure of the corporation to make such appearance said court shall cause to be entered a plea of "not guilty," and upon appearance made or plea entered the corporation shall be deemed forthwith continuously present in court until the case shall be finally disposed of. [L. '11, p. 106, § 2.]

§ 2011-3. Judgment Against Corporation.

If the corporation shall be found guilty and a fine imposed, it shall be entered and docketed by the clerk, or justice of the peace or municipal judge as a judgment against the corporation, and it shall be of the same force and

effect and be enforced against such corporation in the same manner as a judgment in a civil action. [L. '11, p. 106, § 3.]

§ 2012.

The venue of an offense is sufficiently established in Whatcom county, where laid, by proof that it was committed in the city of Bellingham, as the courts will take judicial notice that Bellingham is in Whatcom county: State v. Kincaid, 69 Wash. 273, 124 Pac. 684.

§ 2015.

This section violates constitution, article 1, section 22, providing that the accused shall have the right to a trial by a jury of the county in which the offense is alleged to have been committed; and a demurrer should be sustained to an information for burglary committed in one county, filed in another county into which the property was alleged to have been taken: State v. Carroll, 55 Wash. 588, 133 Am. St. Rep. 1047, 19 Ann. Cas. 1234, 104 Pac. 814.

§ 2018.

The granting or denial of a change of venue in a criminal case on the ground of local prejudice rests in the discretion of the trial court, under this section and section 2019, providing that, if founded upon excitement or prejudice in the county, the court may in its discretion grant a change to another county; and a ruling cannot be reversed where no abuse of discretion appears: State v. Welty, 65 Wash. 244, 118 Pac. 9.

The publication of improper newspaper articles tending to create local prejudice against an accused person does not warrant a change of venue unless the effect of the publication was such that there was danger of the trial jury being influenced thereby: State v. Welty, 65 Wash. 244, 118 Pac. 9.

§ 2019.

See notes to § 2018.

The refusal of a change of venue on the ground of local prejudice will not be reviewed except for clear abuse of discretion, and none appears where the motion was resisted by a counter showing, and upon a second trial a jury was secured after an examination of twenty-eight jurors, only eight of whom were excused for cause: State v. Herold, 68 Wash. 654, 40 L. R. A., N. S., 1213, 123 Pac. 1076.

§ 2043.

The accused is not a "witness" within this section and section 2099, requiring the names of witnesses examined before the grand jury to be indorsed on the indictment, where the accused, learning of the investigation, was

permitted to make a voluntary statement before the grand jury, but the indictment was not based thereon, and no vote was taken after the statement was made: State v. Kulbe, 67 Wash. 21, 120 Pac. 510.

§ 2050.

Under this section it is not reversible error to allow the prosecuting attorney to indorse the names of witnesses at the trial, where no continuance was asked by the accused: State v. Le Pitre, 54 Wash. 166, 18 Ann. Cas. 922, 103 Pac. 27; State v. Quinn, 56 Wash. 295, 105 Pac. 818; State v. Carpenter, 56 Wash. 670, 106 Pac. 206; State v. Pepoon, 62 Wash. 635, 114 Pac. 449.

It is not prejudicial error to permit at the trial the indorsement of new witnesses for the state, where the defendant asked either a continuance or a subpoena for four witnesses, and thereupon the subpoena was issued and all the witnesses appeared in time to testify: State v. Gray, 61 Wash. 549, 112 Pac. 641.

Upon granting a new trial because of a variance between the allegations and proofs, a new information may be filed to cure the defects, and leave of court therefor will be presumed where the court considered the information as filed: State v. Garland, 65 Wash. 666, 118 Pac. 907.

It is not prejudicial error that, after a trial for murder in the first degree, the information was amended to charge murder in the second degree without leave of court or entering a nolle prosequi of the first information, where the accused pleaded not guilty to the amended information without demurring, and first objected on the introduction of the evidence: State v. Phillips, 65 Wash. 324, 118 Pac. 43.

As to the constitutionality of statutes allowing amendment of indictments, see note in Ann. Cas. 1913A, 402.

§ 2051.

The verification of an indictment is sufficient when the jurat is signed by the deputy clerk as such: State v. Clark, 58 Wash. 128, 107 Pac. 1047.

Where an information is duly sworn to in an affidavit by the prosecuting attorney, who takes oath that he is the prosecuting attorney and that the information is true, it is sufficient without reciting that the averments were made on the oath of the prosecuting attorney: State v. Pepoon, 62 Wash. 635, 114 Pac. 449.

The objection that an information was not reverified after it was amended is waived where the defendant demurred to the amended information and was later arraigned and pleaded not guilty without

raising the objection as to the verification until after verdict: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

§ 2055.

See notes to §§ 2064, 2392, 2601.

An information for homicide sufficiently describes the manner of killing under this section if it states the facts constituting the offense in ordinary language, so that it may be understood by a person of common understanding: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

An information in the language of the statute is not sufficient in charging the crime of robbery or larceny from the person: *State v. Hall*, 54 Wash. 142, 102 Pac. 888.

In a prosecution for statutory rape upon a female of previous chaste character between fifteen and eighteen years of age, where the evidence tends to show three distinct offenses occurring at different times and places, it is reversible error for the court to deny defendant's motion, after the testimony is in, to compel the prosecution to make an election as to the offense relied upon for conviction: *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

It is not prejudicial error to refuse to strike from an information the name of defendant's confederate and his aliases, where the matter objected to was heard at the trial without objection, although the confederate was dead: *State v. Ness*, 71 Wash. 334, 128 Pac. 664.

§ 2057.

An information charging a public officer with the embezzlement of fees collected in the sum of one hundred and sixty-five dollars charges but one offense, and is sufficiently direct and certain as regards the crime charged, although the sum represented different fees collected at different times: *State v. Leonard*, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

A complaint charging the sale of beer to four minors on a certain date is not duplicitous as charging four offenses, the reasonable inference being that the beer was sold jointly to all the parties named at one time and as one transaction: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

An information for larceny is not bad for duplicity in that it charges the stealing of specified articles from the persons of, and belonging to, two parties, where, prima facie, both occurred at the same time and place and constituted but a single transaction: *State v. Laws*, 61 Wash. 533, 112 Pac. 488.

An information for grand larceny is not duplicitous where it alleges that on a certain day and at a certain place the defendant, with intent to deprive the owner thereof, feloniously bought, received and concealed specified article (stating the value) then and

there knowing that the same had been stolen, as all of the property was received at the same time and place, even though it belonged to different persons: *State v. Makovsky*, 67 Wash. 7, 120 Pac. 513.

§ 2060.

An information charging the offense of rape on "a certain day within three years next preceding" the filing of the information is sufficiently definite as to time, under this section: *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

§ 2061.

It is not a material variance to allege an assault against Sylvia R. and to prove an assault against Sylvia E., where the defendant admitted the act and was not misled, in view of this section: *State v. Ewing*, 67 Wash. 395, 121 Pac. 834.

§ 2065.

An information charging first degree assault with intent to kill by stabbing with a knife sustains a conviction for second degree assault with intent to do "grievous bodily harm," or that the "weapon or other instrument or thing was likely to produce bodily harm," under Rem. & Bal. Code, section 2414: *State v. Letica*, 61 Wash. 629, 112 Pac. 748.

An information charging an assault with a loaded pistol with intent to murder by striking, beating and wounding, no considerable provocation appearing therefor, supports a conviction of the lesser crime of assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor: *State v. Crist*, 62 Wash. 326, 113 Pac. 772.

The sufficiency of an information must be determined on demurrer by what appears on its face, and error in the admissions of evidence thereafter does not affect its sufficiency: *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

Where a statute provided for three separate offenses of graft, it is surplusage and harmless, in an information for the first offense, to allege a further condition applicable only to the last two offenses, as it was error favorable to the defendant to undertake to prove more than was required; and where the information clearly on its face purports to charge the offense in the first provision, it is itself an election, and a motion to require an election is properly overruled: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

§ 2066.

That the accused had been placed on trial before he had been arraigned or had pleaded is not ground for dismissal by the state without his consent, where he had thereafter

entered a plea of not guilty, as an issue was formed which put him in jeopardy: *State v. Kinghorn*, 56 Wash. 131, 27 L. R. A., N. S., 136, 105 Pac. 234.

§ 2072.

An information for perjury sufficiently negatives the truth of the false testimony when it sets out the false testimony and asserts its falsity by negation and by setting out the true facts: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

An information for perjury sufficiently charges the accused's knowledge of the falsity of his testimony where it charges that he willfully, knowingly and falsely testified to a certain state of facts with knowledge of each fact alleged to negative the truth thereof: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

A conviction of perjury is sustained by the direct testimony of one witness and corroborating circumstances established by independent evidence of such a character as to clearly turn the scale and overcome the oath of the defendant and the legal presumption of innocence: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

§ 2091.

Constitution, article 1, section 22, providing that the accused shall have the right to demand a copy of the charge against him, and this section, merely grant a privilege that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

§ 2099.

See notes to § 2043.

§ 2102.

A demurrer to a complaint for criminal libel only admits the facts alleged and not the pleader's conclusions: *State v. Darwin*, 63 Wash. 303, 33 L. R. A., N. S., 1026, 115 Pac. 309.

§ 2108.

A plea reciting in the first division that the accused "hereby enters his plea of not guilty" and adding pleas of mental irresponsibility and insanity, shows an affirmative plea of not guilty: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

§ 2111.

Under this section, providing that the court may permit a plea of guilty to be withdrawn, the court should liberally exercise its discretion in favor of life and lib-

erty, but a refusal can only be reviewed for abuse of discretion, and it is not an abuse of discretion to refuse leave to withdraw a plea, asked on the ground that immunity had been promised accused by a detective, where that fact is controverted and it appears that the accused was informed of his rights, knew the effect of his plea, and the prosecuting witness had disappeared and his whereabouts were unknown: *State v. Cimini*, 53 Wash. 268, 101 Pac. 891.

§ 2113.

The common-law rule that an acquittal is no bar to another prosecution, if the indictment was so defective that it would not have sustained a conviction, prevails in this state, except where the acquittal was by a judgment on a verdict, as provided by this section; hence the voluntary dismissal of such a defective charge is no bar to another prosecution: *State v. Burns*, 54 Wash. 113, 102 Pac. 886.

Upon appeal after a trial on a complaint before a justice of the peace, the filing of an information in the superior court does not work a dismissal of the complaint or constitute a bar to the prosecution: *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

The dismissal of a prosecution for the violation of the adulterated food act, section 5455, charging the selling of decomposed veal, does not bar another prosecution for the violation of a disjunctive clause of the same section charging the sale of the product of a calf which died otherwise than by slaughter, since the offense charged was not the same, within section 5314, providing that a dismissal shall bar a prosecution where the same offense was charged in the second prosecution: *State v. Poole*, 64 Wash. 47, 116 Pac. 468.

Where a person accused of murder in the first degree was erroneously convicted of manslaughter and the judgment is reversed on his own appeal, he cannot, on a new trial, plead the former conviction of the lesser offense as an acquittal of the greater offense, since by the appeal he waived his plea of former jeopardy, and the new trial should therefore be upon all the offenses included within the charge (overruling *State v. Murphy*, 13 Wash. 229): *State v. Ash*, 68 Wash. 194, 39 L. R. A., N. S., 611, 122 Pac. 995.

As to former jeopardy as a defense, see note in 21 L. R. A., N. S., 26.

Where a trial was stopped because one of the jurymen had not been sworn, the defendant had not been placed in jeopardy, and upon reswearing or affirming the entire jury and recommencing the trial, he cannot plead former jeopardy; and none of his rights are prejudiced where, on recommencing the trial, defendant was tendered the right to examine the juror and the others in the box: *State v. Herold*, 68 Wash. 654, 40 L. R. A., N. S., 1213, 123 Pac. 1076.

As to former jeopardy when trial commenced with unsworn jury, see note in 40 L. R. A., N. S., 1213.

Where a plea of not guilty and of former jeopardy are entered before the commencement of the trial, it is discretionary to direct that they be tried together: *State v. Elliott*, 69 Wash. 62, 124 Pac. 212.

A conviction for obtaining money under false pretenses, the gist of the offense resting primarily in securing credit for a false name, cannot be pleaded in bar of a prosecution for the forgery of an insurance policy, which was incidental to the other offense and arose out of the same transaction, since the crimes are separate and distinct, the false name being the essence of the first, and the uttering of spurious security, of the second: *State v. Elliott*, 69 Wash. 62, 124 Pac. 212.

As to former jeopardy as defense in retrial on a higher charge after setting aside verdict for lower charge, see notes in 5 L. R. A., N. S., 571, and 22 L. R. A., N. S., 959.

§ 2119.

After the information is filed, it is too late to move for the dismissal of a charge on the ground that no indictment or information was filed against the accused within thirty days after his incarceration, as required by this section, where accused passed the delay without complaint: *State v. Lorenzy*, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

§ 2125.

The dismissal of a previous complaint or information is not a bar to another prosecution under an information charging a felony, under this section, expressly so providing: *State v. Burns*, 54 Wash. 113, 102 Pac. 886.

§ 2135.

The defendant is not entitled to a continuance, as a matter of right, upon allowing the state to indorse the name of a witness on the information at the trial, where no showing is made of prejudice to defendant's rights: *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206.

A continuance is properly denied in a criminal case where the accused took no steps to secure a subpoena for witnesses until more than a month after the case was set for trial, and the only diligence shown to secure witnesses living at a distance was the writing of letters a few days before the trial, with no excuse for the delay: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

§ 2140.

See notes to § 101.

§ 2145.

See notes to § 2196.

This section does not, in cases not capital, preclude the entry of judgment upon a verdict, received in the absence of the defendant, if the defendant, out on bail, voluntarily absents himself without leave, for he thereby waives his right: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

As to right of defendant to waive his presence at time of receiving verdict upon trial for felony, see note in 14 L. R. A., N. S., 603.

As to same on trial for misdemeanor, see note in 21 L. R. A., N. S., 56.

§ 2147.

A witness should not be permitted to state his impression after he had testified that it was so long ago that he could not swear to the answer to the question: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

§ 2151.

A confession is inadmissible as one obtained by duress, where it appears that the prosecuting attorney threatened the accused with a series of prosecutions which would culminate in cumulative sentences, unless he confessed, he was subjected to solitary confinement in a dark cell, and testified that he was subjected to severe cruelties and threatened with appalling punishments if he did not confess; and it appears that the jailers threatened many other prisoners if they did not confess, and confined them in the dark cell for refusal to do so: *State v. Miller*, 61 Wash. 125, Ann. Cas. 1912B, 1053, 111 Pac. 1053.

As to admissibility of confessions where accused exhorted, etc., to confess, see note in Ann. Cas. 1913B, 303.

Upon an objection to admissions by the accused on the ground of duress, the question whether the admissions were voluntary or were made under the influence of fear produced by threats, within this section, is a mixed question of law and fact and may properly be determined by the judge upon an examination of the witnesses in the presence of the jury: *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

Such decision is reviewable on appeal as any other question of law or fact passed upon by the court: *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

A confession is inadmissible as one obtained by duress, where it appears that the prosecuting attorney threatened the accused with a series of prosecutions which would culminate in cumulative sentences, unless he confessed, he was subjected to solitary confinement in a dark cell, and testified that he was subjected to severe personal violence, and was denied communication with an attorney or any person, especially in view of

Rem. & Bal. Code, section 2611, making it a misdemeanor for an officer to refuse to permit such communications, or to subject a person to personal violence or threats for the purpose of inducing confessions: *State v. Miller*, 68 Wash. 239, 122 Pac. 1066.

Error in the admission of confessions of a prisoner induced by threats, imprisonment in a dark cell, and personal violence, is not cured by evidence of another like confession, procured four days later, after removal from the dark cell, where there was no evidence that the influence of the duress and threats was removed at the time of the second confession; and the presumption of continuing influence must be overcome by clear, strong, and satisfactory evidence: *State v. Miller*, 68 Wash. 239, 122 Pac. 1066.

Upon a conflict in the evidence as to whether a confession was made under the influence of fear produced by threats, the question is for the jury, and it is not error to admit evidence of the confession: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Under this section, an instruction to the effect that a confession could not be considered as evidence unless it was voluntary is not prejudicial error, as it was favorable to defendant: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

As to the admissibility of confessions procured by duress, etc., see note in Ann. Cas. 1912B, 1056.

§ 2152.

In a prosecution for murder, when the accused is shown beyond a reasonable doubt to have committed the crime, proof of motive is not essential to sustain a conviction: *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

As to the necessity of proving motive in prosecution for murder, see note in Ann. Cas. 1912C, 236.

Upon an information for murder by administering poison on the twenty-seventh day of August, which caused the deceased to languish and die, it is not a variance to prove the deceased came to her death on the 29th: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

As to validity of indictment or information fixing commission of the crime at a future or impossible date, see note in Ann. Cas. 1913B, 1043. See, also, notes in 6 Ann. Cas. 854, 7 Ann. Cas. 774, and 19 Ann. Cas. 930.

In a prosecution for selling one quart of spirituous liquors to an Indian, it is not a material variance to prove the sale of one pint of such liquors: *State v. Rackich*, 66 Wash. 390, Ann. Cas. 1913C, 312, 37 L. R. A., N. S., 760, 119 Pac. 843.

A conviction of murder in the second degree may be had under a charge of murder in the first degree where the evidence was largely circumstantial, the question of deliberation depended upon the circumstances

surrounding the killing, and the evidence does not conclusively show deliberation: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

As to conviction of lower degree of crime when the prosecution has been for higher degree, see note in 21 L. R. A., N. S., 1.

In a prosecution for the murder of the accused's divorced wife, where evidence that the divorce was granted three years before on the ground of the husband's cruelty was admitted to show probable premeditation and a hostile mental attitude, it is error to refuse to allow the accused to rebut the same by proof of goodwill and apparent kindly feeling for a year previous to the homicide, in order to reduce the crime to the legal presumption of a lower degree: *State v. George*, 58 Wash. 681, 109 Pac. 114.

As to proof of malice by circumstances connected with killing, see note in 38 L. R. A. 1088.

Evidence that the accused, two years before the homicide, had, in the presence of the deceased, threatened to shoot the deceased, is incompetent and not inadmissible as too remote: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

As to admission of evidence of threats by accused against the victim, see note in 89 Am. St. Rep. 692.

The evidence of an accomplice in burglary will not be held inadmissible as induced by threats or promises where the witness testified that it was not, and the evidence was given six months after the alleged threats and coercion of the witness by confinement in a dark cell, the strict rules governing confession of the prisoner on trial not applying: *State v. Miller*, 68 Wash. 239, 122 Pac. 1066.

INSANITY.—Upon the defense of insanity to a charge of murder of accused's wife, after a foundation is laid by some evidence of mental aberration, it is error to exclude evidence that the wife, an Indian, had joined the Shakers, a religious organization practicing promiscuous illicit intercourse, whereby the accused was so greatly distressed in mind that his reason was dethroned, since he was entitled to the benefit of any competent evidence tending to account for or naturally lead up to insanity, and the delusion of marital infidelity is a recognized symptom of homicidal insanity: *State v. Flannery*, 61 Wash. 482, 112 Pac. 630.

As to mental attitude of killer as defense, see note in 134 Am. St. Rep. 727.

A witness may give his opinion as to whether the deceased in making a dying declaration apparently believed that she could not live: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

A dying declaration is admissible where the deceased had received a mortal wound and had been informed by the attending physician that she must die, and the statement was drawn by the prosecuting attorney, read in her presence, and assented to and

signed in the presence of witnesses: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

Upon a prosecution for the murder of a policeman, shot while attempting to arrest the accused and his companion or co-conspirator, who was killed in the melee, the dying declaration of the co-conspirator is not admissible in evidence where the declaration was a mere narrative of past events, since it was not made during the existence or in furtherance of the conspiracy, and was hearsay: *State v. Nist*, 66 Wash. 55, Ann. Cas. 1913C, 409, 118 Pac. 920.

A dying declaration made December 10th does not identify with sufficient certainty a prior written statement signed and sworn to December 3d, at a time when deceased was seriously ill but not under a sense of impending death, where, a few hours before death, the deceased, in answer to questions, stated that the "statements made to Mr. S. (the notary) a week ago to-day" were true; and the same is inadmissible although the statement of December 10th was made under a sense of impending death, in view of the rule that dying declarations must be received with great caution: *State v. Peacock*, 58 Wash. 41, 27 L. R. A., N. S., 702, 107 Pac. 1022.

As to declarations admissible as dying declarations, see note in 86 Am. St. Rep. 638. See, also, note in 17 Ann. Cas. 287.

In a prosecution for burglary, evidence that an unidentified man was met at a certain place, and concealed himself, is admissible, where it appears from other evidence that the accused went in that direction, and where the incident, with other evidence, was a circumstance tending to connect him with the crime charged: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

In a prosecution for burglary, in which a witness testified that the accused was wearing the witness' shoes, evidence that the witness had tried on and could wear the shoes identified as shoes left by the accused is admissible: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

As to evidence admissible to prove charge of burglary, see note in 2 Am. St. Rep. 396.

Upon a prosecution for obtaining four twenty-dollar bills by false pretenses, evidence that, on the day after, the sheriff found two such bills concealed in the overcoat of the accused after he had been once searched, is admissible without showing that the coat had been at all times in the possession of the accused: *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

As to the court's duty, on request, to instruct as to law of circumstantial evidence in prosecutions for larceny where defendant is proved to have had possession of the stolen property, see note in 8 L. R. A., N. S., 796.

It is not a fatal variance to allege a rape upon a child named Frieda, and to prove the name Valfreda, as given in Holland, where, after coming to this country, the

child was generally known as Frieda: *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

As to the effect of form of Christian name on criminal prosecutions, see note in 14 L. R. A. 690.

In a prosecution for assault with intent to commit sodomy, evidence of the same act upon another boy immediately after the first is admissible as part of the *res gestae*: *State v. McDowell*, 61 Wash. 398, Ann. Cas. 1912C, 782, 32 L. R. A., N. S., 414, 112 Pac. 521.

As to *res gestae* in criminal cases, see notes in 19 L. R. A. 741, and 65 L. R. A., N. S., 318.

In an action for assault, the quarrelsome disposition of the one assaulted cannot be shown by asking the opinion of a witness as to whether he was a peaceable man, but only by establishing his reputation: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

As to evidence of character of party aggrieved in action against aggressor, see note in 4 Ann. Cas. 839; also note in 19 Ann. Cas. 986.

Evidence relevant to the issues of a cause is not inadmissible because it tends to show the commission of a crime other than the one charged: *State v. Dana*, 59 Wash. 30, 109 Pac. 191.

In a prosecution for living with a common prostitute, letters showing that the accused had been living with the woman and that she was a prostitute for hire are not inadmissible because they show that the accused had committed other crimes: *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768.

Upon a prosecution for burglary, evidence of another burglary in the vicinity about the same time, and that articles then stolen, with burglar's tools, were found on the person of the accused, who was arrested shortly after taking a stage ride from that locality, is admissible to show that accused was in the vicinity and had opportunity to commit the crime: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

In a prosecution for obtaining money under false pretenses, through a conspiracy with a swindling clairvoyant who predicted and advised the investments, evidence of other similar offenses, committed by the same conspirators in the same way upon other dupes, is admissible to show that the acts were done as part of a general scheme of conspiracy to defraud, the unusual and extraordinary means employed making an exception to the general rule that evidence of other crimes is not admissible: *State v. Craddick*, 61 Wash. 425, 112 Pac. 491.

As to admissibility of evidence of other offenses by accused to show intent, see note in 105 Am. St. Rep. 991.

Witnesses who are well acquainted with the accused, and can testify that he is a good citizen "because he behaves himself, or is a moral man," are competent to testify to his reputation for good character and

chastity, although they had not heard it discussed by others, and based their evidence on observation alone, especially in a prosecution for statutory rape: *State v. Hosey*, 54 Wash. 309, 22 L. R. A., N. S., 670, 103 Pac. 12.

As to testimony to prove good character on the part of accused, see note in 103 Am. St. Rep. 891.

It is inadmissible, as hearsay, for a prosecutrix to testify that a third person told her that the accused had said he would not continue relations with her: *State v. Craig*, 52 Wash. 66, 100 Pac. 167.

The statement of an officer identifying a gun and cartridges handed to him by another, who told him they belonged to the defendant, is not inadmissible as hearsay, where the other person was called and testified that the defendant gave her the gun and cartridges shortly after the shooting and that she gave them to the officer: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

In a prosecution against two persons for obtaining money under false pretenses, evidence of a conversation between the prosecuting witness and one of the defendants when the other defendant was not present is admissible, if the facts show a concert of action and that both defendants were parties to the crime, although separate trials were had and no conspiracy was charged: *State v. Williams*, 62 Wash. 286, 113 Pac. 780.

Upon a separate trial of one charged as an accessory to a homicide, confined to acts committed at the time and place of the killing, it is error to admit evidence of threats against the deceased and of declarations in the nature of confessions, made by the principal or codefendant both before and after the homicide at times when the accessory was not present: *State v. Beebe*, 66 Wash. 463, 120 Pac. 122.

As to admissibility of evidence of acts and declarations of co-conspirators, see notes in 1 L. R. A. 273, and 25 L. R. A. 197.

Upon a prosecution for homicide, statements, not part of the *res gestae*, made by the accused to her husband expressing fear of the deceased and members of his family, are inadmissible as declarations of the accused made in her own favor: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.—A conviction of larceny by the receipt of stolen goods may be had upon the testimony of the accomplices who stole the same: *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

A conviction of abortion may be had upon the uncorroborated testimony of accomplices who testified directly to the defendant's connection with the crime: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

A conviction for burglary may be sustained upon the testimony of an accomplice uncorroborated by other evidence tending to

implicate the defendant with the commission of the offense: *State v. Dalton*, 65 Wash. 663, 118 Pac. 829.

A witness is not an accomplice in a burglary where he had not participated in the crime and was asleep in bed when the guilty parties arrived in the room with the goods, although he was then informed that the goods were stolen: *State v. Dalton*, 65 Wash. 663, 118 Pac. 829.

As to accomplices in burglary, see note in 2 Am. St. Rep. 399.

Accomplices in the crime of abortion are not unworthy of belief, as a matter of law, from the fact that they made inconsistent statements as to their knowledge of the miscarriage, prompted by fear of prosecution: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

As to accomplices in abortion, see note in 138 Am. St. Rep. 277.

The fact that witnesses are accomplices goes only to their credibility, and a conviction may be sustained upon their uncorroborated testimony: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

As to testimony of accomplices generally and in particular prosecutions, see note in 98 Am. St. Rep. 172.

Upon a conviction of being an habitual criminal, the record of previous convictions showing the same is sufficient *prima facie* evidence of identity, when received without objection: *State v. Le Pitre*, 54 Wash. 166, 18 Ann. Cas. 922, 103 Pac. 27.

As to conviction or acquittal of other offenses as substantive evidence, see notes in 105 Am. St. Rep. 1006.

A conviction will not be set aside for insufficient identification of the accused at the preliminary hearing by the prosecuting witnesses, where he sufficiently identified the accused at the trial: *State v. Williams*, 62 Wash. 286, 113 Pac. 780.

As to identification of the accused in criminal prosecution, see note in 92 Am. St. Rep. 94.

In a prosecution for obtaining money by false pretenses, money taken from the accused is sufficiently identified, to sustain a conviction, where the prosecuting witness described it as "currency," "four twenty-dollar bills," "United States currency," etc., and that one was a yellow bill, the weight of the evidence being for the jury: *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

In a prosecution for obtaining money under false pretenses on a certain passenger train, alleged in the information as train No. 258, it is not necessary to identify the train by that number if it is otherwise sufficiently identified: *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

As to obtaining money or goods by false pretenses, see note in 25 Am. St. Rep. 378.

Upon the question of the identification of a person, a witness is entitled to give his opinion: *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

As to identification by sound of the voice, see note in 13 L. R. A., N. S., 373.

In a prosecution for rape, proof that the prosecuting witness became pregnant is not such corroborating evidence as tends to convict the accused of the crime, within this section: *State v. McCool*, 53 Wash. 486, 132 Am. St. Rep. 1089, 102 Pac. 422.

In a prosecution for rape, proof that the parties were together under suspicious circumstances at another time two months previous to the time charged is not such corroborating evidence as tends to convict the defendant of the offense charged, within this section, where the prosecutrix denied that any improper relations were had at that time: *State v. McCool*, 53 Wash. 486, 132 Am. St. Rep. 1089, 102 Pac. 422.

Upon a charge of accessory to carnal abuse of a child, letters and oral evidence of the defendant may constitute sufficient corroboration of the testimony of the prosecutrix: *State v. May*, 59 Wash. 414, Ann. Cas. 1912B, 113, 109 Pac. 1026.

As to necessity and sufficiency of corroboration of prosecutrix in rape cases, see notes in 6 Ann. Cas. 771, and 17 Ann. Cas. 413.

In a prosecution of a chief of police, there is sufficient prima facie proof of the fact of a conspiracy between him and two others, for the conducting of houses of prostitution in violation of law, to permit the introduction of evidence of the acts and declarations of the two when the defendant was not present, where it appears that the chief, just prior to taking office, had suggested to one of them that it would be the policy to open up such places, and that "all of us" could make some money thereby, and expressed a desire to meet the other conspirator and a meeting between them was arranged, and that some weeks prior thereto the two had agreed to rent such houses in case the city election resulted as it had: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

Where an indictment charges a chief of police with soliciting and accepting bribes from two others, under an agreement, understanding and promise to permit them to conduct houses of prostitution in violation of law, the unlawful conspiracy is an essential element, though not the gravamen of the offense, making proof of the conspiracy essential to establish the crime, and such proof could be made in the same manner as if the conspiracy was the gist of the offense: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

An objection that before the acts and declarations of the conspirators can be admitted in further proof of the conspiracy, there must be prior evidence aliunde, establishing prima facie the existence of the conspiracy, is one that goes only to the order of proof, which rests largely in the discretion of the trial court: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

Upon a prosecution for homicide occurring in an altercation over a fence placed and defended by the accused in a private way, which was the only road for vehicles to the home of the deceased, evidence that a team could have been driven around the fence, by making a short detour over untraveled ground and an old logging road, is not admissible for the purpose of contradicting a witness for the state who testified that the private way was the only road for vehicles to the home of the deceased: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

Neither is such evidence admissible as bearing on the state of mind of the accused when she shot and killed the deceased for tearing down the fence which she had helped her mother place in the road for the purpose of closing the road to the family of the deceased for its entire way: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

Neither is such evidence admissible to relieve the accused from being put in a bad light before the jury, as attempting to block the deceased from access to his home, where it was admitted that the purpose of the fence was to stop all trespassing by use of the only traveled road, especially where the court instructed the jury that the deceased was an unlawful trespasser, and that his destruction of the fence was an unlawful act which the accused had a right to resist to any degree short of taking human life: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

In a prosecution for a homicide occurring in a quarrel between the deceased and the mother of the accused, which quarrel the accused took up three or four hours before the homicide, evidence of what occurred between the contending parties some time prior thereto, and of an offer by the mother of another way, is inadmissible for the purpose of showing the state of mind of the accused at the time of the homicide, where it is not shown that she was informed of the prior occurrences or of such offer: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

As to admissibility of evidence of heat of passion that will mitigate act of accused in case of homicide, see note in 5 L. R. A., N. S., 809.

As to trespass as provocation, see note in 67 L. R. A. 538.

Where defendant claimed that he was confined to his home by an injury to his knee, at the time of an alleged burglary, and wore a rubber bandage, which he offered in evidence, it is not error to exclude it, there being no dispute as to his wearing the same: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

The killing being admitted, the burden of proving justification or reducing the crime to manslaughter is upon the defendant: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

As to burden of proof in homicide with respect to issue of self-defense, see note in Ann. Cas. 1912C, 47.

In a homicide case, the shirt worn by the deceased at the time he was shot, in the same condition as when removed from the body, is admissible in evidence: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

As to admission in evidence of the victim's clothing worn at time of killing, see note in *Ann. Cas.* 1912B, 775.

In a homicide case, where defendant claimed that deceased attacked him and walked away after being shot, the evidence of a physician describing the wound in detail and stating his opinion as to how far deceased could have walked after receiving it, is admissible: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

As evidence of another crime is admissible when it tends to establish motive, possession by defendant of a burglar's jimmy may be shown in a prosecution for manslaughter, the defendant having shot and killed an officer when commanded to halt: *State v. Ness*, 71 Wash. 334, 128 Pac. 664.

As to homicide in perpetration of burglary, see note in 90 *Am. St. Rep.* 579.

Where one of two robbers was immediately captured and given to the prosecuting witness to hold while the officer pursued the other, whereupon the first offered money to be allowed to escape and finally escaped, what was said and done while the other was absent is admissible as part of the *res gestae*, and also for the reason that there was concert of action between the two in the commission of the offense: *State v. Baker*, 69 Wash. 589, 125 Pac. 1016.

In a prosecution of a chief of police for accepting bribes under a conspiracy with two others to conduct two certain houses of prostitution in violation of law, evidence that the defendant had sent the proprietors of other houses to the conspirators, and endeavored to interest them in the conduct of other houses, and that the defendant had interfered with the running of other houses not conducted by the conspirators, is admissible as tending to show the corrupt relations of the parties and guilty intent and at least slightly probative of the conspiracy: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

Under an indictment charging the defendant with having solicited and accepted bribes from two others under an agreement, understanding and promise to allow them to conduct houses of prostitution in violation of law, evidence of a conversation between the two in pursuance of the design, when the defendant was not present, is not objectionable as hearsay, where, in connection with evidence of what took place in defendant's presence, it tends to establish the unlawful conspiracy, combination or agreement alleged in the indictment, and there was already sufficient evidence proper to go to the jury tending to establish the conspiracy: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

Such evidence was not inadmissible because of no prior consummated corrupt agreement or conspiracy, since it is immaterial at what time anyone entered into the conspiracy, all being deemed parties to every act done in furtherance of it: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

Under a prosecution for murder, evidence of the domestic relations of the accused and his wife is relevant, where it appears (1) that the statements of the accused made the inquiry proper and (2) that the theory of the motive for the crime was based upon the fact that defendant was a sexual pervert: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

One who was present after a burglary when the participants divided up the spoils is not an accomplice: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

A conviction of burglary may be had upon the uncorroborated testimony of an accomplice: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

Where an accomplice who had pleaded guilty had testified that no inducements had been held out to him to testify against the defendant, it is immaterial what his sentence was, and evidence thereof is properly excluded: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

As to accomplices in burglary, see note in 2 *Am. St. Rep.* 399.

A conviction upon the testimony of accomplices cannot be objected to as secured by threats and intimidation of the witnesses or improper inducements held out to them, where it merely appears that the state had knowledge of other offenses committed by the witnesses, who hoped to better their position by telling all they knew, and were simply advised that, under the constitution, their evidence could not be used against them in any proceeding except for perjury in giving the evidence: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

In a prosecution for homicide, the questions of malice and premeditation and justification are for the jury, where it appears that defendant and deceased had quarreled the day before over an obstruction in the road, that defendant admitted that he shot the deceased, whose body shortly after the shooting was found in a large pool of blood near his hat in the road, and that some ninety-six steps away was an empty cartridge, and the tracks of three persons led away therefrom, but no footprints were found near the body, and the defendant and the two other witnesses testified that deceased attacked them in a threatening manner as though about to draw a pistol, when defendant shot twice, and that after the second shot the deceased turned and walked away out of sight and they did not know that he was mortally wounded: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

As to presumption of malice from killing, see note in 4 *L. R. A., N. S.*, 934.

In a prosecution for the sale of liquor to an Indian, the testimony of the Indian is not insufficient to support a verdict from the fact that he was in the employ of the government as an agent in the detection and prosecution of persons selling liquor to Indians: *State v. Rackieh*, 66 Wash. 390, Ann. Cas. 1913C, 312, 37 L. R. A., N. S., 760, 119 Pac. 843.

Upon a prosecution for larceny by false representations that a company was operating a line of steamships, which the law required to be registered, it is competent to establish the fact that it had no such steamships by oral evidence, since the records would not disclose it: *State v. Garland*, 65 Wash. 666, 118 Pac. 907.

Evidence that the county had offered a reward for the apprehension of the person committing the crime of which defendant was accused is inadmissible when not offered for the purpose of showing bias or affecting the credibility of a witness: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

In a prosecution for murder by an alleged sexual pervert, it is not error to allow a physician, answering a hypothetical question as an expert, to give his opinion as to whether such a person, deluded by hallucinations to kill, would commit murder to gratify his sexual passions, especially where the preceding questions clearly showed that he did not give his opinion as to what the defendant did, but only as to what a man so afflicted would have a tendency to do: *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

As to admissibility of expert opinion, on hypothetical statements, in respect to sanity and mental capacity, see note in 39 L. R. A. 313.

Upon a prosecution for abortion, it is not misconduct on the part of the prosecuting attorney, warranting a reversal, to ask the defendant on cross-examination whether a certain other operation for pelvic abscess performed by him was performed upon a pregnant woman, where the answer was excluded on objection and no claim of prejudice was made at the time: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

As to extent of cross-examination with reference to collateral matters, see note in 14 Am. St. Rep. 480.

As to impeachment of witness by specific instances as to character, see note in 14 L. R. A., N. S., 697. And see note in 30 L. R. A., N. S., 846.

Upon a prosecution for burglary, where defendant and one jointly indicted testified that they had no previous acquaintance, the state on rebuttal may show that they had been seen together prior to that time: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

It is not an abuse of discretion to permit testimony on the part of the state in rebuttal which was cumulative of the state's evidence in chief, where it went but little beyond direct contradiction of the defend-

ant's testimony of self-defense: *State v. Copeland*, 66 Wash. 243, 119 Pac. 607.

On rebuttal, it is competent to show facts that would have been competent on the state's case in chief, where the specific matter was first gone into and denied on cross-examination of a witness for the defense: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

Upon a prosecution for a burglary charged on October 4th, in which the defense was an alibi, and defendant was shown to have been at home during the evening and night of that day, it is proper to reopen the case to allow the state to show that the burglary was committed in the early morning of the 4th: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

The order of proof being under the discretion of the trial court, the admission in rebuttal of matters not strictly rebuttal evidence is not ground for reversal, unless prejudice is clearly shown: *State v. Overland*, 68 Wash. 566, 123 Pac. 1011.

As to admissibility generally of evidence to impeach testimony, see note in 82 Am. St. Rep. 25.

Where the evidence does not conclusively establish that witnesses were accomplices, the question is properly left to the jury; and precautionary instructions as to the credibility of accomplices are not erroneous from the fact that the word "accessory" was used instead of "accomplice"; and further general instructions as to the credibility of the witnesses need not again refer to the accomplices: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

Where corroboration of accomplices is not required, it is not necessary to instruct the jury defining corroborating testimony of accomplices: *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

As to testimony of accomplices, in general, see note in 98 Am. St. Rep. 172.

Where a homicide was committed by one who lay in ambush for two nights and one day waiting a favorable opportunity to shoot his victim, and the undisputed facts show a killing with a premeditated design without excuse unless his defense of insanity was established, it is reversible error to submit to the jury the crime of manslaughter: *State v. Ash*, 68 Wash. 194, 39 L. R. A., N. S., 611, 122 Pac. 995.

It is not error to allow a witness who had been robbed to illustrate upon the person of another the position of the defendant's arms with relation to his person when his pocketbook was taken: *State v. Baker*, 69 Wash. 589, 125 Pac. 1016.

§ 2155.

A conviction of statutory rape is sufficiently sustained by corroboration of the prosecutrix, where her story as to being taken to a lodging-house by the defendant as his daughter and occupying the same room, after the landlady had prepared a

couch for her, and of stopping at a drug-store with him the evening before, and at a restaurant the next morning, is corroborated by witnesses who saw them at the drug-store and restaurant, and by the landlady who remembered the occurrence but could not identify the girl nor positively identify the accused: *State v. Morrow*, 63 Wash. 297, Ann. Cas. 1912D, 570, 115 Pac. 161.

§ 2157.

At common law, which prevails in this state except as modified by statute, the truth of a libelous charge was not a defense to a criminal prosecution: *State v. Mays*, 57 Wash. 540, 21 Ann. Cas. 830, 107 Pac. 363.

Under this section the truth is available as a defense only where such a crime was charged with good motives, etc.; and the right to give evidence of the truth is limited to such cases: *State v. Mays*, 57 Wash. 540, 21 Ann. Cas. 830, 107 Pac. 363.

As to evidence of justification in libel suits, civil and criminal, see note in 91 Am. St. Rep. 306.

§ 2158.

CONDUCT OF TRIAL.—It is not error, on receiving a plea of guilty, to appoint a city police detective as an interpreter, especially where the accused speaks broken English, and it appears from his conversation with the judge that he knew what the charge was and the effect of his plea: *State v. Cimini*, 53 Wash. 268, 101 Pac. 891.

As to admissibility of evidence given through interpreter, see note in 17 L. R. A. 813.

In a prosecution for murder, it is not error for the court, on the last day of the trial, to refuse to appoint a chemist to examine the clothes worn by the accused for blood stains, the state not having claimed that they were blood stained, and the accused not having subpoenaed any witness for that purpose: *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

As to the law of evidence of blood stains, see note in 15 Ann. Cas. 811.

In a criminal prosecution, it is not commendable practice to allow a witness to give a spectacular illustration and reproduction of a fight before the jury: *State v. Catsampas*, 62 Wash. 70, 112 Pac. 1116.

Upon an information for an assault against Sylvia R., and proof of an assault against Sylvia E., the court may decide, as a matter of law, that there was no material variance, where it was conceded that the true name was as established by the proof, and there was no claim or evidence that the defendant had been misled by the information: *State v. Ewing*, 67 Wash. 395, 121 Pac. 834.

As to variance in respect of name of deceased as a ground of reversal in homicide, see note in 38 L. R. A., N. S., 187.

MISCONDUCT OF JUDGE.—In a prosecution for homicide, it is misconduct on the part of the trial judge, requiring a new trial, to make an imputation against the good faith of counsel in taking objections or exceptions to the ruling of the court upon the admission of evidence: *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

As to duty of court to curb or reprimand counsel, see note in 100 Am. St. Rep. 698.

It is not prejudicial misconduct on the part of the court to call a deliberating jury at about 9 o'clock Saturday evening and to intimate that he might be required to keep them over Sunday if they could not agree by midnight, where the jury returned a verdict more than two hours before midnight: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

As to conduct of court in urging or coercing jury to bring in verdict, see note in 105 Am. St. Rep. 569. See, also, notes in Ann. Cas. 1912D, 211, and 16 L. R. A. 643.

Error cannot be predicated on the denial of a request to have the court and jury go to a witness confined to bed for the purpose of taking her testimony: *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

A remark by the trial judge indicating that cross-examination had proceeded far enough is not objectionable as indicating the judge's opinion as to the guilt of the accused, nor as comment on the evidence: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

As to power of court to limit number of witnesses as to certain fact or issue, see notes in 8 Ann. Cas. 828 and 17 Ann. Cas. 780.

Where, in a prosecution for soliciting and accepting a bribe, under a conspiracy with two others to conduct houses of prostitution in violation of law, a witness who was the keeper of such a house had covertly insinuated that something said to him by the defendant had led him to go to one of the conspirators with money to bribe the defendant, and the witness was not frank in stating what had been said, it is not prejudicial misconduct on the part of the court to insinuate that the witness was not answering truthfully and admonish him to state the truth and what defendant had said, and to assume that something was said to him about going down and offering money, and that if the defendant had not said anything, to let the witness say so, where the purpose of the court was clearly either to kill the insinuation which the witness had made against the defendant or bring out the ground on which it was made; the result being that the witness denied that the defendant had said anything about money, and testified that he had made an offer of money to a conspirator on his own

initiative, which offer was refused, since it was to the advantage of the defendant: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

In a prosecution for incest, in which the female, testifying for the defendant, contradicted an affidavit previously made by her, it is unlawful comment on the facts in violation of constitution, article 4, section 16, for the court, in the presence of the jury, to order the witness into the custody of the sheriff and to direct the filing of an information against her for perjury: *State v. Primmer*, 69 Wash. 400, 125 Pac. 158.

As to commitment of witness for perjury during trial as prejudicial error, see note in 19 Ann. Cas. 425.

ELECTION BETWEEN ACTS.—In a prosecution for embezzlement of fees by a county auditor, it is not error to refuse to require the prosecuting attorney to elect under which of several statutes providing different penalties he will proceed, the acts charged being punishable under any of them: *State v. Leonard*, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

As to election of remedies, in general, see note in 73 Am. St. Rep. 559.

Upon a charge of rape committed between the first and the twenty-sixth days of a specified month, an election, upon demand of the defendant, to prove an offense committed between the nineteenth and twenty-sixth days is sufficiently specific: *State v. Biggs*, 57 Wash. 514, 107 Pac. 374.

REOPENING CASE FOR FURTHER EVIDENCE.—It is not an abuse of discretion to refuse the accused's request to reopen the case, where counsel for accused advisedly refused to offer any evidence and rested, and the witnesses for the state were excused and an adjournment taken until the next morning: *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263.

It is entirely within the discretion of the trial court to reopen a prosecution for obtaining money by false pretenses to permit further identification of the money: *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

It is within the discretion of the trial court in a criminal case to reopen the case to allow the state to introduce further evidence: *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

PRESENTATION OF EVIDENCE—FOR PROSECUTION: See 4 Remington's Digest, "Criminal Law," §§ 236-238; *State v. Montgomery*, 56 Wash. 443, 105 Pac. 1035; *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179; *Seattle v. Erickson*, 55 Wash. 675, 25 L. R. A., N. S., 1027, 104 Pac. 1128; *State v. George*, 58 Wash. 681, 109 Pac. 114.

Upon a prosecution for abortion, the defendant is deprived of his right to a fair trial, where evidence was received that he had repeatedly ravished the prosecuting witness and compelled her to commit sodomy

with him, and his motion to strike the same was granted only upon exacting an admission that the prosecuting witness was pregnant by him: *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

Where, in a prosecution for abortion, improper evidence of acts of sodomy with the prosecuting witness has been stricken, it is highly improper for the state to cross-examine the defendant concerning the acts of sodomy, and it cannot be said that the prejudicial effect thereof and of the evidence is cured by sustaining objections thereto and instructing the jury to disregard the evidence: *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

WEIGHT AND EFFECT OF EVIDENCE: See 4 Remington's Digest, "Criminal Law," §§ 265-287; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *State v. Jones*, 53 Wash. 142, 101 Pac. 708; *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

INSTRUCTIONS.—An instruction that, a homicide being proven and murder in the second degree presumed, the burden upon the defendant to reduce it to manslaughter is sustained if, from all the evidence or want of evidence, the jury entertain a reasonable doubt as to defendant's guilt, is not objectionable as telling the jury that before the burden of reducing a homicide to manslaughter is sustained the jury must entertain a reasonable doubt of defendant's guilt: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

In a prosecution for homicide, an instruction that the presumption of innocence continues until it has been overcome by the evidence of the prosecution, beyond a reasonable doubt as to each and every material fact, is not open to the objection that the presumption of innocence could be overcome if the jury believed the evidence of the prosecution, without reference to the evidence of the defense, where in other instructions the jury were told that the whole of the testimony bearing upon any particular fact must be considered in arriving at a conclusion as to such fact: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

In a criminal prosecution, it is not error to reiterate instructions to the effect that the jury should free their minds from passion, prejudice and sympathy, and determine the case wholly upon the evidence without reference to the penalty: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

As to instructions warning jury to act upon conscientious belief, etc., see note in 48 Am. St. Rep. 573.

It not being necessary that there be direct and positive evidence of premeditation or malice, instructions thereon are properly given if those elements could be inferred from the circumstances proven: *State v. Drummond*, 70 Wash. 260, 126 Pac. 541.

As to inference and presumption of malice from evil intent, see note in 2 L. R. A. 130.

In a prosecution for violation of the local option law, it is not misconduct on the part of the jury that, on an issue as to the intoxicating character of the liquors, the jurors smelled and tasted the contents of samples of the liquor, received in evidence as exhibits, and taken into the jury-room without objection: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

Cautionary instructions against being led astray by discrepancies and inconsistency in the evidence which have no bearing upon the main issue in the case are not erroneous as eliminating disputed and material facts, where the testimony was very voluminous and there was danger of the jury becoming hopelessly involved in a maze of collateral issues, and no fact was taken from the jury, the jury being told that they were the exclusive judges of the evidence and of its weight and the credibility of the witnesses: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE.—An instruction defining the degrees of murder and manslaughter in the language of the statute is sufficient, since the statute bears no technical terms and is plain and unambiguous: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

In a prosecution for homicide, it is proper to instruct that upon proof of the killing being established beyond a reasonable doubt, the presumption of law is that it was murder in the second degree, and that the burden is upon the defendant to justify it or reduce it to manslaughter, where there were other proper instructions as to the presumption of innocence, burden of proof, and the definitions of the various degrees of homicide: *State v. Clark*, 58 Wash. 128, 107 Pac. 1047.

In a prosecution for murder, the right of the jury to determine the degree of the offense given by statute must be based on the evidence, and the court need not instruct thereon, where there was no evidence tending to show the commission of the lesser offenses: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

In a prosecution for murder in the first degree by poisoning, there is no evidence to warrant instructions upon second degree murder or manslaughter, where it appears that the deceased was of unsound mind, and in a highly nervous condition, and either in an attempt to allay such condition or to murder her, the defendants consulted as to the medicines to be given her, and administered the poison, since they were guilty of first degree murder or not at all: *State v. Pepoon*, 68 Wash. 635, 114 Pac. 449.

As to instruction on circumstantial evidence, see note in 97 Am. St. Rep. 789.

As to instruction on reasonable doubt in criminal cases, see note in 48 Am. St. Rep. 566.

In a prosecution for incest it is proper to refuse to instruct that the jury may find the accused guilty of an attempt to commit the crime, or of assault and battery, where any attempt made culminated in the completed offense, and there was no charge of assault and battery, although there was evidence that the offense was committed with some force, since consent is not an element of the offense: *State v. Aker*, 34 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

Under an instruction authorizing a conviction of assault and battery, under an information charging an assault with intent to rob, a verdict of guilty of assault and battery will be sustained as a conviction of assault, since the instruction was not prejudicial except as authorizing a conviction for a battery: *State v. Beatty*, 59 Wash. 235, 109 Pac. 1011.

In a prosecution for assault in the second degree, it is not error to refuse instructions as to third degree assault, when there was no evidence calling therefor: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

Upon an information for assault with intent to kill, it is not error to refuse to instruct as to assault and battery, where the evidence conclusively shows that defendant was guilty of first or second degree assault or not at all: *State v. Copeland*, 66 Wash. 243, 119 Pac. 607.

On a trial for murder in the second degree, where the accused had shot and killed the deceased, claiming to act in self-defense, he was guilty of second degree murder or manslaughter, or not at all, and it was not error to refuse to instruct the jury as to the lesser offenses of assaults in various degrees: *State v. Phillips*, 65 Wash. 324, 118 Pac. 43.

Under the statute providing that homicides committed in certain ways shall constitute murder in the first degree, and if committed in certain other ways, murder in the second degree, and all other homicides, not being excusable or justifiable, shall be manslaughter, it is not error in defining manslaughter to use the words "voluntarily" and "involuntarily" as excluded in the definitions of first and second degree murder; and such words are not confusing as capable of a varied meaning without any further definition: *State v. Totten*, 67 Wash. 192, 121 Pac. 70.

— **SELF-DEFENSE.** — Instructions upon the subject of self-defense to the effect that the defendant had the right to act upon appearances and that the necessity must be real or apparent are not objectionable because closed with the statement that "the jury and not defendant must be judges of these matters": *State v. Phillips*, 59 Wash. 232, 109 Pac. 1047.

In a prosecution for murder where the deceased had threatened the defendant and each had armed himself with a rifle and they met and both instantly fired almost simultaneously, it is prejudicial error to give an instruction upon the common-law rule relating to the duty to retreat or warn an adversary, if he had time to do so, as it had no application to the facts of the case: *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

Where the deceased was shot by the accused just after taking a bottle of whisky from the accused, upon learning that the accused had given his son whisky, an instruction as to the law of self-defense in case of a felonious assault is properly qualified by a statement that the rule is different when the attack is not felonious in character, when there is no real or reasonable apprehension of death or great bodily harm: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

An instruction clearly and correctly stating the defendant's right to take life in the defense of person and also of his property against robbery is not prejudicial from the fact that parts of it were not applicable to the facts of the case: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

It is proper to instruct that premeditation means "thought over beforehand" for any length of time, however short, but that no particular space of time need intervene between the intent to kill and the killing: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

REASONABLE DOUBT.—An instruction, considered as a whole, correctly defines a reasonable doubt, where it is stated that the law did not require absolute certainty, or proof beyond the possibility of error, and required the jury to be convinced to a moral certainty and to have an abiding conviction of the defendant's guilt, although it contains the statement that the law of reasonable doubt is based upon the doctrine of reasonable probability, which might be objectionable if standing alone: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

A reasonable doubt is properly defined as a substantial doubt having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such as arises from the evidence or want of evidence, and the absence of which would, after deliberation, enable one to have a settled and abiding conviction of guilt: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

An isolated clause in an instruction to the effect that no reasonable doubt exists if the jury is "morally certain" about the matter is not prejudicial error, when the instructions as a whole clearly instructed as to the burden of proof, the presumption of innocence, the distinction between the quantum of proof in civil and criminal cases, and declared that a reasonable doubt is one that must arise from the evidence: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

As to the definition of reasonable doubt, etc., see note in 48 Am. St. Rep. 566.

REQUESTS FOR INSTRUCTIONS.—It is not error to refuse an instruction which, in legal meaning and effect, has already been given: *State v. Churchill*, 52 Wash. 210, 100 Pac. 309.

Where there was no question but what confessions were voluntary, it is not error to refuse to submit to the jury the question whether they were voluntary: *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

§ 2159.

This section, providing that jurors shall not be allowed to separate except by consent of the accused, applies only to jurors sworn to try the cause, and not to jurors sworn on their voir dire, as to whom it is discretionary to allow a separation on adjournments before the panel is complete: *State v. Clark*, 58 Wash. 128, 107 Pac. 1047.

It is not error to allow jurors in a criminal case to separate during a recess after being selected, before they are sworn to try the case, as the statute applies only to juries selected and sworn: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

Under this section it is reversible error in a felony case for a juror to separate from his fellows, and it is not permissible for him to excuse his conduct and show that no prejudice resulted: *State v. Bennett*, 71 Wash. 673, 129 Pac. 409.

A separation of the jurors in a felony case, known to the court and objected to by the defendant at the time, is not waived because the objection or protest was technically insufficient or not put in apt words, and it can thereafter be raised on motion for a new trial: *State v. Bennett*, 71 Wash. 673, 129 Pac. 409.

As to effect of separation of jury, see note in 103 Am. St. Rep. 155. See, also, note in 24 L. R. A., N. S., 776.

§ 2161.

Under this section a demand for a separate trial is timely where the defendant's trial was set before his codefendant had been apprehended, and defendant demanded a separate trial as soon as it was known that there would be a joint trial: *State v. Moran*, 66 Wash. 588, 120 Pac. 86.

As to separate trials in cases of conspiracy, see note in 3 Am. St. Rep. 491.

§ 2164.

See notes to § 7151.

§ 2165.

See notes to § 7151.

§ 2167.

Under an information charging an assault with intent to rob, the defendant may

not be found guilty of an assault and battery, no battery being charged and the same not being necessarily included in the offense of robbery, since this section only authorizes a conviction for a lesser degree of an offense charged, and section 2168 only authorizes a conviction of a lesser offense necessarily included within the offense charged: *State v. Beatty*, 59 Wash. 235, 109 Pac. 1011.

§ 2168.

See notes to §§ 2167, 2414.

§ 2172.

See notes to § 2924.

The doctrine of *aider by verdict* does not apply in a criminal case where the information was insufficient to sustain a conviction: *State v. Hall*, 54 Wash. 142, 102 Pac. 888.

A verdict of guilty as charged is sufficient in a prosecution for murder in the first degree, although the jury is required to find the degree: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

As to sufficiency of verdict of guilty, see note in 8 L. R. A. 837.

A verdict finding the defendant guilty as charged in the "information" is not prejudicially erroneous from the fact that the trial was upon a "complaint," where the two words were used interchangeably throughout the trial, the form prescribed by this section being only directory: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

A verdict finding the accused guilty of murder in the first degree (for which the penalty is death) and recommending him to the mercy of the court is not void and does not show doubt in the minds of the jury, the recommendation being merely surplusage: *State v. Arata*, 56 Wash. 185, 21 Ann. Cas. 242, 105 Pac. 227.

A verdict of guilty upon an information intended to charge the felony of keeping a gambling resort, but only stating facts sufficient to charge the misdemeanor of gambling for gain is a sufficient conviction of the latter offense; and upon reversing a sentence for the felony, the trial court will be directed to enter the proper sentence for the misdemeanor: *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817.

§ 2174.

This section provides for a separate plea of insanity, "in addition to the plea or pleas" required by law, so that withdrawal of the same does not affect the trial on the other pleas: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

Where a person convicted of crime has since become insane, the superior court has original jurisdiction, notwithstanding an appeal to the supreme court, to determine the question of his sanity and if insane to

suspend the judgment; hence the supreme court will not entertain a motion to suspend judgment until the question of insanity is determined: *State v. Wilson*, 69 Wash. 235, 124 Pac. 1125.

This section, providing for a special plea of insanity and the method of trial, when an accused person is mentally irresponsible at the time of trial, the plea is waived if not interposed before jury trial, and hence cannot be urged in the supreme court as ground for suspending judgment: *State v. Wilson*, 69 Wash. 235, 124 Pac. 1125.

As to insanity as a defense for crime, see note in 76 Am. St. Rep. 83.

§ 2178.

This act, requiring one accused of being an habitual criminal to be tried within five days after conviction of an offense if not superseded by section 2286, covering the same subject and making no such provision, is an independent act; and one charged as an habitual criminal under section 2286 need not be tried in five days: *State v. Alexander*, 65 Wash. 488, 118 Pac. 645.

§ 2179.

The habitual criminal statute simply provides an increased penalty for the last offense and does not violate any constitutional right of the accused: *State v. Le Pitre*, 54 Wash. 166, 18 Ann. Cas. 922, 103 Pac. 27.

The habitual criminal statutes authorizing the jury to find that the accused is an habitual criminal from the record of prior convictions "or" other competent evidence is not objectionable as authorizing the finding from such records alone without proof of identification: *State v. Le Pitre*, 54 Wash. 166, 18 Ann. Cas. 922, 103 Pac. 27.

As to the validity of statutes providing special punishments for habitual criminals, see 18 Ann. Cas. 923.

§ 2181.

It is not misconduct warranting a new trial that a juror expressed his opinion in the jury-room as to the guilt of accused before the case was submitted, where it is not claimed that the opinion was based on facts outside the evidence: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

As to right of jurors to discuss and argue among themselves, see note in 134 Am. St. Rep. 1059.

There is such misconduct on the part of the jury as to require a reversal of a conviction, where it appears that the jury, on being sent to view a cell that had been occupied by the accused, inspected, on invitation, the office of a police captain who was an important factor in the prosecution, and it was alleged that such officer had assaulted the accused, and the captain con-

versed with the jurors on the subject of the assault, calling attention to the fact that the window gave full view from the street, and the jury was drawn into a social conversation with him: *State v. Miller*, 61 Wash. 125, Ann. Cas. 1912B, 1053, 111 Pac. 1053.

It is not reversible error, in a prosecution for murder, that the court permitted two jurors to be furnished with a magazine, it not appearing that there was anything in the magazines concerning the case, especially where the question is raised on motion for a new trial, since the presumption is that the court first censored the magazines: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

In a prosecution for conniving at the prostitution of the wife of the accused, where the state was concluded by the testimony of the defendant that a certain house at B. was not a house of prostitution, it is misconduct, requiring a new trial, for a juror who lived at B., to state to other jurors during deliberation that if they would go to B. they would find the place to be "a house of prostitution yet": *State v. Lorenzy*, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

As to the right of jurors to act on their own knowledge, see note in 37 L. R. A., N. S., 790.

It is not misconduct on the part of a bailiff having the jury in charge, warranting a new trial that he opened the door during the deliberation of the jury and stood temporarily in the doorway and spoke to the jurors, when nothing is shown as to what he said, this having occurred in the presence of one of the attorneys for the accused: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

A new trial for newly discovered evidence is properly denied where the same is merely cumulative: *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096.

As to cumulative evidence as ground for new trial, see note in 14 L. R. A. 609.

§ 2182.

A verdict cannot be impeached by the affidavits of a juror that he was coerced to agree to the verdict by threats that he would be denounced to the court and, as he believed, subjected to penalties: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

On motion for a new trial, a conviction of murder cannot be impeached for misconduct of the jury by affidavits on information and belief: *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

A verdict in a criminal case cannot be impeached by the affidavit of a juror showing the effect upon his mind of comment by the judge, but the impropriety of comment must be determined from the context alone: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

Under the statute making misconduct of the jury a specific ground for a new trial in a criminal case, the verdict may be impeached by affidavits of jurors where the misconduct does not "inhere" in the verdict, which means where it does not fall within or pertain to the legitimate issues in the case: *State v. Lorenzy*, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

Where a juror, during deliberation, stated to other jurors, as of his own knowledge, facts material to the case tending to discredit the losing party as a witness, the misconduct does not inhere in the verdict and may be shown by affidavits: *State v. Lorenzy*, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

As to impeachment of verdict by juror, see notes in 5 L. R. A. 523; 9 L. R. A. 820; 11 L. R. A. 706.

A second motion for a new trial, made after appeal taken and pending the hearing in the supreme court, is untimely and cannot be considered: *State v. Smalls*, 63 Wash. 172, 115 Pac. 82.

§ 2183.

A motion in arrest of judgment can only be based on the grounds specified in this section: *State v. Cimmini*, 53 Wash. 268, 101 Pac. 891.

§ 2191.

This section, in effect when a plea of guilty was entered, and section 2280, in effect when the defendant was finally committed, authorized the court to suspend sentence upon a plea of guilty, and to commit the defendant thereafter: *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42.

A suspension of sentence requiring the defendant to report once a week to the officer and once a month to the court is not a final discharge as a release at common law, by reason of failure to expressly recite that the suspension was during "good behavior," where the suspension was under a statute authorizing the same during good behavior: *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42.

§ 2193.

See notes to § 2794.

An indeterminate sentence for a term of not less than ten years and not more than twenty years is beyond the power of the court where the maximum allowed was twenty years and the statute expressly limits the minimum term to "not less than six months nor more than five years": *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102.

§ 2196.

Upon the question of the necessity of the defendant's presence when the verdict is re-

ceived, this section controls section 2145, providing that no person shall be tried unless personally present: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

Under this section, the defendant must be personally present, and if for a fine only, he must be personally present or some responsible person must undertake for him to secure the payment; it is not necessary that a defendant out on bail be present upon receipt of a verdict of acquittal: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

As to waiver of right of accused to be present at rendition of verdict, see note in 13 Ann. Cas. 1213.

§ 2207.

See notes to § 2342.

§ 2225.

See notes to § 491.

§ 2233.

This section imposes a judicial discretion on the trial court and not one that can be exercised arbitrarily: *State v. Johnson*, 69 Wash. 612, 126 Pac. 56.

Under this section it is an abuse of discretion to refuse to vacate the judgment, where, on a charge of grand larceny, there had been several adjournments of the trial of accused, who was advised by her attorney that the state was indifferent about prosecuting, that she might leave the city, and that he would notify her if the case was set for trial, and it appeared that she had no notice of the trial, and none could be given her, that her bail acted in good faith and spent considerable money in attempting to locate her without success; and after judgment forfeiting the bail bond, accused, upon learning of the same, returned and surrendered herself to the court before expiration of the stay: *State v. Johnson*, 69 Wash. 612, 126 Pac. 56.

The clerk's journal entry of a judgment forfeiting a bail bond is not the judgment governing the sixty-day stay of execution thereon within which the accused could be produced, where it was informal and did not specify the amount, being in effect an order of default, and was so construed by the prosecuting attorney, who six weeks later entered a formal judgment for the amount of the bond, as the latter would, in any event, have the effect of vacating the earlier one and estop the state from denying that it was the judgment for all purposes: *State v. Johnson*, 69 Wash. 612, 126 Pac. 56.

A verdict of not guilty in the superior court, upon appeal from justice court, discharges the appeal bond, and judgment forfeiting the bond, even if entered a few minutes before the verdict was received, is error: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

§ 2237.

A malicious prosecution may be based upon search proceedings; and sections 2237, 2239, not requiring the proceedings or warrant to designate the person suspected, it is not necessary that the proceedings name the plaintiff as the suspected party: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

A search-warrant describes the plaintiff's "place of residence" so as to enable her to maintain an action for malicious prosecution, where it mentions the dwelling and premises of another wherein the plaintiff was a "resident, lodger, and inmate," and where it appears that the relation of landlord and tenant did not exist between the plaintiff and the owner of the house, and plaintiff did not maintain a distinct establishment therein: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

One who institutes search proceedings and directs the sheriff's search of plaintiff's effects thereunder may be guilty of malicious prosecution, even if the search-warrant was technically insufficient to protect the officer: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

The arrest of the person or the seizure of property is not essential to sustain an action for malicious prosecution in the institution of search proceedings: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

The disgrace, humiliation and public suspicion caused by a search-warrant to recover stolen goods are sufficient elements of damage to sustain a substantial recovery for malicious prosecution, without proof of pecuniary loss or special damage: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

As to the basis of the action in malicious prosecution and the causes for which it will lie, see note in 93 Am. St. Rep. 454.

§ 2259.

See notes to Const., art. 1, § 21.

While, under the police power, the legislature has a broad discretion in eliminating the element of intent in defining crime, a penal law fixing criminal responsibility upon the insane exceeds constitutional restraints; since a penal law is invalid where it punishes a man for an act which the utmost care and circumspection on his part would not enable him to avoid: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

The power of the legislature to eliminate the element of intent in defining crime cannot be exercised to the extent of preventing an accused from invoking the defense of insanity at the time the act was committed and excluding evidence thereof: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

The question of the insanity of the accused at the time of the commission of the act charged is one of fact: *State v. Stras-*

burg, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

Under the common law, intent was necessary to constitute a criminal act, and hence an insane person incapable of forming a criminal intent was not responsible for crime: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

Construing together this section, providing that insanity is no defense to crime, and section 2283, providing that whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission, unable, by reason of insanity to comprehend the nature of the act, the court may direct such person to be confined in a state hospital for treatment, and providing for the determination of the question of sanity by the court, it will be held, in order to sustain the constitutionality of the act, that the legislature did not intend to punish an insane person for crime, but only intended to change the method for determining the issue of insanity: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

The theory that "punishment" for crime is not within the present-day humanitarian conception of the proper treatment of criminals, and is contrary to the spirit of modern law, cannot uphold a statute authorizing the restraint of the criminal insane, where the act provides that such person be "punished" by imprisonment: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

§ 2260.

See notes to § 2320.

§ 2280.

See notes to § 2191.

§ 2283.

See notes to § 2259.

An act providing punishment for the criminal insane by restraint beyond the necessities of protection to society after the complete restoration to sanity is void: *State v. Strasburg*, 60 Wash. 106, Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

This section is lacking in every essential requirement of due process of law, in that it provides that a person charged with crime and insane at the time of the act charged may, in the discretion of the court, without any charge of insanity, notice or trial, or opportunity to be heard in his defense, upon the court's own observation, or upon evidence dehors the record, upon any procedure adopted by the court, be committed to a hospital and deprived of his liberty: *State v. Strasburg*, 60 Wash. 106,

Ann. Cas. 1912B, 917, 32 L. R. A., N. S., 1216, 110 Pac. 1020.

As to insanity as a defense for crime, see note in 76 Am. St. Rep. 83.

§ 2286.

See notes to § 2178.

§ 2287.

The operation of vasectomy for the prevention of procreation, authorized by this section, cannot be judicially determined to be cruel punishment, in violation of constitution, article 1, section 14, where the sentence required it to be carefully and skillfully performed and there was no showing that it was attended with any marked degree of physical torture, suffering or pain, the rule being that the discretion of the legislature in fixing penalties will not be disturbed except in extreme cases: *State v. Feilen*, 70 Wash. 65, 126 Pac. 75.

As to cruel and unusual punishments, see note in 64 Am. St. Rep. 382.

§ 2290.

The title "An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime and repealing certain acts," is broad enough to include this section, providing that it shall be competent to show the former conviction of witnesses either by record, cross-examination or other evidence, since the title and act manifest an intention that it shall take the place of previous enactments and procedure, even though a former statute had been construed to require proof by record: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

As to the constitutionality of statutes in the respect of sufficiency of title, see note in 64 Am. St. Rep. 70.

It is not a violation of the constitutional guaranty of a fair trial that the court compelled the accused on cross-examination to testify to a former conviction, under this section, providing that it shall be competent in a criminal proceeding to show the former conviction of a witness by cross-examination, where the jury were instructed that evidence of a former conviction could be considered only for the purpose of determining the weight to be given to his testimony: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

Under this section it is competent to show on cross-examination that a witness for the accused had been convicted of disorderly conduct, as affecting her credibility: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

Upon cross-examination of the accused, it may, under the provisions of this section, be shown that he has previously been convicted of a crime, whether a felony or a misdemeanor: *State v. Overland*, 68 Wash. 566, 123 Pac. 1011.

As to incriminating testimony on cross-examination, see note in 75 Am. St. Rep. 332.

§ 2294.

This section, having provided that nothing contained in any provision of the act shall apply to an offense committed or act done before the day when the act shall take effect, the former law (section 2726) defining murder in the first degree was in full force and effect on May 14, 1909, although its prospective operation ceased after the taking effect of the new code; and no question of ex post facto laws can arise on a prosecution under the old law for an offense committed on that date: In re Newcomb, 56 Wash. 395, 105 Pac. 1042.

The saving clause in this section is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect: State v. Newcomb, 58 Wash. 414, 109 Pac. 355; State v. Ware, 58 Wash. 526, 109 Pac. 359; State v. Lorenzy, 59 Wash. 308, Ann. Cas. 1912B, 153, 109 Pac. 1064.

As to the rule of construction determining repeal by implication, see note in 88 Am. St. Rep. 272.

§ 2303.

See notes to § 2610.

A conviction of larceny by the receipt of wheat stolen from railway cars may be had without evidence that the railway company owned the wheat, in view of this section, subdivision 6, providing that anyone having a general or special interest shall be deemed the owner; also where it was shown that the defendant knew the wheat was stolen: State v. Ray, 62 Wash. 582, 114 Pac. 439.

As to sufficiency of ownership for purposes of prosecution for larceny, see note in 88 Am. St. Rep. 595.

§ 2304.

See notes to § 6263.

§ 2309.

In a criminal prosecution, it is error for the court to direct a verdict of guilty, since constitution, article 1, section 22, guarantees the accused the right to trial by jury, and this section provides that no person shall be convicted of crime unless by admission in his plea, confession in open court, or by the verdict of a jury: State v. Holmes, 68 Wash. 7, 122 Pac. 345.

As to rights of courts to direct verdict of "guilty" in criminal case where plea of "not guilty" has been entered, see note in 8 Ann. Cas. 808.

§ 2312.

Under this section, providing that, if the accused is not brought to trial within sixty

days after information filed the court shall order it dismissed unless good cause shown, the objection is waived where motion to dismiss is not made until the trial is at hand, since such dismissal is not a bar under section 2315, and would be denied for good cause shown: State v. Alexander, 65 Wash. 488, 118 Pac. 645.

Objections to evidence on the ground that a plea of guilty had not been entered or that the case had not been brought to trial within sixty days are waived when not made at the time of entering upon the trial: State v. Garland, 65 Wash. 666, 118 Pac. 907.

As to remedy of accused not brought to trial within constitutional or statutory period, see note in Ann. Cas. 1912D, 1273.

Under this section, a dismissal is properly denied where the defendant filed a demurrer, and on the hearing thereof his counsel required more time than the court had at its disposal, and the arguments and trial were for that reason delayed for the accommodation of the defendant: State v. Fox, 71 Wash. 185, 127 Pac. 1111.

As to right of accused to speedy trial, and therein of delay caused by himself, see note in 85 Am. St. Rep. 195.

§ 2314.

This section, construed in connection with section 2315, providing that a dismissal of a misdemeanor or gross misdemeanor under section 2314 shall bar another prosecution charging the same offense, refers only to dismissals where the expressed purpose of the prosecuting attorney is to abandon a prosecution; and not where a motion to dismiss is made because of a variance between the charge and the proof and leave is asked to file a new information, under section 2316, providing that no dismissal on the ground of a variance shall bar another prosecution for the same offense: State v. Poole, 64 Wash. 47, 116 Pac. 468.

As to effect of second indictment or information for same offense after accused is entitled to discharge for want of prosecution under first, see notes in 11 L. R. A., N. S., 257.

§ 2315.

See notes to §§ 2312, 2314.

§ 2316.

See notes to § 2314.

Upon an information, charging robbery of "lawful money of the United States," it is not a fatal variance to prove the taking of one dollar and seventy-five cents in silver and a twenty and a five dollar gold piece, the prima facie presumption being that the witness was speaking of current coins of the country, especially where no objection thereto was made below: State v. Brache, 63 Wash. 390, 115 Pac. 853.

As to description of stolen money, in indictment for larceny, see note in 10 Am. St. Rep. 174.

This section, authorizing a second prosecution after a dismissal of a charge on the ground of variance between the indictment or information and the proof, does not use the word "proof" in its technical sense as distinguished from "evidence," and hence applies where the prosecuting attorney moved to dismiss before trial on the ground of a variance between the charge and the "evidence" disclosed to him on interviewing the witnesses and preparing the case: *State v. Poole*, 64 Wash. 47, 116 Pac. 468.

§ 2320.

This section is not subject to the rule of ejusdem generis, but covers the bribery of all public officers: *State v. Nick*, 66 Wash. 134, 119 Pac. 15.

An indictment for bribing a police officer of the city of Seattle to influence him not to prohibit and prevent the accused from conducting a house of prostitution is not demurrable as failing to allege that a policeman of a city is a "public officer" within this section, under which the indictment was drawn, since the description of the act which he was bribed to do sufficiently shows that he was an officer, and inferentially alleges his authority, and, also, for the reason that the court will take judicial notice of the city charter, from which it appears that a policeman is such a public officer: *State v. Nick*, 66 Wash. 134, 119 Pac. 15.

As to bribery of police officers, see note in 116 Am. St. Rep. 43.

There is sufficient evidence to sustain a conviction of a chief of police of soliciting and accepting bribes under an agreement with two others to allow them to conduct houses of prostitution, where the evidence of the two conspirators establishing the agreement and offense was corroborated by the fact of their securing and conducting two certain houses immediately thereafter, by the defendant's consent, and corroboration as to the payment of sums of money at various times, and the deposit of large sums by the defendant or members of his family: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

As to corroboration of testimony of a conspirator in prosecution of his fellow, see note in 3 Am. St. Rep. 388. See, also, note in 39 L. R. A., N. S., 706.

Where a chief of police was charged with soliciting and accepting bribes from two others under an agreement to permit them to conduct houses of prostitution in violation of law, the crime charged was that of accepting bribes, and not a conspiracy, and although proof of conspiracy was necessary as an element of the offense, it was not the offense charged; hence the conspirators were not accomplices, the offense of giving and offering a bribe being a distinct and sepa-

rate offense from soliciting and accepting a bribe, under sections 2320, 2321; and this, notwithstanding the provision of section 2007, abolishing the distinction between principals and accessories, and section 2260 defining principals as all participants, as the sections are general and have no application to acts expressly designated as primary crimes in themselves: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

§ 2321.

Under this section, an indictment charging that the accused asked for, received and accepted a bribe is not duplicitous, since the act of soliciting and the act of accepting a bribe are not separate and distinct offenses, and may be laid conjunctively in a single count: *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

As to solicitation to bribe, see note in 25 L. R. A. 439.

§ 2333.

While a sufficient information is pending against a person in custody, it is the "official duty" of the prosecuting attorney to prosecute the case, within the meaning of this section: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

There is sufficient evidence to sustain a conviction for bribery in asking the sum of fifteen hundred dollars, from an accused person in custody, "as compensation, gratuity or reward" for influencing the prosecuting attorney to dismiss the case, where it appears that defendant asked nineteen hundred dollars from the accused person, stating that it would take fifteen hundred dollars to get the case against him dismissed: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

§ 2342.

See notes to § 4768.

Where one is in custody under a judgment of conviction of a felony, the judgment is sufficient as a commitment upon which to base an information for an attempt to escape jail: *State v. Workmen*, 66 Wash. 658, 120 Pac. 522.

One imprisoned in the county jail after a final judgment of conviction and sentence authorizing his detention is lawfully in custody and may be guilty of an attempt to escape jail, although the sheriff did not have in his possession any commitment or written evidence of authority to detain him, section 2207 merely providing that such a commitment shall be sufficient authority to the sheriff to execute sentence, not that it is essential: *State v. Hatfield*, 66 Wash. 9, 38 L. R. A., N. S., 609, 118 Pac. 893.

Evidence is sufficient to establish an attempt to escape jail by force, where it appears that the defendant was confined in the

county jail under conviction and sentence, that he had concealed and in his possession saws suitable for cutting iron or steel, that a short time before he counseled escape with other prisoners, and that he guarded the door of his cell while a bolt was being heated and sawed by another prisoner in his cell: *State v. Hatfield*, 66 Wash. 9, 38 L. R. A., N. S., 609, 118 Pac. 893.

As to criminal liability for escape as depending on lawfulness of imprisonment, see note in *Ann. Cas.* 1912C, 757.

§ 2351.

An information charging perjury is sufficient where it clearly sets forth in ordinary language, without repetition, the substance of the controversy in which the oath was taken, the taking of the oath, the authority of the court, and proper allegations as to the falsity of the matter: *State v. Eaid*, 55 Wash. 302, 33 L. R. A., N. S., 946, 104 Pac. 275.

An information for perjury may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely, and it is not error to refuse to require the prosecution to make an election, upon a charge that the accused testified falsely that he did not know of the prior execution of a contract and did not know that Y. was the owner of certain property: *State v. Eaid*, 55 Wash. 302, 33 L. R. A., N. S., 946, 104 Pac. 275.

Since perjury can only be predicated on a false oath in a proceeding of which the tribunal had jurisdiction, an indictment is insufficient where its basis is a false oath before a committee authorized by resolution of a city council "to investigate and probe charges made by the acting mayor," without showing against whom the charges were made or that the matter was within the council or its jurisdiction: *State v. Dallagiovanna*, 69 Wash. 84, 40 L. R. A., N. S., 249, 124 Pac. 209.

As to general requisites for indictments for perjury, see note in 124 *Am. St. Rep.* 655.

§ 2370.

An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is not champertous, or void as against public policy, where the president was a party defendant to the suit, and as executive head of the society had a personal interest in the litigation: *Mazzini Society v. Corgiat*, 63 Wash. 273, 115 Pac. 93.

As to assisting poor person to prosecute or defend suit as maintenance, see note in 11 *Ann. Cas.* 69.

§ 2372.

See notes to § 1051.

This section is declaratory of the common law and equivalent to contempt "in the face of the court": *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

A judgment of summary punishment for contempt of court sufficiently states that the acts were committed in the "immediate view and presence of the court," where it recites the pendency of the action, and that the accused was applying to have a judgment "signed by the court," and that in the presence of the judge at chambers in the courthouse he used boisterous and angry language and gestures, and in the clerk's office and in the immediate presence of the court engaged in a fight, the only reasonable construction being that it was in "view" of the court although that word was not used: *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

Such judgment shows a contempt, within this section, by a breach of the peace or other disturbance directly tending to interrupt the proceedings of the court: *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

A summary judgment of contempt of court is not open to the objection that it fails to show that the court was in session where it appears that the accused was guilty of a breach of the peace directly tending to interrupt the proceedings of a court and that the court was transacting business when the interchange of words took place; and it is immaterial that the court suspended business during a fight that followed, or was in recess: *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

As to when contempt is committed "in presence of" the court, see note in 17 *Ann. Cas.* 220.

§ 2382.

An information sufficiently charges a conspiracy at common law, to control the price of milk in the city of S. when it alleges that the defendants, unlawfully designing to prevent open competition, unlawfully agreed not to sell milk lower than certain fixed prices and not to sell to each other's customers, and agreed to and did raise prices with intent to control the price of milk generally in said city; and it is immaterial that only part of the milk dealers of the city entered into the same, since the purpose of their agreement was to create a monopoly: *State v. Erickson*, 54 Wash. 472, 103 Pac. 796.

As to combinations to control prices in particular localities, see note in 16 L. R. A., N. S., 223.

In a prosecution for conspiracy to create a monopoly in the sale of milk, letters written by one of the parties to the agreement a few days thereafter, showing on their face that they were written in furtherance of the conspiracy, are admissible against a defendant who was absent when they were

written: *State v. Erickson*, 54 Wash. 472, 103 Pac. 796.

As to letters and telegrams as evidence in conspiracy prosecutions, see note in 3 Am. St. Rep. 484.

In a prosecution for a conspiracy to create a monopoly to control the price of milk

in a city, evidence on the part of the defendant that there were a number of other milk dealers in the city who had not entered into the agreement is immaterial: *State v. Erickson*, 54 Wash. 472, 103 Pac. 796.

§ 2392. Murder in the First Degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

1. With a premeditated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or,

3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or,

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life. [L. '13, p. 581, § 1.]

An information charging that the accused purposely and feloniously, etc., did stab and mortally wound, etc., sufficiently alleges that he did the act purposely and feloniously: *State v. Arata*, 56 Wash. 185, 21 Ann. Cas. 242, 105 Pac. 227.

An information charging that the defendant killed the deceased on a certain day sufficiently alleges that the deceased died on that day: *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

An information charging that the accused did, with premeditated design to effect her death, kill and murder A. J. by beating and mortally wounding, etc., follows the language of this section, defining murder in the first degree, and is sufficient without further alleging that the person died: *State v. Jahns*, 61 Wash. 636, 112 Pac. 747.

Under this section defining murder in the first degree it is not necessary that the indictment or information negative that the killing was without excuse or justification; at least, not further than to allege that the killing was "willfully, unlawfully, feloniously and with a premeditated design," in view of sections 2055, 2057, 2064–2066, defining the requisites of indictments and informations and declaring the effect of informal defects that do not affect the substantial rights of the defendant, since the exception is not incorporated as an inseparable part of the offense and the state is not required to anticipate defenses: *State v. Seifert*, 65 Wash. 596, 118 Pac. 746.

As to the certainty required in indictments for murder, see note in 3 Am. St. Rep. 279.

Upon the defense that accused participated in a robbery because of duress, it is not error to instruct that, on a resulting murder, there was no question of justifiable or excusable homicide, where the accused had participated in the robbery and the victim was murdered by a confederate in committing the robbery, in view of this section, subdivision 3: *State v. Moretti*, 66 Wash. 537, 120 Pac. 102.

As to coercion as defense for murder, see note in 106 Am. St. Rep. 722.

As to involuntary killing in perpetration of burglary, see note in 90 Am. St. Rep. 579.

As to liability of one assisting in burglary during which his companion commits murder, see note in 6 L. R. A., N. S., 1154.

§ 2395.

Under this section, if a homicide is neither excusable nor justifiable, it must at least be manslaughter, and the purpose of the code is to do away in homicide with instructions submitting lesser degrees of statutory offenses: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

Under this section, defining manslaughter, the court cannot determine the degree and decide, as a matter of law, that the defendant was necessarily guilty of one of the higher degrees, where it appears that de-

defendant was having a dispute with the deceased over a fence, called his attention to the gun carried by defendant's daughter who evidently heard the remark and who had made threats against the deceased, since defendant's guilt did not depend entirely on the presence or absence of design on her part, the same being a question for the jury: *State v. Beebe*, 66 Wash. 463, 120 Pac. 122.

As to instructions of court on matter of fact in criminal cases of which jury is the judge, see note in 14 Am. St. Rep. 36.

§ 2406.

The duty to retreat before taking life in self-defense has no application to one against whom a felonious assault is made with a deadly weapon: *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

As to the duty to retreat, under the law excusing killing in self-defense, see note in 74 Am. St. Rep. 726.

As to the burden of proof in respect to the issue of self-defense, see note in Ann. Cas. 1912C, 47.

Under this section it is not error against the defendant to instruct as to the right of self-defense "if the defendant believes and has reasonable ground to believe" that the killing was necessary to protect himself from great personal danger; as the instruction is more liberal to the defendant than the law, and the "reasonable ground to apprehend" must be such as to produce an honest belief of the existence of danger: *State v. Bowinkelman*, 66 Wash. 396, 119 Pac. 824.

As to the province of jury on question of danger and necessity justifying killing in self-defense, see note in 3 L. R. A., N. S., 535.

§ 2412.

An information for an assault with intent to commit sodomy, under this section, subdivision 6, is sufficient without stating the precise facts constituting the attempt, although the completed felony may be committed in various ways, since it is sufficient to allege a general attempt, and the assault is charged in the language of the statute: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24.

§ 2414.

The evidence is insufficient to sustain a conviction for "assault with a hammer," where the prosecuting witness had the hammer when he was knocked down and stunned by the first blow, none of the witnesses for the state could testify that he was struck by the hammer, one testifying that he was knocked down by a blow with the fist, and defendant's testimony that he struck with his fist was corroborated by the circum-

stances: *State v. Lillie*, 60 Wash. 200, 110 Pac. 801.

In a prosecution for assault in the second degree, where the one assaulted died before the trial, it is not error to exclude evidence as to the cause of his death: *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609.

A conviction of assault with a weapon likely to produce bodily harm, within this section, subdivision 4, may be had under an information charging an assault with a shotgun by shooting with intent to kill, under section 2413, subdivision 1, as the former is necessarily included within the latter, within the requirements of section 2168: *State v. Copeland*, 66 Wash. 243, 119 Pac. 607.

§ 2415.

Under this section, an assault in the third degree is not necessarily included in the greater offense, and there can be no conviction of assault in the third degree, under a charge of assault with intent to commit a felony (second degree assault), where the evidence of the prosecutrix showed a consummated rape, and that of the defendant proved an alibi, and there was no evidence of assault in the third degree: *State v. Kruger*, 60 Wash. 542, 111 Pac. 769.

Under the rule that at common law an indictment for assault and battery need not set out the particular acts of violence constituting the offense, a conviction for assault in the third degree (defined by this section) may be had under an information for manslaughter charging an assault upon a pregnant woman and her unborn child with intent to cause a miscarriage and resulting in her death, where, omitting that portion relating to the death, it satisfies all requirements of a charge of assault and battery: *State v. Hamilton*, 69 Wash. 561, 125 Pac. 950.

§ 2416.

This section, warranting the repulsion of a robbery by force, even to taking life, is not applicable where the deceased was only guilty of a trespass in taking a whisky bottle away from the accused after learning that the accused had given his son whisky, and with no intent to commit a robbery: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

As to alleged repelling of robbery as defense for killing, see note in 109 Am. St. Rep. 822.

As to homicide to prevent misdemeanors, crimes without force, and trespasses, see note in 67 L. R. A. 536.

§ 2418.

An information in the language of the statute is not sufficient in charging the crime of robbery or larceny from the person: *State v. Hall*, 54 Wash. 142, 102 Pac. 888.

An information for robbery charging the forcibly taking of the property of A from the immediate presence of B, without showing any connection between A and B or the right of B to control and dominion over the property, is insufficient to sustain a conviction: *State v. Hall*, 54 Wash. 142, 102 Pac. 888.

A conviction of robbery is sustained by the evidence of the victim that the defendants seized and carried him along the sidewalk, abstracted silver from his trousers' pocket, and threw him down on the walk, and that, when he got up, his pocket-book and gold pieces which he was carrying in his inside coat pocket were gone: *State v. Brache*, 63 Wash. 396, 115 Pac. 853.

A conviction of robbery is sustained where part of the property taken was found in defendant's possession, and he was taken shortly after the robbery in the vicinity where the crime was committed, although there was no direct evidence of identity: *State v. King*, 67 Wash. 651, 122 Pac. 323.

A conviction of robbery is not sustained where there was no evidence that the defendant participated in the crime or aided or abetted therein or in a conspiracy to commit it, other than the fact that he joined the others a short time previously and said "get him," when the victim started to run away: *State v. Gamber*, 69 Wash. 66, 124 Pac. 210.

An information charging an attempt to commit robbery is not insufficient in that the physical acts done toward the commission of the offense are not set forth, where it follows the language of this section and charges the defendant with an attempt to do the precise thing recited in the statute as constituting the crime: *State v. Baker*, 69 Wash. 589, 125 Pac. 1016.

As to the constituent parts of the crime of robbery, see note in 135 Am. St. Rep. 476.

§ 2424.

Upon demurrer to a complaint for criminal libel, the court must determine from

the facts alleged whether the publication tended to expose the complainant to hatred, contempt or obloquy, or to injure him in his business, within this section, regardless of the conclusions of the pleader in that regard: *State v. Darwin*, 63 Wash. 303, 33 L. R. A., N. S., 1026, 115 Pac. 309.

A complaint alleging the malicious publication in defendant's newspaper of a list of conditional sales made by a furniture dealer to various patrons, as shown by memoranda legally filled by him in the auditor's office two years previously, the truth of which was unquestioned, contains no words libelous per se, and does not charge criminal libel when it fails to state facts showing that it tended to expose him to hatred, contempt or obloquy, or injure him in his business, within this section, defining criminal libel; and the conclusions of the pleader to that effect must be disregarded: *State v. Darwin*, 63 Wash. 303, 33 L. R. A., N. S., 1026, 115 Pac. 309.

As to the liability for a written charge with reference to plaintiff's business, see note in 4 L. R. A., N. S., 977.

The publication of plaintiff's photograph, which was a true likeness and inoffensive in itself, in connection with a story of her father's crime, is not a libel as defined by sections 2424 and 292, providing that it is a libel to expose any living person to hatred, contempt or obloquy or to deprive him of the benefit of public confidence or social intercourse, and that it is sufficient to allege generally that the publication was of and concerning the plaintiff, without alleging extrinsic facts showing the application of the matter, since the photograph did not make the article "of and concerning" the plaintiff: *Hillman v. Star Publishing Co.*, 64 Wash. 691, 25 L. R. A., N. S., 595, 117 Pac. 594.

As to the publication of one's photograph as that of another, as libel, see notes in 9 Ann. Cas. 866 and 16 Ann. Cas. 1077.

§ 2432-1. Slander of Financial Institutions.

Any person who shall willfully and maliciously instigate, make, circulate, or transmit to another or others any false statements concerning the moral or financial condition or affecting the solvency or financial standing of any bank, banking institution or trust company doing business in this state, or who shall willfully counsel, aid, procure, or induce another to start, transmit or circulate any such statement or rumor, shall be guilty of a gross misdemeanor. [L. '13, p. 278, § 1.]

§ 2435.

The evidence is sufficient to sustain a conviction of rape committed between the nineteenth and twenty-sixth days of a certain month, where it appears that the prosecut-

ing witness was under the age of consent; that between said dates she and the defendant registered at different hotels as man and wife under assumed names and occupied a single room over night; that the defendant was arrested while occupying a bed

with her, and that a physical examination by a physician a few days after showed evidence of recent penetration: *State v. Biggs*, 57 Wash. 514, 107 Pac. 374.

As to what constitutes rape, see note in 80 Am. Dec. 361.

There is sufficient evidence of an assault with intent to commit rape, without consent, with force sufficient to overcome resistance, where the assault was conceded and the attempt, force and resistance clearly shown by the evidence of the prosecutrix, and by her condition and bruises on her person immediately thereafter, the intent of the accused being for the jury as shown by his acts: *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263.

In a prosecution for assault with intent to commit rape, by force, it is sufficient to instruct the jury that the act must have been by forcibly overcoming the resistance of the prosecutrix, without charging that she must have made all the resistance within her power: *State v. Pilegge*, 61 Wash. 264, 112 Pac. 262.

As to the necessity for proving force and resistance in prosecution for rape, see note in 9 Ann. Cas. 572; also see note in 8 L. R. A. 297.

§ 2436.

Under this section there can be no conviction for an offense committed on a certain date where for months prior thereto, the parties had continued sexual relations, without any intervening reformation; and it is immaterial that the prosecutrix was chaste except as to the defendant, "previous chaste character" meaning sexual purity: *State v. Dacke*, 59 Wash. 238, 30 L. R. A., N. S., 173, 109 Pac. 1050.

Under an information charging rape on or about March 1st, by carnally knowing a female child between fifteen and eighteen years of age, of previous chaste character, where the prosecutor elected an act of January 20th, the defense that the prosecutrix was not then of chaste character, by reason of previous relations with the accused, is not available, where all their acts occurred in the same county, within one month, since any one of the acts would have sustained a conviction under the information: *State v. Sargent*, 62 Wash. 692, 35 L. R. A., N. S., 173, 114 Pac. 868.

As to impeachment of character of prosecutrix for chastity by proof of prior acts of intercourse with defendant, see note in 30 L. R. A., N. S., 173.

In a prosecution for rape of a child nine years of age, in the last of February or first of March, complaints made by the child about the first or middle of March are seasonably made, and therefore admissible in evidence: *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

In a prosecution for the carnal abuse of a child, the fact that she was not married

to the principal offender appears indirectly and is sufficiently shown to submit the issue to the jury, where she was under fourteen years of age, a mere school girl, living with her parents and bearing her maiden name, and the fact was not questioned at the trial: *State v. May*, 59 Wash. 414, Ann. Cas. 1912B, 113, 109 Pac. 1026.

As to the necessity that indictment for rape negatives the existence of marital relation between the defendant and the prosecutrix, see note in 16 Ann. Cas. 902.

A conviction of statutory rape is sustained by the testimony of the prosecutrix that the defendant had "intercourse" with her, where it appears that she meant sexual intercourse and fully comprehended her statements: *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

As to evidence of complaints by the victim of the crime of rape, see notes in 2 Ann. Cas. 234 and 11 Ann. Cas. 99.

In a prosecution for statutory rape under this section, evidence is admissible on the part of the defense of the previous general reputation of the prosecutrix as to unchastity, as going to her credibility as a witness, but is not admissible to prove her unchaste condition: *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

As to evidence of specific instances to prove character for chastity in prosecution for rape, see note in 14 L. R. A., N. S., 714.

§ 2437.

Under this section, evidence of repeated attempts by the accused and pain suffered by a child of twelve is sufficient to make a case for the jury upon the question of consummation of a statutory rape: *State v. Kincaid*, 69 Wash. 273, 124 Pac. 684.

§ 2440.

To constitute one a common prostitute under this section, it is not essential that she submit herself to sexual intercourse for gain: *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768.

An information for living with a common prostitute is not insufficient because it charges the offense to have been committed on a single day instead of charging a continuing offense, since so living for one day with intent to continue the relation constitutes the offense: *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768.

In a prosecution of a male person for living with and accepting the earnings of a prostitute, the objection that there was no evidence that he was a male person is without merit, where he appeared before the jury, responded to masculine pronouns addressed to him, and his sex was not made an issue: *State v. Risaburo*, 61 Wash. 162, 112 Pac. 85.

A conviction of living with and accepting the earnings of a prostitute is supported by evidence of confessions and admissions, and the fact that the accused had lived for years with the same prostitute without other visible means of support: *State v. Risaburo*, 61 Wash. 162, 112 Pac. 85.

Physical restraint is not an essential element of the crime of placing a female in a house of prostitution: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

Upon a prosecution for placing a female in charge of another for the purposes of prostitution, the previous unchastity of the prosecutrix is not material, except as affecting her credibility as a witness: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

Upon a prosecution for placing a female in charge of another for the purpose of prostitution, evidence tending to show the character of the house as a house of prostitution is competent: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

As to what is a disorderly house, see note in 134 Am. St. Rep. 836.

§ 2443.

Repealed. See L. '13, p. 298, § 1.

Under this section it is error to refuse to instruct the jury that no conviction can be had upon the uncorroborated testimony of the prosecutrix when she was contradicted by other witnesses: *State v. Crouch*, 60 Wash. 450, 111 Pac. 562.

This section requires evidence from an independent source having a tendency to connect the accused with the crime, although the same act repealed section 2155, requiring, in prosecutions for rape and seduction, corroborating evidence tending to "convict the defendant" of the offense, the intention being to extend the rule to other crimes than rape and seduction, rather than to abrogate the former rule: *State v. Gibson*, 64 Wash. 131, 116 Pac. 872.

Upon a prosecution for rape, evidence that the prosecutrix started for the place where she claims to have met the defendant at the time of the offense is not sufficient corroborating evidence to sustain a conviction within this section, where no one testified to taking or seeing her there, or that she and the defendant were at any time isolated from others: *State v. Gibson*, 64 Wash. 131, 116 Pac. 872.

Proof of acquaintance and opportunity is not sufficient corroborating evidence to sustain a conviction of rape, within this section, where other young men had intimate acquaintance with her and more ample opportunity: *State v. Gibson*, 64 Wash. 131, 116 Pac. 872.

In a prosecution for rape, where another had been first charged with the offense and offered to marry the girl and officers sought to secure evidence against him, the fact that such party was warned by the accused and advised to leave the state does not show an

attempt by the accused to fix the crime upon another or constitute sufficient corroborating evidence to support a conviction under this section: *State v. Gibson*, 64 Wash. 131, 116 Pac. 872.

Upon a trial for placing a female in charge of another for the purposes of prostitution, the evidence of the prosecutrix that defendant took her to his house and introduced her to his wife and that she stayed there several weeks as a prostitute, is sufficiently corroborated, as required by this section, where several witnesses testified that the house was a house of prostitution conducted by the defendant and his wife: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

In a prosecution for statutory rape, evidence that the defendant had admitted a similar act with the prosecutrix is sufficient corroboration of her testimony, and any doubt as to the meaning of the language used in the admissions raises a question for the jury: *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

In a prosecution for rape, the testimony of the prosecutrix that she was violently assaulted by the defendant is not sufficiently corroborated where she allowed the defendant to escort her home, invited him in and entertained him at luncheon with her mother, without making any complaint, the only corroboration being the testimony of her mother that when they arrived her dress was pulled out of her belt, hair on sideways, and "their faces pretty red on one side": *State v. Roberts*, 66 Wash. 503, 119 Pac. 836.

An instruction in a prosecution for rape that corroboration of the prosecutrix is sufficient if the testimony in any material matter tends to connect the defendant with the commission of the offense is not objectionable as making it sufficient if she was corroborated as to her age: *State v. Aton*, 67 Wash. 485, 121 Pac. 980.

There is no corroboration of the prosecuting witness as to the use of force to overcome her resistance where there were no eye-witnesses, no one heard her outcry, if she made any, she made no complaint for some time, her clothing was not torn and she was not injured, it not being sufficient to merely prove opportunity and recent penetration: *State v. Raymond*, 69 Wash. 98, 124 Pac. 495.

Under this section, corroboration of testimony as to the use of force to overcome resistance is essential where force is an element of the offense under section 2435: *State v. Raymond*, 69 Wash. 98, 124 Pac. 495.

As to necessity and sufficiency of corroboration of prosecutrix in trials for rape, see notes in 6 Ann. Cas. 771 and 17 Ann. Cas. 413.

§ 2444.

Repealed. See L. '13, p. 73, § 2.

§ 2445. Keepers of Concert Saloons, etc.

Every person who—

(1) Shall admit to or allow to remain in any concert saloon, or in any place owned, kept, or managed by him where intoxicating liquors are sold, given away or disposed of—except a restaurant or dining-room, any person under the age of twenty-one years; or,

(2) Shall admit to, or allow to remain in any dance-house, public pool or billiard hall, or in any place of entertainment injurious to health or morals, owned, kept or managed by him, any person under the age of twenty-one years; or,

(3) Shall suffer or permit any such person to play any game of skill or chance, in any such place, or in any place adjacent thereto, or to be or remain therein, or admit or allow to remain in any reputed house of prostitution or assignation, or in any place where opium, or any preparation thereof, is smoked, or where any narcotic drug is used, any person under the age of twenty-one years; or,

(4) Shall sell or give, or permit to be sold, or given to any person under the age of twenty-one years any intoxicating liquor, cigar, cigarette, cigarette paper or wrapper, or tobacco in any form; or,

(5) Shall sell, or give, or permit to be sold or given to any person under the age of eighteen years, any revolver, pistol, or toy pistol;

Shall be guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another.

Any person under the age of twenty-one years who shall purchase, or shall have in his or her possession, any intoxicating liquor, cigar, cigarette, cigarette paper or wrapper, or tobacco in any form, shall be guilty of a misdemeanor. [L. '11, p. 649, § 1.]

Under this section it is not an offense to allow minors in poolrooms in which no intoxicating liquors are sold; and if capable of two constructions, the one in favor of innocence must be adopted: *State v. Anderson*, 61 Wash. 674, 112 Pac. 931.

As to sales of intoxicating liquors to minors, see note in 12 Am. St. Rep. 354 and 10 L. R. A. 80.

§ 2447.

One who unlawfully employs a child under the age of fourteen years, prohibited by this section, assumes all the risk of personal injuries while he is engaged in the performance of the prohibited duties, regardless of contributory negligence; and in an action by the child, it is no defense that the father of the child misrepresented his age, or that the employer did not "knowingly" violate the statute, and exercised due care to ascertain the age of the child: *Glucina v. Goss Brick Co.*, 63 Wash. 401, 42 L. R. A., N. S., 624, 115 Pac. 843.

As to the negligence imputed to employer of minors in violation of statute, see note in Ann. Cas. 1912B, 803.

§ 2448.

In a prosecution for abortion, evidence of the commission of sodomy with the prosecuting witness is inadmissible: *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

As to evidence of other offenses in criminal prosecutions, see note in 105 Am. St. Rep. 977.

§ 2455.

See notes to § 7151.

Upon a prosecution for incest between first cousins, the fact of a lawful marriage between the parties, if a defense, is to be affirmatively pleaded and need not be negatived in an information stating every essential element of the crime as defined by this section: *State v. Nakashima*, 62 Wash. 686, Ann. Cas. 1912D, 220, 114 Pac. 894.

As to the necessity that indictment or information for incest negative lawful marriage between the parties, see note in Ann. Cas. 1912D, 222.

A conviction of incest may be had without corroboration of the testimony of the prosecuting witness, in the absence of any

statutory requirement therefor: *State v. Aker*, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

As to the necessity of corroboration of prosecutrix in trials for incest, see note in 18 Ann. Cas. 975.

One may be guilty of incest although the act was accomplished without consent: *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

As to absence of consent as element of crime of incest, see note in 111 Am. St. Rep. 24.

The female is not an accomplice in incest where she at no time consented to the criminal relations: *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

As to consent of both parties as element of crime of incest, see note in 8 Ann. Cas. 910.

A conviction for incest may be had upon the uncorroborated evidence of an accomplice: *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

§ 2456.

The evidence is sufficient to sustain a conviction for sodomy, notwithstanding certain exaggerations in the testimony of the prosecuting witness, where he was corroborated as to the overt act by two other witnesses: *State v. Douglass*, 66 Wash. 71, 118 Pac. 915.

As to how evidence is to be considered in criminal prosecutions, see note in 103 Am. St. Rep. 904.

§ 2457.

This section prescribes a rule of law rather than a rule of evidence, and re-

quires a complaint by the husband or wife before a magistrate; and an information by the prosecuting attorney is void if it fails to show that such complaint was made: *State v. La Bounty*, 64 Wash. 415, 116 Pac. 1073.

As to the construction and effect of provisions requiring prosecutions for adultery to be upon complaint of husband or wife, see note in 19 L. R. A., N. S., 786.

§ 2469.

An information charging merely the opening and conducting of a gambling game without alleging that it was done in any of the capacities prohibited by this section is insufficient to sustain a conviction of a felony under this section, or of a misdemeanor under section 2470: *State v. Hardwick*, 63 Wash. 35, 114 Pac. 873.

As to what is gaming as contemplated by statute making it punishable, see note in 121 Am. St. Rep. 694.

§ 2470.

See notes to § 2469.

§ 2475.

It is no defense to an action to recover money lost at gambling that the same was not the property of the plaintiffs: *Crowley v. Taylor*, 49 Wash. 511, 95 Pac. 1016.

As to defenses available against obligation based on gambling transaction, see note in 119 Am. St. Rep. 172.

§ 2512. Regulating the Sale of Milk and Cream in Cities.

Every person, firm or corporation, who, in any city of the first class, shall sell or deliver, or offer for sale, or have in his, their or its possession, with intent to sell or deliver, any milk or cream, without having a permit therefor duly issued by the commissioner of health, health officer or inspector of milk in such city, or without having such permit displayed in a conspicuous manner in his, their or its place of business, or without having the number of such permit and the name of the owner thereof or the name of the firm or corporation thereof, as the case may be, painted in a conspicuous manner on both outer sides of every wagon or other vehicle used for the sale or delivery of milk or cream by any such person, firm or corporation, shall be guilty of a misdemeanor. [L. '11, p. 61, § 1.]

§ 2513.

Under this section, the manager of a dairy corporation having general supervision of the mixing of the milk may be guilty of violation of the statute although he was not present when the milk left the dairy and had given instructions to keep

it up to standard: *State v. Burnam*, 71 Wash. 199, 128 Pac. 218.

As to police regulations prescribing standard of quality of milk, see note in 1 L. R. A., N. S., 918.

As to criminal liability for adulteration of food by servant, agent or partner, see note in 41 L. R. A. 656.

§ 2517-1. Aliens—Firearms Prohibited Without License.

It shall be unlawful for any person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States, to carry or have in his possession at any time any shotgun, rifle or other firearm, without first having obtained a license from the state auditor, and said license is not to be issued by said state auditor except upon the certificate of the consul domiciled in the state of Washington and representing the country of such alien, that he is a responsible person and upon the payment for said license of the sum of fifteen dollars (\$15.00); nothing in this section contained shall be construed to allow aliens to hunt or fish in this state without first having obtained a regular hunting or fishing license. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '11, p. 303, § 1.]

§ 2531.

A complaint in justice court charging that defendant, at M. in S. county, drove an automobile at a speed in excess of twenty miles an hour, frightening horses, and unlawfully refused to obey a signal to reduce the speed, is insufficient to charge a violation of this section, since it does not charge excessive speed nor any place where twenty miles would be unlawful: State v. Hall, 64 Wash. 99, 116 Pac. 593.

As to speed regulations in respect to automobiles in statutes relating to highways, see note in 108 Am. St. Rep. 218.

§ 2536.

Repealed. See L. '11, p. 650, § 2.

§ 2544.

A complaint for practicing medicine without a license is sufficient where the acts constituting the offense are set forth in ordinary concise language without repetition in such manner as to enable a person of common understanding to know what was intended: State v. Greiner, 63 Wash. 46, 114 Pac. 897.

Under the statute prohibiting any mode of treating the sick without first obtaining a license, a conviction is sustained where it appears that the defendant diagnosed the patient's ailments with the aid of a vibrator, used manual manipulations, prescribed a dietary, gave advice, and collected a fee: State v. Greiner, 63 Wash. 46, 114 Pac. 897.

As to the amenability of physicians to laws as to licenses, see note in 129 Am. St. Rep. 293.

§ 2564.

This section is not objectionable as uncertain in defining the nature of the crime: State v. Fox, 71 Wash. 185, 127 Pac. 1111.

This section is not unconstitutional as abridging the right of free speech and of the press, since the legislature has power to punish abuse of the right: State v. Fox, 71 Wash. 185, 127 Pac. 1111.

§ 2578.

The gist of burglary is the breaking and entering with intent to commit a crime: State v. Beeman, 51 Wash. 557, 99 Pac. 750.

§ 2579.

Under this section, defining burglary in the second degree, it is not essential to burglary in the second degree that it was committed in the night-time: State v. Leroy, 61 Wash. 405, 112 Pac. 635.

As to the elements of the crime of burglary, see note in 2 Am. St. Rep. 393.

The evidence is insufficient to warrant a conviction for entering a ship in the night-time with intent to commit a misdemeanor, where no breaking was alleged and it devolved upon the state to prove entry in the night-time, and from the evidence the property was not missed until more than two hours after daylight: State v. Gunderson, 56 Wash. 672, 21 Ann. Cas. 350, 106 Pac. 194.

§ 2580.

Upon a prosecution for the burglary of a millinery store, in which a large number of plumes were taken, it is proper to allow the state to show that plumes found at the home of the defendant were of the same kind and similar in appearance to the plumes stolen, where that was the best evidence of identification obtainable: State v. Mallahan, 66 Wash. 21, 118 Pac. 898.

As to possession of the stolen property as evidence of burglary, see note in 19 Ann. Cas. 1281.

§ 2583.

In a prosecution for forgery it is not error to admit in evidence a photographic copy of a letter supposed to have been written by the accused, introduced for the purpose of comparison by the experts, where the accused, after examining the photograph, admitted that it was a photographic copy of her handwriting: *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179.

As to the foundation for the admission of photographs in evidence, see notes in 1 Ann. Cas. 161 and 10 Ann. Cas. 962. See, also, note in 15 Ann. Cas. 98.

In a prosecution for forgery of a check of one J., another check purporting to be signed by him, admitted for comparison, is sufficiently identified when J. testified that he believed it was genuine: *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179.

A notary's certificate showing that a mortgage was executed and acknowledged by the grantors is sufficiently overcome by their direct testimony that they did not execute it to make a question for the jury as to the fact of forgery: *State v. Peeples*, 65 Wash. 673, 118 Pac. 906.

As to the instruments subject to forgery, see note in 8 Am. St. Rep. 466.

§ 2587.

There is sufficient evidence of the uttering of a forged check where the manager and forewoman in a store each testified that the accused purchased goods, uttered the check in payment, and received her change, and the testimony of experts made a question for the jury as to whether the check was forged: *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179.

The presumption from the uttering of a forged deed is one of fact for the jury and not of law, and it is error to instruct that the fact of uttering is presumptive proof of the defendant's guilty knowledge of forgery, since the weight of the circumstances of uttering was for the jury, and it did not shift the burden of proof: *State v. Hatfield*, 65 Wash. 550, Ann. Cas. 1913B, 895, 118 Pac. 735.

In a prosecution for uttering a forged mortgage, an instruction that the fact of forgery is a circumstance from which guilty knowledge is presumed, unless rebutted, invades the province of the jury and is reversible error: *State v. Peeples*, 65 Wash. 673, 118 Pac. 906.

Upon a prosecution for uttering a forged deed with guilty knowledge of the forgery, it is admissible to introduce in evidence a purported corporate seal of a fictitious abstract company, which might have been used in fabricating titles in that county, which was found in an office occupied by the defendant two months previously: *State v. Hatfield*, 65 Wash. 550, Ann. Cas. 1913B, 895, 118 Pac. 735.

A conviction for uttering a forged deed is sufficiently sustained by proof of the forgery, where the grantor and his daughter testified that he was in another state at the time the deed purports to have been executed in this state, and that he did not sign it, although the state did not call the notary who certified to the acknowledgment, where the notary was jointly informed against with the defendant: *State v. Hatfield*, 65 Wash. 550, Ann. Cas. 1913B, 895, 118 Pac. 735.

An instruction that the mere uttering of a forged instrument is a circumstance tending to show knowledge of its falsity is not prejudicially erroneous when immediately explained to mean that if the jury find that if it was forged and uttered by the defendant or his codefendant with his assistance, then the jury could consider these facts in determining whether the defendant knew it was forged at the time it was uttered: *State v. Elliott*, 69 Wash. 62, 124 Pac. 212.

As to what constitutes "uttering" under laws relative to forgery, see note in 119 Am. St. Rep. 317. See, also, note in 8 L. R. A., N. S., 1175.

It is no defense to a joint prosecution for knowingly having in possession a forged instrument with intent to utter it that the instrument was taken from the actual possession of only one of the conspirators, where there was abundant evidence that they were acting in concert with a common criminal design: *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102.

As to the possession of forged instruments as evidence of crime, see note in 61 L. R. A. 820.

In a prosecution for forgery, there was sufficient evidence that defendant had a guilty knowledge of the spurious character of the papers, a note and mortgage, and participated in their utterance, where it appears that he took the papers to be executed by a spurious grantor, made affidavit that he knew the family to aid in closing the loan, aided in cashing the checks, retaining commissions, and denied acquaintance with one of the guilty parties whom he had known for a long time: *State v. Peeples*, 71 Wash. 451, 129 Pac. 108.

§ 2590.

Upon an issue as to the forgery of a check paid by a bank, in an action by the customer to recover the deposit, it is error to permit a third person to testify that the bank had refused payment of another check purporting to be drawn by plaintiff in favor of the same payee which was also repudiated as a forgery: *Buell v. Aberdeen State Bank*, 58 Wash. 407, 108 Pac. 951.

Upon such an issue, it is error to receive evidence that plaintiff had caused a war-

rant to issue for the arrest of the payee on the charge of forgery; also, to show that the defendant's officers refused to contribute to a sum to be offered as a reward for his arrest: *Buell v. Aberdeen State Bank*, 58 Wash. 407, 108 Pac. 951.

Upon such an issue, it is error to admit evidence that the payee of the check had years before gone under an alias in Alaska, and could closely imitate the signature of the witness: *Buell v. Aberdeen State Bank*, 58 Wash. 407, 108 Pac. 951.

§ 2601.

An information for the larceny of fifty-one horses running on the range, described as mares and geldings belonging to the state, is sufficient under the statute, although there was no specific description of the several animals sufficient to identify in any subsequent prosecution: *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710.

As to the description of the property stolen in indictments for larceny, see note in 22 Am. St. Rep. 154.

An information charging the obtaining of a check by false pretenses sufficiently describes the check and ownership, where it alleges B. delivered to defendant a check for one thousand dollars and that defendant unlawfully received and obtained the money thereon: *State v. Garland*, 65 Wash. 666, 118 Pac. 907.

As to the indictment and its essentials in cases of false pretenses, see note in 25 Am. St. Rep. 384.

Under a prosecution for the larceny of meat, groceries and other articles of food supplies, evidence of the misappropriations of gunnysacks is inadmissible; and the error is intensified by instructing the jury that before finding the defendant guilty of stealing gunnysacks, they must find that they were of some appreciable value: *State v. Smith*, 60 Wash. 399, 111 Pac. 342.

As to the necessity of alleging value in indictments for larceny, see note in 2 Ann. Cas. 857.

In a prosecution for larceny, it is not a variance to prove a robbery, since larceny is included in the offense of robbery, and it is no defense that the offense proved is greater than the one charged: *State v. Hatch*, 63 Wash. 617, 116 Pac. 286.

A prosecution for larceny of a check is supported by proof of the larceny of an instrument which in its original form was a certificate of deposit, stated on its face as not subject to check, but providing that the money was payable on the order of the depositor, where it was indorsed by him to the defendant, since it thereby became in legal effect a check, under section 3575, defining a check as a bill of exchange drawn on a bank payable on demand, and section 3516, of similar effect: *State v. Garland*, 65 Wash. 666, 118 Pac. 907.

Under this section, a state officer who withholds or misappropriates money of the state in his possession as such officer is guilty of larceny although he had no authority or warrant in law to receive it, the clause as to "competent authority" not applying to "public officers," and the law having regard to the officer's relation to the money, and not to the legality of its acquirement: *State v. Snow*, 65 Wash. 353, 37 L. R. A., N. S., 305, 118 Pac. 209.

As to the distinction between larceny and embezzlement, see note in 87 Am. St. Rep. 21; also note in 13 Ann. Cas. 882.

An information charging embezzlement of twenty-two thousand dollars on divers dates and days continuously from June 20th, 1908, to February 1st, 1909, charges but one offense, although by a bill of particulars furnished on demand three acts of "embezzlement" are specified as occurring on September 25th, January 5th, and January 8th, since the bill of particulars is no part of the information: *State v. Boone*, 65 Wash. 331, 118 Pac. 46.

As to when larceny is to be deemed continuous, see note in 7 L. R. A., N. S., 520.

Upon such a charge, it is not error to refuse to require the state to elect between the acts specified in the bill of particulars, where it appears that many closely related but separate transactions were involved, all culminating in the final condition of the bank, whereby it held worthless securities as an asset of twenty-two thousand dollars, all as a result of defendant's continuous acts with reference to his fraudulent stock subscription and its payment: *State v. Boone*, 65 Wash. 331, 118 Pac. 46.

An information for larceny, which could be readily understood as charging the defendant with unlawfully obtaining a check for one thousand dollars from B. by means of false and fraudulent representations and that he received the money thereon with intent to deprive and defraud the owner thereof, is sufficiently definite and certain without stating further details, under section 2055, requiring it to contain a statement of the facts in ordinary language in such manner as to enable a person of common understanding to know what was intended: *State v. Garland*, 65 Wash. 666, 118 Pac. 907.

Under an information charging the obtaining of property under false pretenses that certain securities had been executed by A., when in fact there was no such person, without alleging that the securities were false, is not a fatal variance that the prosecuting witness testified that he had parted with his property upon his faith in the securities, where his testimony was qualified by saying that it was also upon his faith of the identity of the party who was falsely introduced to him in the fictitious name used in the execution of the papers, it not being necessary that the false repre-

sentation alleged in the information be the sole inducement, nor a fatal variance that the evidence showed other concurring inducements, where the false pretense alleged was a moving inducement: *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

As to variance in prosecutions for obtaining money, etc., by false pretenses, see note in 25 Am. St. Rep. 390.

WEIGHT AND SUFFICIENCY OF EVIDENCE.—There is sufficient evidence to sustain a conviction for horse stealing, notwithstanding conflicting evidence establishing an alibi, where there was testimony that the horses were in the owner's pasture on May 4th, twenty miles southeast of W., that on May 4th at W. the accused obtained leave of A., the younger, to put four or five horses in the pasture of A. and his father, twelve miles north of W., that the accused and his brother were seen with the four young horses on the road to the pasture May 4th, 5th, or 6th, to which they added an old horse of accused's brother when near the pasture, and the accused notified the elder A., about noon on May 5th, that he had turned five horses into the pasture with his son's consent, and the elder A. saw the four young horses there, freshly branded, with an older horse on May 9th, a note-book in the accused's possession contained a memorandum evidently in his handwriting to the effect that he "Put four horses in pasture May the 5th, 1909" (the accused denying the writing of the memorandum), and that accused lived near the pasture where the animals were found until May 1st, when he went to work about three miles from the place from which the horses were stolen: *State v. Gray*, 61 Wash. 549, 112 Pac. 641.

As to animals where subjects of larceny, see note in 47 Am. Rep. 569.

In a prosecution for obtaining money under false pretenses, it is not necessary for the state to show that all of the representations were false: *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

As to the requisites and essentials of the offense of obtaining money, etc., by false pretenses, see note in 10 L. R. A. 302.

The evidence is sufficient to sustain a conviction of embezzlement by a salaried county auditor for failing to pay over one hundred and sixty-five dollars collected for hunting license fees, where there was no question over the defalcation, and no intricacy in the bookkeeping, and the defendant had stated that he knew of the shortage and exactly how much it amounted to, although the defendant, after his term had expired, had expressed a willingness to make good the deficiency, the statute requiring monthly payments of such collections: *State v. Leonard*, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

The evidence is sufficient to sustain a conviction for embezzlement where it appears

that defendant received a certain sum of money for the specific purpose of paying taxes on land, and failed to use it for that purpose and deceived his principal in the matter: *State v. Nilson*, 56 Wash. 289, 105 Pac. 829.

As to sufficiency of indictment for embezzlement with respect to allegations of fiduciary relation, see note in Ann. Cas. 1912B, 1334.

Evidence that furs "disappeared" and were "taken" from witness' place of business sufficiently proves the corpus delicti upon a charge of larceny: *State v. Lewis*, 65 Wash. 485, 118 Pac. 626.

Upon a charge of larceny of furs, evidence that goods identified as the goods in question of the value of twelve dollars were found in the defendant's room, and that a day or two previously other identified goods were sold by defendant for twenty-five dollars, is sufficient to show their value to be over twenty-five dollars and to sustain a conviction of grand larceny: *State v. Lewis*, 65 Wash. 485, 118 Pac. 626.

As to proof, in larceny, of corpus delicti by circumstantial evidence, see note in 16 Ann. Cas. 1214; also note in 28 L. R. A., N. S., 536.

There is sufficient evidence to sustain a conviction of larceny by embezzlement, where it was admitted that the defendant, employed as a bookkeeper, took small sums from a cash drawer, secreting the fact by the execution of a note charged off to profit and loss, which he kept in his possession, and he claimed that he returned the money secretly and destroyed the note, while his employer testified that he had not returned any part of the money: *State v. Downer*, 68 Wash. 672, 123 Pac. 1073.

A conviction of larceny by receiving stolen goods is sustained where it appears that the accused received ostrich plumes which he knew had been stolen and sold them with intent to deprive the owner thereof: *State v. Rubenstein*, 69 Wash. 38, 124 Pac. 135.

As to the crime imputed to the receiver of stolen goods, see note in Ann. Cas. 1912B, 1211.

A conviction of larceny of United States money is sustained where a witness stated that he was familiar with United States money, that it was United States currency, and looked like United States money, and described the denomination of the bills, although in an isolated answer on cross-examination he admitted it might have been Canadian money: *State v. Jones*, 53 Wash. 142, 101 Pac. 708.

ADMISSIBILITY OF EVIDENCE.—In a prosecution for obtaining money by false pretenses, in that the defendants D. and H. represented that they owned a lot of the value of two hundred and fifty dollars, and pointed out another more valuable lot as the lot in question, and procured the money

upon H.'s deed of the lot to the prosecuting witness, it is admissible for the state to introduce in evidence a deed of the same lot from H. to D. antedating H.'s deed to the prosecuting witness, for the purpose of showing intent to defraud, and that H. had no title at the time of the conveyance to the prosecuting witness: *State v. Dana*, 59 Wash. 30, 109 Pac. 191.

In a prosecution for obtaining money under false pretenses through a conspiracy with a swindling clairvoyant, photographs of the latter, in oriental costume, with writings thereon, of which he was author, scoffing at the gullibility of his victims, are admissible in evidence: *State v. Craddick*, 61 Wash. 425, 112 Pac. 491.

In a prosecution for the embezzlement of money sent to the defendant to pay taxes on the land of the prosecuting witness, the land having been left in charge of the defendant, it is relevant and pertinent for the state to show that the defendant witnessed a deed purporting to convey the land and knew of the change in title, and had not used the money for the purpose for which it was sent: *State v. Nilson*, 56 Wash. 289, 105 Pac. 829.

In a prosecution for the embezzlement of money sent to pay taxes, certified copies of tax receipts made from the originals in the treasurer's office, showing the payment of the taxes by others, are competent to show prima facie that defendant did not pay the taxes, where the treasurer testified that he paid no taxes; and the same are not subject to the objection that the defendant was not confronted with the witness against him: *State v. Nilson*, 56 Wash. 289, 105 Pac. 829.

In a prosecution for grand larceny of money grabbed from a table during a card game, evidence as to the dealing of the cards preceding the larceny is competent upon the general issue of guilt and also as part of the res gestae, notwithstanding it tended to show a conspiracy between the accused and others to rob the prosecuting witness: *State v. Hatch*, 63 Wash. 617, 116 Pac. 286.

Upon a prosecution of a bookkeeper for embezzlement, in which the defendant testified that he had subsequently returned the money in small amounts without showing on his books where the money came from, making his cash more at times than the books showed, it is proper on cross-examination to ask if certain persons had not paid him money which he had not credited, even if it did show other offenses, as it tended to explain how the cash came to overrun: *State v. Downer*, 68 Wash. 672, 123 Pac. 1073.

Upon a prosecution of embezzlement by a bookkeeper, evidence of other offenses than the one charged is admissible, where it tended to show a general scheme or system adopted in keeping his accounts in further-

ing his embezzlement: *State v. Downer*, 68 Wash. 672, 123 Pac. 1073.

As to proof of other offenses and similar acts in prosecutions for embezzlement, see note in 11 Ann. Cas. 816; also note in 62 L. R. A. 226.

In a prosecution for embezzlement of money sent to pay taxes on land left in charge of the defendant, evidence in regard to a deed of the land to another, and defendant's knowledge thereof, is properly submitted to the consideration of the jury in so far as it had a tendency to show the guilty knowledge of the defendant, who deceived the prosecuting witness in receiving the money for a specific purpose: *State v. Nilson*, 56 Wash. 289, 105 Pac. 829.

As to sufficiency of indictment for embezzlement with respect to allegations of fiduciary relation, see note in Ann. Cas. 1912C, 903.

In a prosecution for obtaining money under false pretenses for worthless stock, evidence of the value of land traded to the prosecuting witness in restitution is inadmissible, that being no defense: *State v. Craddick*, 61 Wash. 425, 112 Pac. 491.

TRIAL—INSTRUCTIONS.—In a prosecution of a salaried county officer for the embezzlement of fees which he failed to pay into the county treasury, the proposition that a criminal intent is essential is sufficiently covered, where the jury were so instructed, and that they could not convict if the failure to pay was due to neglect or carelessness without an intent to defraud the county: *State v. Leonard*, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

As to criminal intent in embezzlement, see note in 87 Am. St. Rep. 26.

Under an information charging the larceny of fifty bushels of wheat during a certain month, and this section, making it larceny to knowingly buy or receive stolen property, it is competent to show that the accused offered one B. and his associates one dollar and a half a sack for all wheat they would take from cars and put in his barn, and thereafter, on three different occasions during said month, he paid B. and his associates for wheat stolen by them and put in his barn; and the prosecution need not elect between the different deliveries, since it was all part of one continuous transaction: *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

As to admissibility of declarations as to ownership made by person accused of larceny prior to being suspected, see note in 2 Ann. Cas. 303.

Where money was found concealed on the accused when arrested shortly after a theft, it is not error to refuse an instruction that the presumption of guilt from the possession of stolen property attaches only when the money is shown to have been stolen and is destroyed by a reasonable explanation, where the jury were in-

structed that such presumption applies only to property identified as stolen and that they must find beyond a reasonable doubt that the accused had obtained the money charged to have been stolen: *State v. Williams*, 62 Wash. 286, 113 Pac. 780.

As to proof of possession in cases of prosecution for larceny of money, see note in 101 Am. St. Rep. 506.

In a prosecution for obtaining money by false pretenses, it is not inconsistent or misleading to instruct that the false representations must have been the effective cause inducing the loss of the money and that it is sufficient if they were relied upon and in some measure induced the loss, since the false representations need not be the sole, if the efficient, inducement: *State v. Kulbe*, 67 Wash. 21, 120 Pac. 510.

As to the proposition that the false pretense was believed and acted upon, causing loss to the person deceived, see note in 25 Am. St. Rep. 379.

In a prosecution for stealing a nugget chain, in which the issue was as to the identification of a chain found in the possession of defendant's wife, and claimed by the prosecuting witness as her chain and as the one stolen without any suggestion of error in her identification of it as her property, and defendant showed such chain to be a gift from a third person, it is reversible error to instruct the jury that, although they find the prosecuting witness to be mistaken in her identification, still they may convict if they find that the prosecuting witness did own a chain which was stolen by the defendant: *State v. Neis*, 68 Wash. 599, 123 Pac. 1022.

In a prosecution for larceny by receiving and disposing of stolen goods, it is error to instruct upon the subject of defendant's knowledge respecting the theft, that knowledge of any particular fact may be inferred from the knowledge of such other facts as would put an ordinary prudent man upon inquiry, and that the state must prove beyond a reasonable doubt either that defendant had actual knowledge that the goods were stolen or was in possession of facts that would put an ordinary prudent man on inquiry, since it compelled the jury to infer the fact of knowledge instead of leaving the inference to be drawn by the jury: *State v. Rubenstein*, 69 Wash. 38, 124 Pac. 135.

As to duty of court, upon request, to instruct as to law of circumstantial evidence in prosecution for larceny, wherein it is shown that defendant had possession of stolen property, see note in 8 Ann. Cas. 796.

§ 2605.

Where the purchase of stolen property on three different occasions was pursuant to one offer and all part of one transaction, it amounts to grand larceny, under this section, if the total value was over twenty-five dollars, notwithstanding there might have been a conviction of petty larceny for any one of the three acts: *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

As to when larceny deemed continuous, see note in 7 L. R. A., N. S., 520.

As to degree of larceny, see note in Ann. Cas. 1912A, 895.

§ 2610.

Under the common law, it was not an indictable offense to extort money by threatening to institute a criminal prosecution against the party defrauded, since the threat is not of personal violence or such as to overcome a firm and prudent man: *State v. Nethercutt*, 48 Wash. 105, 92 Pac. 938.

As to extortion through threats at common law, see note in 116 Am. St. Rep. 457.

The defendants are guilty of extortion by threats, where they accused the prosecuting witness of adultery and demanded the payment of money as satisfaction which he at first refused, although they later enforced their demands by violence: *State v. Barr*, 67 Wash. 87, 120 Pac. 509.

Under this section defining extortion of money or property by threats or accusation of crime, and section 2303, providing that the word "property" shall include all instruments or writings completed and ready to be delivered by which any right is or purports to be evidenced or created, one may be guilty of extorting a check, although it had no actual cash value from the fact that it would not have been cashed, as the claim which might have been made thereon imported value: *State v. Barr*, 67 Wash. 87, 120 Pac. 509.

As to extortion through false accusations, see note in 11 L. R. A. 656.

§ 2622-1. False Advertising.

Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes,

publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor: Provided, That the provisions of this act shall not apply to any owner, publisher, agent, or employee of a newspaper for the publication of such advertisement published in good faith and without knowledge of the falsity thereof. [L. '13, p. 91, § 1.]

§ 2629-1. Removal of Timber from Land Delinquent for Taxes.

It shall be unlawful for any person, firm or corporation to remove any timber from timbered lands, no portion of which is occupied for farming purposes by the owner thereof, upon which taxes are delinquent until the taxes thereon have been paid. [L. '13, p. 346, § 1.]

§ 2629-2. Penalty.

Any person violating the provisions of this act shall be guilty of a gross misdemeanor and punished accordingly. [L. '13, p. 346, § 2.]

§ 2640.

As a criminal law will not be extended beyond its plain terms, the act of 1893, entitled an act punishing bank officers for receiving deposits knowing the bank to be insolvent, and providing that officers of any "banking institution" so doing shall be guilty of a felony, did not apply to private bankers, but only to incorporated banks, especially in view of the subsequent legislative construction in 1907 (Rem. & Bal. Code, section 3331), extending the law to cover "owners," and this section extending it to cover stockholders and employees: State v. Youngbluth, 60 Wash. 383, 111 Pac. 240.

In a prosecution of a bank officer for receiving deposits knowing that the bank was insolvent, evidence of the value of securities held by the bank and the general reputation for solvency of the makers of notes is admissible: State v. Welty, 65 Wash. 244, 118 Pac. 9.

It is also admissible to show transactions involving financial deals some years previously tending to show the accused's knowledge of the bank's insolvency, and to show a deficiency of assets and a motive for subsequent transactions, the state not being confined to the showing of insolvency on the day charged, when the insolvency charged was the result of many previous acts, even though another offense was established by such evidence: State v. Welty, 65 Wash. 244, 118 Pac. 9.

In a prosecution of a bank officer for receiving deposits knowing that the bank

was insolvent, it is admissible to show that a mortgage for eighteen thousand dollars was carried on the books as an asset at its face value, when the mortgagor had made a first payment of only four hundred and eighty dollars on the purchase of the land from the state, and the purchase had been canceled by the state for failure to make deferred payments: State v. Welty, 65 Wash. 244, 118 Pac. 9.

This section authorizes the conviction of the president of a bank for the receipt of deposits by the cashier in the usual course of business on a certain day when the president was absent, if he knew at the time that the bank was insolvent: State v. Welty, 65 Wash. 244, 118 Pac. 9.

Under this section the officer is guilty if by the exercise of reasonable care and diligence in the performance of his duties he could have known of the insolvent condition when the deposit was received: State v. Welty, 65 Wash. 244, 118 Pac. 9.

In a prosecution of a bank officer for receiving deposits on a specified date knowing that the bank was then insolvent, in which the insolvency charged did not result from any act on the day in question, but from numerous prior acts, it is not error to refuse to instruct the jury that evidence of prior insolvency and of acts relating to securities held and intending to show the withdrawal of certain assets from the bank prior to the day charged could be considered by the jury only for the purpose of showing defendant's knowledge of the insolvency on the day charged, where it appears that such previous acts by

the defendant largely contributed to the insolvency of the bank: *State v. Welty*, 65 Wash. 244, 118 Pac. 9.

As to criminal liability of officer of insolvent bank for receiving deposit, see *Ann. Cas.* 1912B, 316.

§ 2664-1. Trespass on Double Track.

It shall be unlawful for any person to go upon or be upon that portion of any railroad right of way upon which is constructed and operated more than one main line track or upon which is constructed and operated an electric interurban line of one or more tracks where the electricity is transmitted by a third rail. [L. '13, p. 394, § 1.]

§ 2664-2. Exceptions.

The foregoing section shall not be construed to include that part of any right of way embraced in any highway crossing or any lawful private crossing; and shall not be construed to prohibit officers or employees of any such railroad or public officers from going or being upon any portion of the right of way in the performance of their duties. [L. '13, p. 395, § 2.]

§ 2664-3. Crossing Warnings.

The Public Service Commission of Washington shall require any company operating such a railroad as is described in section 2664-1, to erect and maintain upon such part of its line, at every point where a highway crosses such line, a sign or a warning, in form to be prescribed by such commission. [L. '13, p. 395, § 3.]

§ 2664-4. Penalty.

Any person violating the provisions of section 2664-1, shall be guilty of a misdemeanor. [L. '13, p. 395, § 4.]

§ 2665. Trespass upon Land of Another—Warning.

Every person who shall go upon the land of another with the intent to vex or annoy the owner, or occupant thereof, or to commit any unlawful act, or shall enter upon the inclosed land of another for the purpose of hunting or fishing without having first obtained the permission of the owner or occupant of said land, or shall enter upon any land of another bounded on one or more sides by water when notices not to trespass thereon have been posted as often as every seven hundred feet on or near the other boundaries thereof for either of said purposes, or shall willfully go or remain upon any land after having been warned by the owner or occupant thereof not to trespass thereon, shall be guilty of a misdemeanor.

An entryman on land under the laws of the United States shall be deemed an owner within the meaning of this section.

Inclosed land shall for the purpose of this act mean any land fenced either with a lawful fence or with such a fence as is usually used in the neighborhood of such land. [L. '13, p. 437, § 1.]

§ 2688.

This section prohibiting "fortune-telling" is valid, notwithstanding the principles of religion laid down by the "National Astrological Society" include the practice of casting and reading horoscopes, since harmful practices may be prohibited

though religious beliefs and opinions may not be interfered with: *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939.

One who, for a fee, casts horoscopes and professes to tell future events in the life of the sitter, is guilty of fortune-telling, within this section, providing that every person who receives any compensation for

fortune-telling is a vagrant; and it is immaterial that his means of telling fortunes was based upon a science or the principles of astrology: *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939.

As to fortune-telling as an unlawful call-

ing, see note in 137 Am. St. Rep. 951; also 17 L. R. A., N. S., 52.

§§ 2691, 2692.

Repealed. See L. '13, p. 30, § 1.

§ 2696-1. Improper Conduct by Judges.

It shall be a misdemeanor for any judge or justice of any court not of record, during the hearing of any cause or proceeding therein, to address any person in his presence in unfit, unseemly or improper language. [L. '11, p. 521, § 1.]

§ 2696-2. Fraudulent Use of Name of Secret Societies.

Any person, firm, association, society, order or organization or any officer, agent, representative or employee thereof, or person acting or pretending to act on behalf thereof who in a newspaper or other publication published in this state, or in any letter, writing, circular, paper, pamphlet or other writing or printed notice, matter or device without authority of the grand lodge hereinafter mentioned, fraudulently uses, or in any manner directly or indirectly aids in the use of the name or title of any secret fraternal association, society, order or organization which has had a grand lodge in this state for five (5) years, or any secret fraternal association, society, order or organization having as a necessary qualification to membership, membership in a secret fraternal society, order or organization under the jurisdiction of said grand lodge, or any imitation of such name or title or any name or title so nearly resembling it as to be calculated to deceive, or without such authority publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet or other written or printed notice, matter or device, or by word of mouth, directly or indirectly advertising for or soliciting members or applications for membership in such secret fraternal association, society, order or organization using or designated or claimed to be known by such title or imitation or resemblance thereof or who offers to sell or to confer or to communicate or to give information directly or indirectly where, how, of whom, or by what means alleged or pretended secret work or any alleged or pretended secrets of such secret fraternal association, society, order or organization or of any alleged or pretended association, society, order or organization designated or claimed to be known by such title or imitation or resemblance thereof can or may be obtained, conferred or communicated, or any person who falsely represents himself to be a member of any such secret fraternal association, society, order or organization or any person who upon false representations as to membership therein seeks or obtains admission into any such secret fraternal association, society, order or organization shall be guilty of a gross misdemeanor. [L. '11, p. 155, § 1.]

§ 2722.

Offenses prior to the enactment of the new Penal Code (Rem. & Bal. Code, section 2753 et seq.) are properly prosecuted under the laws in force at the time the offense was committed, being expressly saved by the repealing clauses of the later enactment: *State*

v. Morrow, 63 Wash. 297, Ann. Cas. 1912D, 570, 115 Pac. 161.

§ 2746.

A complaint charging that the defendant did assault S. with a deadly weapon, to wit, a shotgun, thereby showing a willful and

abandoned heart, is not sufficient, upon "reducing the charge of assault with a deadly weapon to simple assault," to give the court jurisdiction of the offense of assault, defined by this section, the charge of "assault" without the statement of any facts being a mere conclusion: *State v. Heath*, 57 Wash. 246, 106 Pac. 756.

The evidence supports a conviction for assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor, under this section, where it appears that the accused placed a loaded pistol against the person of the prosecuting witness threatening to kill her, and desisted only when interrupted by an officer: *State v. Crist*, 62 Wash. 326, 113 Pac. 772.

As to what is a deadly weapon, see note in Ann. Cas. 1912A, 1328.

As to pointing an unloaded firearm as assault, see note in 13 Ann. Cas. 484.

§ 2777.

"Defamation," as used in this section, defining criminal libel, does not imply that the defamatory words are false, as the statute is simply declaratory of the common law in which the truth of the charge was no defense: *State v. Mays*, 57 Wash. 540, 21 Ann. Cas. 830, 107 Pac. 363.

As to truth of charge in prosecutions for criminal libel, as a defense, see note in 21 L. R. A. 509.

§ 2784.

This section and section 2788, defining arson, and providing that a married woman commits the crime if the property set fire to belongs to her husband, creates no exception to the rule of evidence that one spouse cannot testify against the other, without the other's consent, except in prosecutions for crime committed by one against the other: *State v. Kephart*, 56 Wash. 561, 26 L. R. A., N. S., 1123, 106 Pac. 165.

As to ownership of burned property as affecting crime of arson, see note in Ann. Cas. 1912A, 1126.

As to burning by one spouse of the other's property, in the aspect of arson, see note in 16 Ann. Cas. 867.

§ 2788.

See notes to § 2784.

§ 2794.

Under sections 2794, 2986, and 2193, fixing the maximum penalty for burglary at fourteen years and providing that the maximum term of an indeterminate sentence for attempted burglary shall not exceed one-half of the maximum for burglary, without any restriction on the minimum term, a sentence of not less than five and not more than seven

years for attempted burglary is not an abuse of discretion: *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42.

§ 2804.

In a prosecution for larceny of horses running on the range, the state is entitled to the benefit of the presumption of guilt given by this section, although there was direct evidence on the part of the state that the horses were feloniously taken from the range by the accused, as the presumption is only cumulative of the direct evidence: *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710.

§ 2820.

See notes to § 2850.

§ 2843.

Obtaining a donation of money as a charity under false representations is within this section, the act being within the spirit and intent of the law, which makes no exception: *State v. Swan*, 55 Wash. 97, 133 Am. St. Rep. 1024, 19 Ann. Cas. 1129, 24 L. R. A., N. S., 575, 104 Pac. 145.

As to obtaining donation on false pretense that it is for charity, see note in 25 Am. St. Rep. 383.

It is no defense to a prosecution for obtaining a donation of money by false pretenses, in violation of this section that the same act is punishable under the vagrancy act, section 6724: *State v. Swan*, 55 Wash. 97, 133 Am. St. Rep. 1024, 19 Ann. Cas. 1129, 24 L. R. A., N. S., 575, 104 Pac. 145.

As to prosecutions for vagrancy, see note in 137 Am. St. Rep. 951.

§ 2850.

Technical ownership of money paid out by a bank over its counter is not material in a prosecution under this section; and a variance as to the ownership is immaterial, especially in view of section 2820, providing that the name of the party defrauded need not be given, as the same would be surplusage: *State v. Pilling*, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

In a prosecution for issuing a check on a bank without funds to meet it, confessions of the accused and the evidence of the officer of the bank are sufficient to make a case for the jury on the question of the existence of funds in the bank: *State v. Pilling*, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

This section is not unconstitutional as authorizing imprisonment for debt: *State v. Pilling*, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

In a prosecution for issuing a check upon a bank without funds therein or credit to meet it, with intent to defraud, under this section, it is error to instruct that the law would presume intent to defraud from the

issuing of a check knowing that the accused had no funds or credit to meet its payment, since it was at least only a rebuttable presumption, and the most that the court could do would be to leave it to the jury to infer the fraud, the burden of proof of which was upon the state: *State v. Pilling*, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

Such an instruction would not be cured by other general instructions disassociated therefrom: *State v. Pilling*, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

As to the imputation of false pretense to the giving of a worthless check, see notes in 8 Ann. Cas. 1069 and 14 Ann. Cas. 510.

§ 2851.

Under this section and section 2857, providing that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," the common-law and statutory crimes are substantially the same, and an information good at common law is good under the statute: *State v. Eaid*, 55 Wash. 302, 33 L. R. A., N. S., 946, 104 Pac. 275.

As to the general requisites of indictments for perjury, see note in 124 Am. St. Rep. 655.

§ 2857.

See notes to § 2851.

§ 2901.

Under the statutory offense of lewdness, it is not necessary that the acts be open and notorious or that the parties should hold themselves out as husband and wife: *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

In a prosecution for lewdness, the general reputation of the defendant's paramour is relevant and material: *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

§ 2924.

See note to § 2931.

A complaint or information for gambling under this section is insufficient to support a conviction where it fails to allege that the game was played "for money, checks, credits, or any other representative of value": *State v. Burns*, 54 Wash. 113, 102 Pac. 886.

As to who is "a common gambler," see note in Ann. Cas. 1913A, 773.

Playing at a game of poker, without having any interest in the place of conducting the game, warrants a conviction under this section, providing that each person who "shall deal, (play), or carry on . . . conduct . . ." etc., shall be guilty etc., the word "play" being part of the original law as enacted in 1881: *State v. Smith*, 58 Wash. 235, 108 Pac. 618.

Where an information charged but one offense, the misdemeanor of playing, opening or conducting the game of poker as defined by this section, a verdict of "guilty of conducting a game of poker" is sufficient, although by section 2172 the form of "guilty" or "not guilty" is contemplated: *State v. Smith*, 58 Wash. 235, 108 Pac. 618.

Upon an information charging only the misdemeanor of playing or conducting a game of poker, defined by this section, in which the court erroneously assumed that it charged the felony of keeping a gambling place as "owners, proprietors," etc., and so charged the jury, submitting three forms of verdict, a verdict in the form instructed for the misdemeanor, showing that the jury clearly intended to find the defendants guilty under this section, is sufficient to sustain a conviction of the misdemeanor, although technically defective: *State v. Smith*, 58 Wash. 235, 108 Pac. 618.

As to gaming devices, poker-tables, see note in 121 Am. St. Rep. 701.

Money loaned to a husband for the express purpose of gambling in futures in a manner prohibited by law cannot be recovered either from the husband or the community, and is therefore not a community debt: *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387.

As to loans for gambling purposes, see note in 1 Am. St. Rep. 302.

§ 2925.

An ordinance providing a punishment for leasing a gambling house by fine not exceeding three hundred dollars, or imprisonment not exceeding three months, is within the powers of a city of the third class, notwithstanding this section, on the same subject, authorizing a fine for substantially the same act in a sum not exceeding one hundred dollars, in view of section 7685, authorizing the city to pass ordinances not in conflict with the laws of the state and to impose fines and penalties for the violation of ordinances not exceeding three hundred dollars, or three months' imprisonment: *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

§ 2931.

The statute making it a felony for owners, proprietors, employees, etc., to conduct gambling games in a gambling resort "in any manner whatsoever" does not amplify the intent of the law (which was aimed at keepers of resorts) so as to include those who play at the game: *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817.

This section, making it a felony to keep a gambling resort, does not repeal section 2924, making gambling for gain a misdemeanor: *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817.

The felony of conducting or opening certain games of chance, at a place "where persons resort for the purpose of gambling,"

under this section, is not a "continuing" offense, and an information charging the crime as committed on different days between specified dates is not specific and certain as to the offense charged, and is demurrable in that it charges more than one offense: *State v. Hoffman*, 56 Wash. 622, 106 Pac. 139.

A complaint or information for gambling, under this section, is insufficient to support a conviction, where it fails to allege the commission of the crime in a place "where persons resort for the purpose of playing," etc., the statute clearly being intended to prohibit the maintaining of gambling resorts: *State v. Burns*, 54 Wash. 113, 102 Pac. 886.

An information charging that the defendants did conduct and carry on a gambling game with cards in a building where persons resort for that purpose is insufficient to charge a felony under this section, the statute being aimed at the keeping of gambling resorts: *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817.

As to the applicability of statutes against gaming, etc., to gambling in social club, see note in *Ann. Cas.* 1912A, 995.

§ 2960.

The general definition of "nuisance" is comprehensive enough to include almost all wrongs interfering in any way with personal rights of every kind: *Thornton v. Dow*, 60 Wash. 622, 32 L. R. A., N. S., 968, 111 Pac. 899.

As to what is a private nuisance, see note in 118 Am. St. Rep. 869.

§ 2962.

See notes to § 6263.

§ 2963.

This section prohibiting the sale of "intoxicating or spirituous" liquors to minors, does not mean "intoxicating spirituous" liquors, and includes beer as an intoxicating though not a spirituous liquor: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

As to constitutionality of statute declaring beverage intoxicating irrespective of its actual character, see note in 8 Ann. Cas. 52.

As to beer, ale, and other fermented liquors as intoxicants, see note in 20 L. R. A. 647.

A sale of liquor to minors is made "knowingly," within this section, if the barkeeper making the sale knew, or by reasonable diligence should have known, that the purchaser was a minor: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

As to ignorance of minority as affecting prosecution for furnishing liquor to minor, see note in 18 Ann. Cas. 437. See, also, note in 25 L. R. A., N. S., 669.

A sale of intoxicating liquors to one minor will warrant a conviction on an information for a sale to two or more: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

The burden of proving parental consent as a justification for the sale of liquor to a minor "without the written permission" of the parents, in violation of this section, is upon the defendant: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

The evidence is sufficient to support a conviction for selling liquor to a minor, although the minor and bartender testified there was no sale, where the state's witness testified that the sale was made in his presence and he knew that it was beer from its appearance and smell, the credibility of the witnesses and weight of the evidence being for the jury: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

In a prosecution for selling liquor to a minor without the "written permission of his parent," evidence by the father that he had not consented is sufficient to make a prima facie case, without evidence as to his mother's consent: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

As to liability for sale of liquor to minor purchasing for another, see note in 6 Ann. Cas. 867.

Upon a complaint for the sale of liquor to four minors, where the state elected to proceed upon the sale to one only, an instruction authorizing a conviction upon the sale to any one of them is error, but is without prejudice where immediately followed by an instruction confining the jury to the sale to the one as to whom the election was made, and the trial proceeded, and there was no evidence of any other sale: *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

§ 2966.

Repealed. See L. '09, p. 538, § 2.

§ 2970.

An assignment of a part of a recovery arising out of an alleged tort, in consideration of advancing money for costs, is not champertous, especially in view of this section, defining barratry as willfully maintaining suits in which a party has no interest: *Weed v. Foster*, 58 Wash. 675, 109 Pac. 123.

As to the abrogation of the ancient doctrine of champerty, see note in 119 Am. St. Rep. 1035. See, also, note in 4 L. R. A. 113.

In an action upon a guaranty of an assignment, the defense that the assignment was champertous is not available, since a champertous contract can be relied upon as a defense only in an action wherein it is sought to be enforced: *Weed v. Foster*, 58 Wash. 675, 109 Pac. 123.

This section is a reasonable restriction upon the right to practice law, which is a

privilege and not a natural right, and is not, therefore, in derogation of the fourteenth amendment guaranteeing the liberty of the citizen to engage in lawful occupations: *State ex rel. Mackintosh v. Rossman*, 53 Wash. 1, 17 Ann. Cas. 625, 21 L. R. A., N. S., 821, 101 Pac. 357.

As to grounds for disbarment of an attorney, see note in 45 Am. St. Rep. 71.

§ 2977.

The evidence is sufficient to show that defendant opened a telegram making plaintiff a cash offer for land, where it appears that it was delivered to defendant upon his offering to deliver it to the plaintiff, that he did not deliver it, but on the next day defendant closed a trade with the plaintiff for the land, which trade he had just previously refused to make, and after the trade attempted to dispose of the land to the party who had made the offer

in the telegram: *Deighton v. Hover*, 58 Wash. 12, 137 Am. St. Rep. 1035, 21 Ann. Cas. 860, 107 Pac. 853.

Under this section, giving treble damages for all loss and damages sustained by the wrongful opening of a telegram, where defendant, by wrongfully opening a telegram making plaintiff a cash offer for land, induced plaintiff to trade the land to the defendant for less than was offered, the measure of damages is the difference between the value of the land given and the value of that received, irrespective of the tentative offer, where it was probable plaintiff could have sold for its full value: *Deighton v. Hover*, 58 Wash. 12, 137 Am. St. Rep. 1035, 21 Ann. Cas. 860, 107 Pac. 853.

§ 2986.

See notes to § 2794.

GENERAL STATUTES

OF THE

STATE OF WASHINGTON

TITLE XVI.

AGRICULTURE.

CHAPTER A.

DEPARTMENT OF AGRICULTURE.

§ 3000-1. Creation of Department.

There shall be a department of the state government known as the Department of Agriculture, which shall be charged with the administration of the laws relating to agriculture, agricultural resources and products, horticulture, livestock, foods, drugs and oils, and such other subjects as the legislature may provide. [L. '13, p. 196, § 1.]

§ 3000-2. Commissioner of Agriculture.

The office of commissioner of agriculture is hereby created. The governor shall appoint the commissioner of agriculture, and such commissioner shall hold office at the pleasure of the governor and until his successor is appointed and qualified. The commissioner shall be *ex officio* a member of the state board of health. [L. '13, p. 196, § 2.]

§ 3000-3. Bond—Salary.

Before entering upon the duties of his office the commissioner of agriculture shall take and subscribe the oath of office required of state officers, and shall give a surety company bond in the sum of five thousand dollars, conditioned for the faithful performance of his duties, the cost of said bond to be paid by the state. The commissioner shall receive an annual salary of four thousand dollars, payable in the same manner as the salaries of other state officers, and shall be allowed such expenses as may be actually and necessarily incurred in the performance of his duties. He shall maintain his office at the state capitol. [L. '13, p. 196, § 3.]

§ 3000-4. Advisory Board.

An agricultural advisory board is hereby created, which shall consist of the governor, the commissioner of agriculture, the director of the Washington agricultural experiment station of the State College of Washington, and two other members who shall be appointed by the governor and serve at his pleasure. The governor shall be *ex-officio* chairman of the board, and the commissioner of agriculture shall be *ex-officio* secretary. The members of the board shall serve without compensation, but shall be allowed their

actual and necessary expenses incurred in the performance of their duties. It shall be the duty of the agricultural advisory board to meet at the call of the governor, and it shall advise the commissioner of agriculture in such matters as pertain to the administration of the department. [L. '13, p. 197, § 4.]

§ 3000-5. Four Divisions.

For the purpose of administering the affairs of the department of agriculture it shall be organized into four divisions, to be known respectively as the division of dairy and livestock, the division of horticulture, the division of agriculture and the division of foods, feeds, fertilizers, drugs and oils. [L. '13, p. 197, § 5.]

§ 3000-6. Powers of Commissioner.

The commissioner shall have power and it shall be his duty:

(1) To exercise all the powers and perform all the duties now vested in and required to be performed by the state veterinarian.

(2) To exercise all the powers and perform all the duties now vested in and required to be performed by the state dairy and food commissioner.

(3) To exercise all the powers and perform all the duties now vested in and required to be performed by the state commissioner of horticulture and the district horticultural inspectors appointed by such commissioner.

(4) To exercise all the powers and perform all the duties now vested in and required to be performed by the state oil inspector.

(5) To exercise all the powers and perform all the duties now vested in and required to be performed by the state fair commission.

(6) To exercise all the powers and perform all the duties now vested in and required to be performed by the Southwest Washington Fair Commission.

(7) To exercise all the powers and perform all the duties now vested in and required to be performed by the state commissioner of labor so far as they concern the inspection and supervision of bakeries and bakeshops.

(8) To exercise all the powers and perform all the duties now vested in and required to be performed by the department of animal husbandry in the State College of Washington in respect to the registry and licensing of stallions and jacks.

(9) To exercise all the powers and perform all the duties now vested in and required to be performed by the director of the Washington agricultural experiment station in respect to concentrated commercial feeding stuffs.

(10) To exercise all the powers and perform all the duties now vested in and required to be performed by the director and chemist at the Washington agricultural experiment station, or either of them, in respect to commercial fertilizers used for manurial purposes.

(11) To publish and distribute bulletins and reports embodying information upon the subjects of agriculture, horticulture, livestock, dairying, foods and drugs and other matters pertaining to his department.

(12) To cause surveys and classifications to be made of such lands as shall come within any project of the state for reclamation, drainage or utilization of logged-off lands, or other similar enterprises.

(13) To make a report to the governor, at least thirty days before the commencement of each biennial session of the legislature, containing an account of all matters pertaining to his department and its administration, which shall be printed and published in the manner provided by law. [L. '13, p. 197, § 6.]

§ 3000-7. Assistants.

The commissioner of agriculture may appoint such assistants, inspectors, experts and other employees as may be necessary for the administration of the affairs of the department, at such rates of compensation as the advisory board may determine upon. The commissioner may require any assistant, inspector or other employee to give a surety bond to the state of Washington in such sum and with such conditions as he shall determine, the premium on such bond to be paid by the state. He shall before appointing any assistant or inspector require him to take an examination on such subject or subjects as shall pertain to the performance of his duties; but he may appoint without examination any person who is a graduate of the State College of Washington in such subject, or who is a graduate of any recognized school maintaining a course of instruction in such subject equivalent to the course prescribed at the State College of Washington therein. [L. '13, p. 199, § 7.]

§ 3000-8. Assignment of Assistants.

The commissioner of agriculture shall designate the division of the department to which any assistant or inspector appointed by him shall be assigned. An assistant or inspector may be assigned to more than one division. Any assistant or inspector assigned to any division shall, subject to the supervisory control of the commissioner, possess and exercise the same powers and perform the same duties as the commissioner of agriculture, with respect to all matters within such division. [L. '13, p. 199, § 8.]

§ 3000-9. Appeals to Commission.

Any person aggrieved by any finding, order or act of any assistant or inspector in the department of agriculture may appeal from such finding, order or act to the commissioner, who shall forthwith proceed to hear and determine such appeal, render his decision therein, and report the same to the appellant and to such assistant or inspector. Such decision shall specify the further proceedings to be had in the premises. Such decision shall not, however, preclude an appeal or proper action in the courts in cases where such rights would otherwise exist. [L. '13, p. 199, § 9.]

§ 3000-10. Officer not Interested in Contracts.

It shall be unlawful for the commissioner, or any assistant, inspector, or other employee, to be interested, directly or indirectly, either as owner, agent or solicitor, in the sale or purchase of any article, commodity or product used or produced by any person with whom he may come in contact in his official capacity. Any person violating the provisions of this section shall be guilty of a gross misdemeanor. [L. '13, p. 200, § 10.]

§ 3000-11. Chemists of Department.

The chemist of the Washington agricultural experiment station and the dean of the department of chemistry of the University of Washington shall be the chemists of the department of agriculture, and it shall be the duty of such chemists or either of them, without compensation other than their expenses necessarily incurred in the performance of such work, to analyze any and all substances that the commissioner of agriculture, his deputies or inspectors may send to them, and report to the commissioner, without unnecessary delay, the result of any analysis so made, and when called upon by said commissioner any such chemist shall assist, as an expert or otherwise, in any prosecution for the violation of any law pertaining to the department. [L. '13, p. 200, § 11.]

§ 3000-12. Fees and Expenses.

All moneys collected as fees or otherwise by the department of agriculture shall be paid into the state general fund. All expenses incurred under the provisions of this act shall be paid out of the general fund, and shall be audited by the state auditor upon proper vouchers approved by the commissioner of agriculture; and the state auditor shall draw warrants upon the state treasurer for the amounts thus audited, in the manner provided by law. [L. '13, p. 200, § 12.]

§ 3000-13. Horticultural Fund Reverts to General Fund.

Upon the taking effect of this act all moneys in the state horticultural fund shall be transferred to the state general fund, and all moneys thereafter collected which shall be payable into the state horticultural fund shall be paid into the state general fund. [L. '13, p. 200, § 13.]

CHAPTER B.

BUREAU OF FARM DEVELOPMENT.

§ 3000-15. Bureau of Farm Development—Expenses.

There is hereby created the bureau of farm development of the state of Washington, which shall consist of the director of the experiment station of the State College of Washington, who shall be director thereof, and of the boards of county commissioners of all counties of the state of Washington desiring to participate therein. The officers and members of such bureau of farm development shall serve without salary, and the expenses incident to the operation of said bureau of farm development shall be borne by the county for which the same shall be incurred. [L. '13, p. 48, § 1.]

§ 3000-16. Agricultural Expert—Salary.

The board of county commissioners of any county may by request in writing apply to the director of the bureau of farm development who shall appoint and assign to such county a competent agricultural expert: Provided, That the board of county commissioners applying therefor shall always have the right to reject any appointment, to determine the period during which such expert shall be employed, and to fix the compensation of such expert, not exceeding two hundred dollars (\$200.00) per month, and in their discretion necessary traveling expenses. [L. '13, p. 48, § 2.]

§ 3000-17. Term of Office—Expenses.

Such expert shall during the period of his employment reside and maintain an office within the county for which he is appointed, and, with the consent of the board of county commissioners of such county he may employ such assistance as may be required and purchase such books, equipment, apparatus, and material as may be required, which such books, equipment, apparatus, and material shall become and remain the property of the county: Provided, That the expenses which may be incurred by the authority of this section shall never exceed the sum of twelve hundred dollars during any calendar year. [L. '13, p. 48, § 3.]

§ 3000-18. Duties of Expert.

Such experts shall give individual instruction and conduct experimental work with the object of improving the agricultural methods and conditions of their counties, and shall perform such other duties as may be required, subject to the general supervision and control of the director of the bureau of farm development: Provided, That the boards of county commissioners shall always have the right to co-operate with the department of agriculture of the United States in the appointment, maintenance, and work of such experts; and in such event, the director of the bureau of farm development shall appoint for the county exercising the privilege herein granted such person as said department of agriculture may recommend, and said expert shall then be subject to the general supervision and control of said department of agriculture, and said department of agriculture shall defray such portion as may be agreed upon of the salary, office expenses, and other expenses incurred by such expert. [L. '13, p. 49, § 4.]

§ 3000-19. Tax Levy for Bureau Work.

For the purpose of fully and effectively carrying out the object and provisions of this act, the board of county commissioners participating herein of the several counties of the state of Washington are hereby empowered to levy, appropriate, and set aside such sum of money as may be necessary, not exceeding three thousand and six hundred dollars for any calendar year; and in the event of a failure from any cause to levy and appropriate such fund, and until the next annual tax levy, said boards of county commissioners are empowered to set aside such fund from the county current expense fund. [L. '13, p. 49, § 5.]

§§ 3003, 3004.

Repealed. See L. '13, p. 201, § 14.

§§ 3012-3021.

Repealed. See L. '13, p. 128, § 6.

§ 3012.

See notes to § 3024.

CHAPTER II.

SOUTHWEST WASHINGTON FAIR.

§ 3012-1. Transfer to Lewis County.

The Southwest Washington Fair Association, as organized and existing at the time of the taking effect of this act, shall turn over and deliver to the county of Lewis all the lands, buildings, books, records, and other property belonging to the state as a member of the Southwest Washington Fair Association. [L. '13, p. 126, § 1.]

§ 3012-2. Property—Control.

The property herein granted, including the buildings and structures thereon as now constructed or as may be built or constructed from time to time, or any alterations or additions thereto, shall be under the jurisdiction and control of the board of county commissioners of Lewis county at all times except during the month or months in which the Southwest Washington Fair Commission shall desire to use such property for the purpose of holding a fair or exposition in conformity with the objects of such association as defined in section 2 of chapter 237, Laws of 1909,* and for the two months immediately preceding the month or months fixed for the holding of such fair or exhibition, and such other or further time or times as the board of county commissioners of Lewis county may authorize the Southwest Washington Fair Commission to use the same. [L. '13, p. 126, § 2.]

*N. B.—See 2 Rem. & Bal. Code, § 3013.

§ 3012-3. Management—Fairs—Commissioners—Powers.

For the purpose of holding fairs or expositions in conformity with the provisions named in section 3013, a new commission is hereby created, which, however, shall be known as the Southwest Washington Fair Commission, to have all the power and authority granted to the Southwest Washington Fair Association in the above-named act subject to the modifications of its powers and duties as provided herein. Such commission shall be composed of, as ex-officio members thereof, by virtue of their office, the members of the board of county commissioners of Lewis county and the chairman of the board of county commissioners of each of the other counties composing the Southwest Washington Fair Association, or so many of said counties as evidenced by formal resolution of the respective boards of county commissioners thereof, as shall desire to participate in such fair or exhibition or other event held on such grounds. [L. '13, p. 126, § 3.]

§ 3012-4. Officers of Commission—Funds.

Within thirty days after the taking effect of this act, the board of county commissioners in the county of Lewis shall notify the board of county commissioners of each of the other counties comprising the Southwest Washington Fair Association of the time and place of the first meeting of the Southwest Washington Fair Commission, as herein defined, which meeting shall be called for a time not less than thirty days from the giving of such notice. The first meeting of such commission shall be held at the courthouse

of Lewis county, at which time and place the commission shall proceed to organize. The chairman of the board of county commissioners of Lewis county shall be chairman of the commission. The commission shall proceed to elect a president and secretary and define their duties and fix their compensation, and provide for the keeping of the records of the commission. The commission shall also select some person to act as treasurer, and for this purpose may designate the treasurer of Lewis county as treasurer of the commission. The funds of the commission, however, shall be kept separate and apart from the funds of Lewis county, but shall be deposited in the regular depositories of Lewis county and all interest earned thereby be added and become a part of such fund. The treasurer shall give such bond as the commission may determine for the safekeeping of such funds. The commission shall also provide for an auditing committee of three members to audit all accounts against the commission, and no funds shall be paid out of the treasury of the commission except upon warrants signed by the chairman of the commission, attested by the secretary, after the approval of the claim therefor by such auditing committee. [L. '13, p. 127, § 4.]

§ 3012-5. Support of Fair.

Each county belonging to the Southwest Washington Fair Association may make donations or appropriations to the funds of the commission, and may take any other part in the commission as may be deemed advisable by the board of county commissioners of such county, and may exhibit the products or resources of such county in the manner deemed to the best interests of such county. [L. '13, p. 128, § 5.]

§§ 3015, 3016.

Repealed. See L. '13, p. 201, § 14.

§ 3022.

Repealed. See L. '13, p. 201, § 14.

§ 3024.

Under this and the following sections a county has no power to appropriate money in aid of the Southwest Washington Fair Association, a state institution (created by virtue of section 3012 et seq.) managed by

commissioners appointed by the governor and empowered to acquire land for holding fairs under a state appropriation therefor, since the act authorizing county aid to fairs is to be strictly construed, and requires the management and title to be vested in the county, without any indication of legislative intent to authorize county appropriations in aid of a state institution, especially as the act in which such authority is sought antedates the act creating the state institution: *Moses v. Summersett*, 58 Wash. 403, 108 Pac. 943.

CHAPTER V.

NOXIOUS WEEDS.

§ 3033.

This act, as amended by Laws of 1911, page 327, providing for a charge against lands for cutting down noxious weeds, upon the owner's default, is not obnoxious to the due process clause of the federal and state constitutions by reason of want of notice and opportunity to contest the claim, in view of the provisions requiring a notice to the owner, agent or occupant, which, in the

case of nonresidents, may be posted upon the land, and requiring a verified statement of the expense to be sent to the owner and presented to the county commissioners to be allowed and added to the tax lien against him, the owner being given thirty days to pay up or file objections, since the notice is sufficient and the commissioners are made the tribunal to pass upon all questions of fact affecting the claim: *Wedemeyer v. Crouch*, 68 Wash. 14, 122 Pac. 361.

§ 3038. Thistles must be Out Down.

It shall be the duty of every owner, lessee, occupant or agent thereof, or of any person having the care and charge of any land or lands, improved or unimproved, inclosed or uninclosed, in this state, to cut down or otherwise destroy all noxious weeds growing thereon or on any road, street or highway to the center thereof bordering on any such land or lands, so often in each and every year as shall be certain to prevent them from going to seed: Provided, That this shall not apply to timber lands, brush lands or logged-off lands. [L. '11, p. 327, § 1; L. '13, p. 305, § 1.]

See note to § 3033.

§ 3039. Penalty for Permitting Growth of Thistles.

If any owner, lessee, occupant, agent or person having the care or charge of any such land or lands shall knowingly suffer any noxious weeds to grow thereon, and shall permit the seeds of any such noxious weeds to ripen, he shall be guilty of a misdemeanor: Provided, That this section shall not apply to what is commonly known as "bull thistle," on lands known as "logged-off, or cut over lands" outside of cities and towns. [L. '11, p. 327, § 1; L. '13, p. 306, § 2.]

§ 3040. Notice to Remove.

It shall be the duty of each road supervisor in each road district in this state to see that the provisions of this act are carried out within his district, and he shall file with the prosecuting attorney of the county lists of lands within his district upon which any noxious weeds may be growing, giving a description of the kinds and character of weeds growing thereon, together with a statement of the approximate time within which said weeds must be destroyed in order to prevent their going to seed.

Upon receipt of such lists it shall be the duty of the prosecuting attorney to demand from the county auditor and county treasurer lists giving the names of any and all owners, lessees, mortgagees and occupants of the lands to be affected, together with their places of residence or address so far as may be shown by the public records of said county or of said offices or be known to said officers, and it shall be the duty of said auditor and said treasurer to furnish such information.

It shall be the duty of such prosecuting attorney to issue and subscribe notices directed to each and all of said owners, lessees, mortgagees and occupants which said notices shall require the persons therein named to cause said noxious weeds to be cut down and destroyed within ten days from the time of serving, mailing or posting said notices as in this act provided and said notices shall be served or given in the following manner: On all residents of the county within which the lands affected are situated, by serving the same personally in the same manner as provided by law for the service of a summons in the superior court; on all nonresidents of the county whose address or place of residence is shown by the records or is known, by mailing a copy of said notice by registered mail; and in all cases where the address or place of residence is unknown, by posting a copy of said notice in a conspicuous place on the land in full view of the traveling public. In case of a return of not found as to any of such persons whose address

or place of residence is unknown, posting of the notices as herein provided shall be a sufficient service thereof.

It shall be the duty of the county auditor to keep a record book in which he shall cause to be entered the names, addresses or places of residence of any person, firm or corporation who may notify such officer of their desire to be registered therein and of their desire to be notified by registered mail at the place of residence or address given of any proceedings had under this act affecting any lands of which they may be the owners, lessees, mortgagees or occupants; and the sending by registered mail of any notice or statement provided for under this act to said person or persons, firm or corporation at the place of residence or address given shall constitute a sufficient service under this act.

All returns of not found shall be made by the sheriff of the county or his deputies, and all returns not found, proofs of service, mailing or posting shall be filed forthwith in the office of the auditor of the county where the land is situated.

Where noxious weeds are growing on the right of way of any railroad within any road district, said notice may be served on the foreman in charge of that portion of the right of way passing through such district, or such notice may be served on such railway corporation by delivering a copy thereof to any agent of said corporation within the state personally.

In case the persons named in said notice fail, refuse or neglect to cut down and destroy said noxious weeds within ten days after the date of serving, mailing or posting said notices as in this act provided, then such road supervisor shall take the necessary assistance and enter upon said lands and cause said noxious weeds to be destroyed with as little damage to growing crops as may be.

If any such road supervisor shall fail or refuse to perform or cause to be performed any of the duties or services enumerated in this act, he shall be deemed guilty of a misdemeanor. [L. '11, p. 327, § 1; L. '13, p. 306, § 3.]

§ 3041. Expense of Removal—Payment.

Each road supervisor shall keep an accurate account of the expenses incurred by him in carrying out the provisions of this act with respect to each parcel of land entered upon therefor and the prosecuting attorney of the county shall cause to be served, mailed or posted in the same manner as is provided in this act for giving notice to destroy noxious weeds a statement of such expense, including description of the land verified by oath of the road supervisor, to the owner, lessee, mortgagee, occupant or agent or person having charge of said land, and coupled with such statement shall be a notice subscribed by said prosecuting attorney and naming a time and place when and where said matter will be brought before the board of county commissioners for hearing and determination, said statement and notice to be served, mailed or posted, as the case may be, at least ten days before the time for such hearing. At the time of such hearing or at such other time to which the same may be continued or adjourned by said county commissioners, the board shall proceed to examine said claim, hear testimony if offered and shall make and enter an order upon the minutes of said meeting that said claim, or so much thereof as shall be deemed just and

proper, shall be paid out of the road and bridge fund of said county. Costs of serving, mailing and posting shall be added to any amount so found to be due and shall be collected at the same time and in the same manner as other charges under this act. [L. '11, p. 327, § 1; L. '13, p. 308, § 4.]

§ 3042. Collection.

At the time when the board of county commissioners pays the claim for cutting said weeds as in section 3041 provided it shall make an order that the amount paid be a tax on the land on which said work was done after the expiration of ten days from the date of the entry of said order, unless an appeal be taken as in this act provided, in which event the same shall become a tax at the time the amount to be paid shall be determined by the court, and the county treasurer shall enter the same on the tax-rolls against the land for the current year and collect it together with penalty and interest as other taxes are collected, and when so collected, the same shall be credited to the county road and bridge fund: Provided, That a failure to serve, mail or post any of the notices or statements provided for in this act shall not invalidate said tax but in case of such failure, the lien of such tax shall be subordinate and inferior to the interests of any mortgagee to whom notice has not been given in accordance with the provisions of this act. [L. '13, p. 309, § 5.]

§ 3042-1. Appeals to Superior Court.

Any interested party may appeal from the decision and order of said county commissioners to the superior court of said county by serving written notice of appeal on the county auditor and by filing in the office of the clerk of the superior court a copy of said notice of appeal with proof of service attached, together with a good and sufficient cost bond in the sum of \$200.00, said cost bond to run to the county and in all other respects to comply with the laws relating to cost bonds required of nonresident plaintiffs in the superior court. Said notice of appeal must be served and filed within ten days from the date of the decision and order of the county commissioners and said cost bond must be filed within five days from the filing of said notice of appeal.

Whenever notice of appeal and cost bond shall have been filed with the clerk of the superior court, that officer shall notify the county auditor thereof forthwith and the auditor shall certify immediately to said court all notices and records in said matter, together with proofs of service, and a true copy of the order and decision pertaining thereto made by the county commissioners. If no appeal be perfected within ten days from the decision and order of the county commissioners the same shall be deemed confirmed and the auditor shall certify the amount of such charges to the county treasurer who shall enter the same on the tax-rolls against the land; when an appeal is perfected the matter shall be heard in the superior court de novo and the court's decision shall be conclusive on all persons properly served under this act: Provided, That an appeal may be taken to the supreme court from the order or decision of the superior court in the manner provided by existing laws, and upon the conclusion of such appeals the amount of charges and costs adjudged to be paid shall be certified by the clerk of the superior court to the county treasurer and said treasurer shall

proceed to enter the same on his rolls against the land affected. [L. '13, p. 309, § 6.]

§ 3042-2. Exemptions—Petition—Notice—Hearing.

The board of county commissioners of any county in this state shall have the power to designate by an order, to be made and entered in the manner hereinafter, certain territory which may be excepted from the provisions of this act. Whenever a petition signed by ten or more residents of any road district shall be filed with the county auditor praying that certain contiguous territory therein bounded and described and lying wholly within said road district be excepted from the provisions of this act for the reasons set forth in said petition, said auditor shall cause a notice to be published for two successive weeks in the newspaper doing the county printing, which said notice shall set forth the boundaries of the tracts to be excepted and shall name the time and place for a hearing by the board of county commissioners on said petition, the first publication of said notice to be at least fifteen days prior to the time of said hearing: Provided, That the person or persons filing said petition shall pay in advance to the county auditor the costs of the publication of such notice.

At the time of said hearing the board of county commissioners shall hear all persons interested in the matter presented by said petition and, by an order made and entered in the record of their proceedings, shall determine whether said territory shall be excepted from the provisions of this act, giving the reasons for their decision, and in case the prayer of such petition is granted such order shall describe the boundaries of the territory within said road district to which such exception shall be applied: Provided, That any order thus made excepting any territory from the provisions of this act shall not be in force for a longer period than twelve months from the date of the entry of such order, unless a new petition be filed, new notice given and another hearing be had as in this act provided. [L. '13, p. 310, § 7.]

CHAPTER VIII.

HORTICULTURE.

§§ 3069-3074.

Repealed. See L. '13, p. 201, § 14.

§§ 3076-3079.

Repealed. See L. '13, p. 201, § 14.

§ 3080. Duties of District Inspectors.

District horticultural inspectors shall have power and it shall be their duty:

(a) To enforce the provisions of all laws relating to horticulture, within their respective districts;

(b) To arrange for and hold institutes and meetings of horticulturists for the discussion of horticultural subjects and the dissemination of information as to horticultural questions, and for the demonstration of methods of preventing the diseases of or pests injurious to horticultural plants and fruits, and of curing and removing the same;

(c) To inspect orchards, nurseries, nursery stock, fruit, horticultural products, supplies, packing-houses, warehouses and other places where fruit

is packed, stored or shipped, also vines, ornamental shrubs and bushes, as well as other trees and property, for the purpose of ascertaining whether the same is infected with any disease or pests injurious to fruit trees or fruit, and of taking steps to disinfect the same and prevent the spread thereof; and, for that purpose, shall have free access to orchards, nurseries, packing-houses, storage-houses and any other place at all times;

(d) To require the disinfection of all trees, ornamental shrubbery; orchards, nurseries or nursery stock, fruit-packing houses or other places infected with any pests, fungi or disease injurious to the horticultural industry of the state of Washington;

(e) Inspect and examine orchards, fruit, nursery stock, and other horticultural plants and products at the request of the owner thereof for the existence of any disease or pest thereof, and report to the applicant the result of such investigation and prescribe proper remedies therefor;

(f) Prevent the shipping and sale of infected fruit, except for canning, preserving or jelling or the making of cider or manufacture of other by-products within the state of Washington, and under such rules and regulations as may be established by the state commissioner of horticulture, and the delivery, sale, planting and shipping of infected nursery stock, trees, and other horticultural products and supplies, by notifying the owner thereof or the person having the same in charge, and requiring the proper disinfection of the same;

(g) To disinfect, or cause to be disinfected, orchards, nursery stock, trees, fruit and other horticultural products and supplies, in case the owner or person having the same in charge, shall not do so after notice; and, in case of trees, fruits, etc., which cannot be properly disinfected, to destroy the same, or cause to be destroyed;

(h) To sort and repack, or cause to be sorted and repacked, infected fruit, if the owner thereof, or the person having same in charge shall not do so after notice;

(i) Prevent the introduction and spread of diseases of or pests injurious to fruit trees and horticultural plants, fruit and other products, and to prescribe and specify the means and methods to be employed for the disinfection of trees, fruit and horticultural products; and

(j) To issue certificates of inspection to nurserymen and tree dealers on stock inspected. [L. '11, p. 513, § 2.]

§§ 3081, 3082.

Repealed. See L. '13, p. 201, § 14.

§§ 3111, 3112.

Repealed. See L. '13, p. 201, § 14.

§ 3114.

Repealed. See L. '13, p. 201, § 14.

§ 3118.

Repealed. See L. '13, p. 201, § 14.

§ 3121.

Repealed. See L. '13, p. 201, § 14.

§§ 3128—3130.

Repealed. See L. '13, p. 201, § 14.

§ 3129-1. Application of Act.

Nothing in this act shall be construed as affecting any taxes heretofore imposed under existing laws or as relieving any county or taxpayer from

the liability for such tax; nor shall this act be construed as prohibiting any county from making expenditures for the salaries and expenses of an additional assistant district inspector for such county, such assistants to be under the direction and control of the state horticultural commissioner in all respects as other assistant district inspectors, and each county of the state is hereby authorized to make expenditures for the purposes herein specified. [L. '11, p. 515, § 6.]

"This act," refers to § 3880.

§ 3131.

Repealed. See L. '11, p. 515, § 5.

§§ 3132, 3133.

Repealed. See L. '13, p. 201, § 14.

CHAPTER IX.

LAND DEVELOPMENT.

§ 3139-1. Agricultural Districts.

For the purpose of improving the agricultural lands of this state and encouraging their most productive use, agricultural development districts are hereby authorized to be established in the various counties in this state, as hereinafter provided. [L. '13, p. 492, § 1.]

§ 3139-2. County Districts—Election.

At any general election, or at any special election which may be called for that purpose, the board of county commissioners of any county in this state may, and on petition of ten per cent of the qualified electors of such county based on the total vote cast in the last general county election shall, by resolution submit to the voters of such county the proposition of creating an agricultural development district, which shall be coextensive with the limits of such county as now or hereafter established, except as provided in section 3139-7. [L. '13, p. 492, § 2.]

§ 3139-3. Petition.

Such petition shall be filed with the county auditor, who shall within fifteen (15) days examine the signatures thereto and certify to the sufficiency or insufficiency thereof, and for such purpose the county auditor shall have access to all registration books in the possession of the officers of any incorporated city or town in such proposed agricultural development district. [L. '13, p. 492, § 3.]

§ 3139-4. Signatures—Amendment.

If the signatures to such petition are found to be insufficient the petition shall be returned to the persons filing the same, who may amend or add names thereto for ten days, when the same shall be returned to the county auditor, who shall have an additional fifteen (15) days to examine the same and attach his certificate thereto. No person having signed such petition shall be allowed to withdraw his name therefrom after the filing of the same with the county auditor. [L. '13, p. 492, § 4.]

§ 3139-5.. Election—Notice.

Whenever such petition shall be certified to as sufficient, the county auditor shall forthwith transmit the same, together with his certificate of

sufficiency attached thereto, to the board of county commissioners, who shall submit such proposition at the next general election or, if such petition so requests, the board of county commissioners shall, at their first meeting after the date of such certificate, by resolution call a special election to be held not less than thirty nor more than sixty days from the date of such certificate. Such notice of election shall describe the boundaries of the district and state the purpose for which such district is proposed to be formed. [L. '13, p. 493, § 5.]

§ 3139-6. Propositions.

In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot substantially in the following terms:

“—— Agricultural Development District of —— Yes.”

(Inserting the name of the county or number of district and county.)

“—— Agricultural Development District of —— No.”

(Inserting the name of the county or number of district and county.)

[L. '13, p. 493, § 6.]

§ 3139-7. Districts Less Than County—Hearing on Petition.

Any petition for the formation of an agricultural development district may describe a district of less area than the county in which such petition is filed, and in such event the county commissioners shall fix a date for hearing on such petition and publish a notice of such hearing for two weeks in a newspaper of general circulation in such county, after which hearing the county commissioners may increase or diminish the boundaries of such proposed agricultural development district, and thereafter the same procedure shall be followed as is prescribed in this act for the formation of the larger agricultural development district, except that the petition and election shall be confined solely to the lesser agricultural development district: And provided, That whenever two or more petitions for the formation of an agricultural development district shall be filed as herein provided, the petition describing the greater area shall supersede all others and an election shall first be held thereunder, and no lesser agricultural development district shall ever be created within the limits, in whole or in part, of any agricultural development district. [L. '13, p. 493, § 7.]

§ 3139-8. Canvass of Vote.

Within five days after such election the board of county commissioners shall canvass the returns, and if at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such district, the board of county commissioners shall so declare in its canvass of the returns of such election and such agricultural development district shall then be and become a municipal corporation of the state of Washington and the name of such agricultural development district shall be “Agricultural Development District of ——” (inserting the name on the ballot). [L. '13, p. 494, § 8.]

§ 3139-9. Expenses of Election.

All expenses of election for the formation of such agricultural development district shall be paid by the county holding such election, and such expenditure is hereby declared to be for a county purpose, and the money paid out for such purpose shall be repaid to such county by the agricultural development district, if formed. [L. '13, p. 494, § 9.]

§ 3139-10. Commissioners—Contracts.

The powers of the agricultural development district shall be exercised through an agricultural development commission consisting of three members, who shall serve without pay, save expenses incurred in the course of their duties under the provisions of this act. For the purposes of this act the said commissioners shall be entitled to the advice and service of all state, county and municipal officers and institutions, particularly engineers, agricultural chemists, directors of experiment stations, and the state department of agriculture, and all such officers and institutions are hereby authorized and directed to co-operate with said commissioners in furthering the purposes of this act. Said commissioners are hereby forbidden to become interested, directly or indirectly, in any purchase, contract or work under this act, and any such interest is hereby declared void. [L. '13, p. 494, § 10.]

§ 3139-11. Election of Commissioners—Terms.

The said commissioners shall be elected one from each of the county commissioner districts of the county in which the agricultural development district is located, when the agricultural development district is coextensive with the limits of such county. When the agricultural development district comprises only a portion of the county, three commissioner districts numbered consecutively having approximately equal population and with boundaries following ward and precinct lines, shall be described in the petition for the formation of the agricultural development district, and one commissioner shall be elected from each of the said commissioner districts. Said commissioners shall hold office for a term of three years and until their respective successors are elected and qualified, each term to commence on the second Monday in January following the election thereto. At the same election at which the proposition is submitted to the voters as to whether an agricultural development district shall be formed, three commissioners shall be elected to hold office, respectively, for the term of one, two and three years. All candidates shall be voted upon by the entire agricultural development district, and the candidate residing in commissioner district number one receiving the highest number of votes in the agricultural development district shall hold office for the term of three (3) years; and the candidate residing in commissioner district number two receiving the highest number of votes in the agricultural development district shall hold office for the term of two years, and the candidate residing in commissioner district number three receiving the highest number of votes in the agricultural development district shall hold office for the term of one year, each of said terms to date from the second Monday in January following the election, but also to include the period intervening between the election and the second Monday in January following. [L. '13, p. 495, § 11.]

§ 3139-12. Qualifications.

No person shall be eligible to hold the office of an agricultural development commissioner unless he is a qualified voter, a freeholder within such agricultural development district, and is and has been a resident for a period of three (3) years of the commissioner district from which he is elected. [L. '13, p. 496, § 12.]

§ 3139-13. Nominations by Petition.

Nominations for agricultural development commissioners at the first special election and at subsequent general elections shall be by petition of not less than one per cent of the qualified electors of the commissioner district in which the candidate is a resident, to be filed in the office of the county auditor at least twenty days prior to such election. [L. '13, p. 496, § 13.]

§ 3139-14. Vacancies—Cause of.

A vacancy in the office of agricultural development commissioner shall occur by death, resignation, removal, conviction of a felony, nonattendance at meetings of the agricultural development commission for a period of sixty days unless excused by the agricultural development commission, by any statutory disqualification, or by any permanent disability preventing the proper discharge of his duty. [L. '13, p. 496, § 14.]

§ 3139-15. Filling Vacancies—Special Election.

In the event of a vacancy in the office of agricultural development commissioner by death, resignation, or otherwise, such vacancy shall be filled at the next general election, the vacancy in the interim to be filled by appointment by a majority vote of the remaining agricultural development commissioners. In the event that such ad interim appointment shall not be made by the remaining commissioners within thirty (30) days following the occurrence of the vacancy, the appointment shall be made forthwith by the superior court of the county. If there should be at the time more than one vacancy, a special election shall be called to fill the same, by the remaining member, or, that failing, by the board of county commissioners of the county, such election to be held not more than forty days after the occurring of such vacancies. [L. '13, p. 496, § 15.]

§ 3139-16. General Election Laws Applicable.

The manner of conducting and voting at elections under this act, opening and closing of polls, keeping of poll lists, canvassing the votes, declaring the result, and certifying the returns, shall be the same as provided by the general election laws governing the election of state and county officers, except as otherwise provided in this act. [L. '13, p. 497, § 16.]

§ 3139-17. General District Election.

A general election shall be held on the first Saturday in December of each year, (except the first Saturday in December immediately following the creation of such agricultural development district), for the election of agricultural development commissioners and for the submission of propositions, and special elections shall be held at such other times and for such purposes as the agricultural development commissioners may by resolution prescribe,

subject to the limitations and pursuant to the requirements of this act. [L. '13, p. 497, § 17.]

§ 3139-18. Notices of Election—Publication.

All notices of election shall be given by publishing the same for a period of ten days in a daily newspaper of general circulation in said agricultural development district, or in at least two issues of a weekly newspaper of general circulation in said agricultural development district, such publication to be made within a period of twenty days immediately preceding such election; and by posting, for at least ten days prior to the date of election, a written or printed notice of such election in each polling place within such agricultural development district. The published notice shall give the time of holding the election, the hours the polls will remain open, the officer or officers to be elected, and a statement of the propositions to be submitted; and the posted notices shall, in addition, give the location of the polling places. [L. '13, p. 497, § 18.]

§ 3139-19. Registration Books.

Officers of the city and county having charge of the registration books of any city or precinct in an agricultural development district shall deliver the same for the use of the election officers at all agricultural development elections. In the event of such registration books being required by law to be used by any school district or other public corporation at the same time as the use thereof will be necessary to the agricultural development district, such books shall be delivered to the agricultural development commission and school district or other public corporation jointly, and the same polling places and registration books may be used jointly in such cases, and the same individuals may serve as election officers for all such joint elections, and in such cases the compensation of such election officers and other expenses shall be so divided that the agricultural development district shall bear only its proportionate share thereof. [L. '13, p. 497, § 19.]

§ 3139-20. Polling Places.

There shall be not less than one polling place in each of the various wards of any incorporated city within such agricultural development district, and one polling place within each precinct of each agricultural development district not within the limits of any incorporated city. It shall be the duty of the county commissioners in the formation of the agricultural development district, and of the agricultural development commission in all subsequent elections to designate the polling places and appoint three election officers for each place of voting at least twenty days before each election. [L. '13, p. 498, § 20.]

§ 3139-21. Opening of Polls.

The polls shall be open between such hours of the day as the commission shall designate, but in every case the polls shall be open between one o'clock P. M., and eight o'clock P. M. [L. '13, p. 498, § 21.]

§ 3139-22. Counting Votes.

Immediately after the closing of the polls the election officers shall then and there, without removing the ballot-box from the place where the bal-

lots were cast, proceed to count the votes, and as soon as such count is completed a return thereof shall be signed by such election officers and securely enveloped and sealed and delivered, together with the ballot-box containing the ballots, to the agricultural development commission, or some person delegated to receive the same on their behalf.

Within five days after the election, the agricultural development commission shall meet and proceed to canvass the returns of such election, and shall thereupon declare the result. [L. '13, p. 498, § 22.]

§ 3139-23. Who may Vote.

All electors who are, at the time of such election, duly qualified to vote within their respective precincts under the general election laws for state and county officers shall be entitled to vote at any election held in such agricultural development district. [L. '13, p. 499, § 23.]

§ 3139-24. Powers of District.

All agricultural development districts organized under the provisions of this act shall be and are hereby authorized to exercise the following rights and powers, and all other rights and powers necessary for the purposes of this act.

(a) To acquire by purchase, condemnation and purchase or otherwise all lands, property rights, leases, or easements necessary for the purposes of the agricultural development district; also water for irrigation purposes from any public watercourse, lake, stream or any other source;

(b) To exercise the right of eminent domain in the acquirement or damaging of all lands, property, property rights, leases or easements, and levying and collection of assessments upon property for the payment of all damages and compensation in carrying out the provisions for which said district shall have been created. Such right shall be exercised in the same manner and by the same procedure as is or may be provided by law for cities of the first class, except in so far as such law may be inconsistent with the provisions of this act, and that the duties devolving upon the city treasurer under such law are hereby imposed upon the county treasurer for the purposes of this act;

(c) To own and control lands, leases, and all easements in land necessary for the purposes of such agricultural development districts;

(d) To sell or lease lands and other property owned and controlled by said agricultural development district as hereinafter provided, and to execute all titles, leases and any other papers and documents in connection therewith, or incidental thereto;

(e) To build, improve or repair any roads within the agricultural development district;

(f) To raise revenue by levy of an annual tax on all taxable property within such agricultural development district, not exceeding two mills in any one year: Provided, That such levy shall be made and taxes collected in the manner now or hereafter provided by law for the levy and collection of taxes in school districts of the first class;

(g) To purchase, manufacture or otherwise acquire all materials and equipments necessary for the improvement of agricultural lands under the

provisions of this act, and to sell or lease such materials and equipments at cost to farmers and settlers, within such agricultural development district;

(h) To give such aid in the production and marketing of agricultural products, not inconsistent with law, as said commissioners may deem proper;

(i) To borrow money and issue bonds as provided by the state constitution for municipal corporations. General bonds of any such district may be issued for any period not exceeding twenty years.

(j) To create and fill such positions and offices and fix salaries and bonds thereof as may be necessary for the purposes of this act. [L. '13, p. 499, § 24.]

§ 3139-25. Officers of Commission.

The agricultural development commission shall organize by the election annually from its own members of a president and secretary, shall by resolution adopt rules governing the transaction of its business, and shall adopt an official seal. [L. '13, p. 500, § 25.]

§ 3139-26. Resolutions.

All proceedings of the agricultural development commission shall be by a resolution recorded in a book or books kept for such purpose, which shall be public records. [L. '13, p. 500, § 26.]

§ 3139-27. Claims—How Paid.

All funds of the agricultural development district shall be paid to the county treasurer, and all disbursements shall be made by such officer on warrants drawn by the county auditor upon order of or vouchers approved by the agricultural development commission. No payments of any kind under this act shall be paid except upon certificate of the agricultural development commission that the sum therein named has been justly incurred, is necessary for or is due to the person, firm or corporation therein named over and above all just credits and offsets for services performed or to be performed or material furnished or property sold to the agricultural development district for the uses of this act. [L. '13, p. 501, § 27.]

§ 3139-28. Agricultural Development Fund—Special Funds.

The county treasurer shall create a fund to be designated the "Agricultural Development Fund," into which shall be paid all money received by him in behalf of such agricultural development district, and no money shall be disbursed therefrom except upon warrants of the county auditor issued as in this act provided. The county treasurer shall also maintain such other special funds as may be prescribed by the agricultural development commission, into which shall be placed such moneys as the agricultural development commission may by its resolution direct, and from which disbursements shall be made upon proper warrants of the county auditor issued against the same by the authority of the agricultural development commission. [L. '13, p. 501, § 28.]

§ 3139-29. Indebtedness.

Any agricultural development commission created under the provisions of this act is hereby authorized, prior to the receipt of taxes raised by levy,

to borrow money or issue the warrants of the district in anticipation of the revenues to be derived by such district from the levy of taxes for the purpose of such district during the first year, and such warrants shall be redeemed from the first money available from such taxes when collected. [L. '13, p. 501, § 29.]

§ 3139-30. Investigation of Lands.

It shall be the duty of the said commissioners, as promptly as possible after the organization of such district, to commence an investigation of the unimproved agricultural lands within such district, for the purpose of determining what portions or areas of such lands are adapted to economical irrigation or clearing, and adapted for sale or lease as agricultural lands to settlers. For the purpose of such investigation the said commissioners are authorized to employ all necessary assistants, and shall be entitled to the services of all state, county and municipal officers and institutions in accordance with section 3139-10. [L. '13, p. 501, § 30.]

§ 3139-31. Matters Considered.

Such investigation shall include a description of the qualities of the soil and of the locality as regards existing highways and railway transportation, also an estimated cost of clearing such lands or of conducting water upon any proposed tract, and shall point out the opportunity for reservoir sites and the probable cost of acquiring such sites for purposes of irrigating tracts of land. The result of such investigation shall be kept on record in the office of said commissioners, and a certified copy thereof shall be sent to the state department of agriculture for public information and use. [L. '13, p. 502, § 31.]

§ 3139-32. Acquisition of Undeveloped Land.

The said commissioners shall have power to acquire by purchase or otherwise, except by condemnation, in accordance with the provisions of this act any undeveloped agricultural lands within the limits of the agricultural development district, for the purpose of improving and fitting such lands for productive use, but no lands may be acquired under this act from private owners (except from settlers under the provisions of sections 3139-35 and 3139-36) at a price exceeding twenty dollars an acre for logged-off lands and twenty-five dollars an acre for arid lands, and unless authorized by subsequent legislation no lands shall be cleared when the estimate therefor shall exceed one hundred dollars an acre. [L. '13, p. 502, § 32.]

§ 3139-33. Refusal of Price Reported to Assessor.

In negotiating for the purchase of unimproved agricultural lands, whenever there shall have been offered in writing to a private owner a certain price and it shall be refused, the commissioners shall report that fact to the county assessor forthwith, and the price refused for such lands shall be considered by the assessor in respect to such and similar lands in that vicinity. [L. '13, p. 502, § 33.]

§ 3139-34. Purchase or Lease Lands.

The said commissioners may lease or purchase any undeveloped agricultural lands at public auction or otherwise in accordance with law, includ-

ing school and granted lands, for the purpose of bringing such lands into productive use, and may sell or lease the lands so acquired and improved for agricultural use as provided in sections 3139-44 to 3139-49. [L. '13, p. 503, § 34.]

§ 3139-35. Who Entitled to Benefit of Act—Preference Rights.

All citizens of this state shall be entitled to the benefits of this act as provided in this and the next following section. Any settler, being a citizen of the United States may offer not to exceed twenty acres of undeveloped, logged-off agricultural lands for sale to the commissioners of the agricultural development district in which such lands are located, and if the offer be accepted, then such vendor shall have a preferential right after such lands have been cleared and improved for agricultural use to repurchase and entry of not to exceed twenty acres of such lands, upon the terms described in sections 3139-44 to 3139-49, notwithstanding that such vendor may retain ownership of other lands not offered to said commissioners. Such vendors and repurchasers shall be subject to all the terms and conditions imposed by this act upon other purchasers. [L. '13, p. 503, § 35.]

§ 3139-36. Preference in Letting Contracts.

When logged-off or cut-over lands have been sold by settlers subject to the right of preferential repurchase as provided in the next preceding section of this act, the commissioners shall give preference to the vendors of such lands when letting contracts for the clearing and improving of the same: Provided, Such vendors undertake by contract in writing, on such terms and conditions as said commissioners may prescribe, to effect such clearing and improving at a price not exceeding the most satisfactory tender received by the commissioners from outside bidders, or in any case not exceeding a reasonable price in view of the value of such lands for agricultural purposes. [L. '13, p. 503, § 36.]

§ 3139-37. Notice of Letting of Contracts.

Before awarding any contract (except only in the case of preferential repurchasers provided for in section 3139-36), the agricultural development commission shall cause to be published, in some newspaper within the district for at least fifteen days before the letting of such contract, a notice inviting sealed proposals for such work, plans and specifications for which must at the time of publication of such notice be on file in the office of the agricultural development commission subject to public inspection: Provided, however, That the agricultural development commission may at the same time, and as a part of the same notice, invite tenders for said work or materials upon plans and specifications to be submitted by the bidder. Such notice shall state generally the work to be done and shall call for proposals for doing the same to be sealed and filed with the commission on or before the day and hour named. [L. '13, p. 504, § 37.]

§ 3139-38. Check to Accompany Bid.

Each bid, tender or proposal named in section 3139-37 shall be accompanied by a certified check payable to the order of the agricultural

development commission for a sum not less than five per cent of the amount of such bid, and no bid, tender or proposal shall be considered unless accompanied by such check. [L. '13, p. 504, § 38.]

§ 3139-39. Opening Bids and Letting Contracts.

At the time and place named such bids shall be publicly opened and read and the commission shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications on file, or to the best bidder submitting his own plans and specifications. If, in the opinion of the commission, all bids are unsatisfactory, they may reject all of them and readvertise, and in such case all checks shall be returned to the bidders. [L. '13, p. 504, § 39.]

§ 3139-40. Retention of Check—Bond.

If such contract be let, then and in such case all checks shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract shall be entered into for the purchase of such materials or doing of such work, and a bond given to the agricultural development district for the performance of the contract and otherwise conditioned as required by law, with sureties satisfactory to the commissioners, in an amount to be fixed by the commission, but not in any event less than twenty-five per cent of the contract price. If said bidder fails to enter into said contract in accordance with said bid and furnish such bond within fifteen days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the agricultural development district. [L. 13, p. 504, § 40.]

§ 3139-41. Material or Labor by Contract or Otherwise.

All materials and equipments required by the agricultural development district for the purposes of this act may be manufactured or purchased in the open market or by contract, and all work ordered may be let by contract or done by day labor, as the agricultural development commission may determine. [L. '13, p. 505, § 41.]

§ 3139-42. Lands to be Subdivided.

The commissioners shall cause all lands in their possession or control to be subdivided into the smallest practicable tracts, in order to provide for as many settlers as possible, giving preference whenever practicable to resident householders with families depending upon them. All tracts distant less than one mile from a state or county highway shall be connected by a temporary road, and the proportion which any particular tract should bear of the expense of that road shall be estimated by said commissioners against that tract in the price subsequently to be placed upon it for purposes of future sale or lease. [L. '13, p. 505, § 42.]

§ 3139-43. Prospectus of Each Tract.

Whenever agricultural lands have been cleared or otherwise improved under the provisions of this act, the commissioners shall prepare a statement finally showing, in respect to each tract, in detail, the original cost of acquired lands, the cost of clearing, the quantity cleared, the soil analysis, the

condition of the uncleared portion, and such other particulars as experience may show to be useful data for colonists, and shall keep such statements on permanent record and transmit a certified copy thereof to the state department of agriculture for public information and use. [L. '13, p. 505, § 43.]

§ 3139-44. Sale of Lands.

The said commissioners, as soon and so often as any lands acquired by purchase or otherwise are cleared and improved as aforesaid, shall cause the same to be appraised and offered to settlers on twenty equal annual payments (or less if so requested by the settler) at not less than the cost of their acquisition and improvement plus five per cent. One-half of one per cent per annum above the rate realized by the agricultural development district on its issue of bonds, and not less than four and one-half per cent. per annum, interest shall be charged on deferred payments. [L. '13, p. 506, § 44.]

§ 3139-45. Application to Purchase.

The manner of sale shall be by application and entry with priority to the first applicant. The commissioners shall execute the contracts of sale to purchasers on behalf of the agricultural development district in such form as shall carry out the intent of this statute to encourage settlement, and they shall make reasonable rules and regulations in respect thereto to insure good faith from the purchaser. [L. '13, p. 506, § 45.]

§ 3139-46. Assignability of Right to Purchase.

No assignment of any claim by any purchaser shall be permitted until after such purchaser has made at least three annual payments and also has actually resided on the land at least two years. Continuous residence of not less than three years shall be required of any purchaser who may desire to anticipate the remaining payments and pre-empt the tract. The commissioners may on written application therefor, but are not required to permit in writing an absence from the land of not to exceed five continuous months in any one year. [L. '13, p. 506, § 46.]

§ 3139-47. Purchasers Limited to One Tract.

No purchaser shall directly or indirectly acquire more than one tract. Tracts may be entered by persons who are not yet citizens of the United States, but all contracts shall provide that title shall not be delivered, notwithstanding the acceptance of payments meantime, until the purchaser has declared intention in good faith to become a citizen of the United States. All tracts shall be entered in parcels of not to exceed twenty acres each. [L. '13, p. 506, § 47.]

§ 3139-48. Irrigable Lands—Acquisition of Reservoir Sites.

In respect of irrigable lands, whenever and so often as the commissioners shall have decided upon improvement thereof by a system of irrigation, then said commissioners are authorized to acquire by purchase, by condemnation and purchase, or by any other lawful means any reservoir sites or other land necessary for reservoirs, canals, ditches and laterals, within or without the district: Provided, They shall first have obtained offers from

the owners of two-thirds of the lands that can be watered therefrom, or from an irrigation district or company, to accept distribution from such reservoirs, which offer shall be in form binding upon such owners or irrigation districts or companies during a period sufficient and reasonable for the construction of the reservoir. The commissioners, having obtained such binding offers, may then call for the written opinion of some competent engineering expert, showing the estimated cost of the reservoir, its capacity, the area that can be watered therefrom and the source and constancy of supply thereto, and when reports thereon satisfactory to the commissioners shall be filed, they may proceed with the construction of any works within or without the district which in the opinion of said commissioners may be necessary for the impounding and distribution of the waters. [L. '13, p. 507, § 48.]

§ 3139-49. Refusal of Price Reported to Assessor.

The commissioners may make offer to purchase from private owners any lands necessary, in whole or in part, for the purpose of such reservoir, canals, ditches and laterals aforementioned and if the price offered be refused, they shall certify such offer and refusal to the assessor of taxes in the county where such lands are situated and the price refused for such lands shall be considered by the assessor in respect of such and all similarly situated lands in the next assessment. [L. '13, p. 507, § 49.]

§ 3139-50. Irrigation System—Construction.

Whenever the said commissioners feel justified in so doing, in view of the provisions of section 3139-48, they may construct any reservoirs, canals, pipe-lines, ditches, laterals and other necessary works, within or without the district, by contract or by direct labor, in such manner as in their judgment shall most effectively and economically store and distribute the water at least cost; and may sell perpetual water rights to individual land owners, or may supply water to irrigation districts or companies, on terms of twenty annual payments (or less if so requested by such owners, districts or companies), with interest on deferred payments at the rate of not less than four and one-half per cent per annum, and not in any case less than one-half of one per cent per annum above the rate realized by the agricultural development district upon its issue of bonds, of which the proceeds, directly or indirectly, may go into such undertaking. [L. '13, p. 507, § 50.]

§ 3139-51. Price of Water—Maintenance.

The price per acre, for a water right shall be determined by dividing the total cost to the district of acquiring and constructing the reservoir and distribution system (including all expenses in connection therewith or incidental thereto), by the number of acres furnished with water rights therefrom; and an annual charge per acre for water rights may be levied for maintenance of such reservoir and distribution systems. [L. '13, p. 508, § 51.]

§ 3139-52. Sale of Irrigable Lands.

Whenever and so often as the district may itself own or acquire any lands watered by such irrigation works, it may dispose of such lands to

settlers, irrigation districts or companies upon the terms, interest rates and conditions described in section 3139-50. [L. '13, p. 508, § 52.]

§ 3139-53. Limitation on Sales to One Person.

Until the legislature shall otherwise provide the commissioners shall not sell or dispose of any irrigable lands to any one firm, person, or corporation exceeding forty acres, directly or indirectly, or sell or dispose of water rights to any firm, person or corporation to any tract exceeding one hundred and sixty acres, nor shall any assignment between holders be effective to evade these provisions without the written consent of the commissioners. [L. '13, p. 508, § 53.]

§ 3139-54. Lease—Time Limit.

Any land or other property owned or controlled by the agricultural development district may, in the discretion of the commissioners, be leased for a period of not exceeding twenty years, on such terms and conditions as the commissioners may determine: Provided, That in all leases of land or property the net income therefrom to the agricultural development district, after allowing for depreciation, shall be not less than six per cent per annum of the fair selling value of such land or property, and shall in any case be sufficient to yield a net interest return to the district upon such investment at the rate of one-half of one per cent above the rate realized by the district upon any issues of bonds, the proceeds of which directly or indirectly may enter into the cost to the district of such land or property. [L. '13, p. 508, § 54.]

§ 3139-55. By-products.

It shall be the duty of the commissioners to utilize, as far as practicable, any and all by-products from the lands secured, cleared and otherwise improved by them, and to make tests for the utilization and sale of by-products, and to manufacture or purchase equipment for any processes that may prove successful for that purpose. [L. '13, p. 509, § 55.]

§ 3139-56. Issuance of Bonds.

To provide funds for its purposes, any agricultural development district formed under authority of this act may issue negotiable bonds, to be designated "Agricultural Development Bonds." These bonds shall be payable not more than twenty years after their date, and shall be executed in accordance with law by the president of the agricultural development commission and attested by the secretary thereof. They shall be registered or coupon bonds, issued in denominations of not less than one hundred nor more than one thousand dollars each, numbered from one up consecutively, and shall bear interest, payable semi-annually, at a rate not to exceed six per cent per annum. They shall be disposed of serially, dated the day of issuance, and shall not bear interest until after their actual sale, and shall be sold only when their proceeds may from time to time be required. The principal and interest shall be payable at such place as may be designated in the bond. The bonds and each coupon shall be signed by said presiding officer, and shall be attested by the secretary under the seal of the agricultural development district. Such bonds shall be sold in

such manner as the agricultural commission may by resolution declare to be for the best interest of the district. A register shall be kept of all the bonds issued, showing the number, date, amount, interest, to whom delivered (if coupon bonds) and the name of payee (if registered bonds); and also showing each and every bond executed, issued or sold under the provisions of this act, and when and where payable.

The coupons for the payment of interest on said bonds shall be considered for all purposes as warrants drawn upon the general fund of the agricultural development district issuing such bonds, and when presented to the treasurer of the county having custody of the funds of such agricultural development district, if there are no funds in the treasury to pay the said coupons, it shall be the duty of the county treasurer to indorse said coupons as presented for payment, in the same manner as county warrants are indorsed, and thereafter said coupons shall bear interest at the rate named in the bond. [L. '13, p. 509, § 56.]

§ 3139-57. Form of Bond.

The form of the bond shall be substantially as follows:

\$——.

No. ——.

UNITED STATES OF AMERICA

STATE OF WASHINGTON

AGRICULTURAL DEVELOPMENT BOND. ———

The —— Agricultural Development District of —— in the state of Washington, for value received, hereby promises to pay to bearer, or to the registered holder of this bond, if the same be registered, on the 1st day of ——, 19——, the sum of —— Dollars with interest thereon at the rate of —— per centum per annum, payable semi-annually on the first day of —— and —— in each year upon the presentation and surrender of the annexed interest coupons, as they severally become due; both principal and interest of this bond are payable in gold coin of the United States, of the present standard weight and fineness, at the —— County Treasury, in the state of Washington; for the prompt payment whereof, both principal and interest as they mature, the full faith, credit and resources of the —— Agricultural Development District of ——, in the state of Washington, are hereby irrevocably pledged.

It is redeemable on any interest date occurring —— or more years after the date hereof, at par, and interest on this bond shall cease when it is called for payment either at maturity or by redemption before maturity.

This bond is one of an issue of —— similar bonds authorized by the legislature of the state of Washington in a statute passed in the year 1913 and entitled: (here insert the exact title of act.)

It is hereby certified and declared that all conditions and things required by the constitution and laws of the state of Washington to exist and be done precedent to the issuance of this bond have existed and been done in due and regular form, as required by law, and that this bond is by virtue of the law made incontestible for any informalities preceding its issuance, and the signatures of the president and the secretary hereto attached, together with the seal of the —— Agricultural Development District

of — in the state of Washington, are warrants to the holder thereof of the due execution and valid consideration for this instrument.

In Testimony Whereof the said president and secretary have hereto affixed their signatures and attached an impression of the seal of the — Agricultural Development District of —, in the state of Washington, and the coupons hereto annexed have been executed by lithographed fac-simile in accordance with the act this — day of —, 19—. [L. '13, p. 510, § 57.]

§ 3139-58. Public Funds may be Invested in Bonds.

All state, county, municipal and other public funds may be invested in such bonds of any agricultural development districts established under authority of this act, and such bonds shall be a preferential investment for the permanent school fund, second only to school district bonds, except when a higher rate of interest can be secured for the school fund by investment in other municipal bonds. [L. '13, p. 511, § 58.]

TITLE XVII.

ANIMALS.

CHAPTER II.

LIENS FOR SERVICES OF SIRE.

§ 3163. Owner may have Lien—Statement to be Filed.

The owner or owners of any such sire receiving such certificate, by complying with the last two preceding sections of this chapter, shall obtain and have a lien upon the female served for the period of one year from the date of service, or upon the get of any such sire for the period of one year from the date of birth of such get: Provided, Said owner or owners shall file for record a statement of account, verified by affidavit, with the county auditor of the county wherein the service has been rendered, of the amount due such owner or owners for said service, together with a description of the female served, within ten months from the date of service or date of birth, as the case may be: Provided further, That the lien upon the get of any such sire shall be a preferred lien: And provided further, That no sale or transfer of any female animal served shall defeat the right of such lienholder. [L. '13, p. 155, § 1.]

§ 3165-1. Pedigree Enrolled—Certificate—Disqualification.

Every person, firm or company, owning any draft stallion, or jack, for sale, exchange or for public service in this state shall cause the name, description and pedigree of such stallion or jack to be enrolled by the department of animal husbandry of the State College of Washington, and procure a certificate of such enrollment from said department, which shall thereupon be presented to and recorded by the auditor of the county in which said stallion or jack is used for public service.

In order to obtain the license certificate herein provided for, the owner of each stallion or jack shall file a certificate of soundness, signed by a veterinarian registered to practice in the state of Washington and shall forward the veterinarian's certificate, together with the stud-book certificate of registry of the pedigree of the said stallion or jack, and other necessary papers relating to his breeding and ownership to the department of animal husbandry of the said college.

The presence of any one of the following named diseases shall disqualify a stallion or jack for public service:

Bone spavin; ringbone, sidebone, navicular disease.

Bog spavin; curb with curby formation of hock.

Glanders, farcy, maladie du coit; urethral gleet; mange; melanosis; and the department of animal husbandry is hereby authorized to refuse its certificate of enrollment to any stallion or jack affected with any one of the diseases hereby specified and to revoke the previously issued enrollment certificate of any stallion or jack found on investigation of the department to be so infected. [L. '11, p. 483, § 1.]

§ 3165-2. Standard Used.

The professor of animal husbandry of the said college whose duty it shall be to examine and pass upon the merits of each pedigree submitted, shall use as his standard for action the stud-books and signatures of the duly authorized officers of the various horse or jack pedigree registry associations, societies or companies recognized by the department of agriculture, Washington D. C., and shall accept as purebred and entitled to a license certificate as such, each stallion or jack for which a pedigree registry certificate is furnished bearing the signature of the duly authorized officers of a government recognized and approved stud-book. [L. '11, p. 484, § 2.]

§ 3165-3. Posting Certificate.

The owner of any stallion or jack used for public service in this state shall post and keep affixed, during the entire breeding seasons, copies of the license certificate of such stallion or jack, issued under the provisions of the next succeeding section, in a conspicuous place both within and upon the outside of every stable or building where the said stallion or jack is used for public service at his home or elsewhere. [L. '11, p. 484, § 3.]

§ 3165-4. Forms of Certificate.

Subd. 1. The license certificate issued for a stallion or jack whose sire and dam are of pure breeding and the pedigree of which is registered in a stud-book recognized by the government department of agriculture, shall be in the following form:

**THE STATE COLLEGE OF WASHINGTON,
DEPARTMENT OF ANIMAL HUSBANDRY.**

CERTIFICATE OF PURE-BRED STALLION OR JACK NO. —.

The pedigree of the stallion or jack (name) —. Owned by —.
Described as follows: (Color) —. (Breed) —. Foaled in the year —,
has been examined at the state college, and it is hereby certified that the
said stallion or jack is of pure breeding and is registered in a stud book
recognized by the department of agriculture, Washington, D. C.

(Signature) —,
Professor of Animal Husbandry.

Subd. 2. The license certificate issued for a stallion or jack whose sire or dam is not of pure breeding shall be in the following form:

**THE STATE COLLEGE OF WASHINGTON,
DEPARTMENT OF ANIMAL HUSBANDRY.**

CERTIFICATE OF GRADE STALLION OR JACK NO. —.

The pedigree of the stallion or jack (name) —. Owned by —.
Described as follows: (Color) —. Foaled in the year —, has been
examined at the state college, and it is found that the said stallion or jack
is not of pure breeding and is, therefore, not eligible for registration in
any stud book recognized by the department of agriculture, Washington,
D. C.

(Signature) —,
Professor of Animal Husbandry.

Subd. 3. The license certificate issued for a stallion whose sire and dam are pure bred, but not of the same breed, shall be in the following form:

THE STATE COLLEGE OF WASHINGTON,
DEPARTMENT OF ANIMAL HUSBANDRY.

CERTIFICATE OF CROSS-BRED STALLION NO. —.

The pedigree of the stallion (name) —. Owned by —.
Described as follows: (Color) —. Foaled in the year —, has been examined at the state college and it is found that his sire is registered in the — and his dam in the —.

Such being the case, the said stallion is not eligible for registration in any stud book recognized by the department of agriculture, Washington, D. C.

(Signature) —, —,
Professor of Animal Husbandry.

Subd. 4. The license certificate issued for a nonstandard-bred stallion shall be used in the following form:

THE STATE COLLEGE OF WASHINGTON,
DEPARTMENT OF ANIMAL HUSBANDRY.

CERTIFICATE OF NONSTANDARD-BRED STALLION NO. —.

The pedigree of the stallion (name) —. Owned by —.
Described as follows: (Color) —. Foaled in the year —, has been examined at the state college, and it is found that the stallion is not eligible to registration as standard-bred, and for the purpose of the license is not pure bred, although recorded in the nonstandard department of the American Trotting Register.

(Signature) —, —,
Professor of Animal Husbandry.

[L. '11, p. 484, § 4.]

§ 3165-5. Form of Poster—Fee for Certificate—Assignment.

Each bill and poster issued by the owner of any stallion or jack enrolled under this act, or used by him or his agent for advertising such stallion or jack's certificate of enrollment shall be printed in bold-face type, not smaller than long primer, on said bill or poster, and the first mention thereon of the name of the stallion or jack shall be preceded by the words: "Pure-bred," "grade," "cross-bred," or "nonstandard-bred," in accordance with the wording of the certificate of enrollment; and it shall be illegal to print upon the poster any misleading reference to the breeding of the stallion or jack, his sire or his dam, or to be used upon such bill or poster the portrait of a stallion or jack in a misleading way; and each newspaper advertisement printed to advertise any stallion or jack for public service shall show the enrollment certificate number and state whether it reads "pure-bred," "grade," "cross-bred," or "nonstandard-bred."

A fee of two dollars shall be paid to the department of animal husbandry of said college for the examination and enrollment of each pedigree and for the issuance of a license certificate, in accordance with the breeding for the stallion or jack as above provided, and a renewal license fee of one dollar shall

be paid to said department every second year from the date of the issuance of the original license certificate.

Upon the transfer of the ownership of any stallion or jack enrolled under the provisions of this act, the certificate of enrollment may be transferred to the transferee by said department upon submittal of satisfactory proof of such transfer and upon payment of the fee of fifty cents; and a fee of fifty cents shall be paid for a duplicate license certificate issued where proof is given of loss or destruction of the original certificate. [L. '11, p. 486, § 5.]

§ 3165-5½. Certificate for Animals Brought into State.

Any person, firm or corporation bringing any stallion or jack into the state shall within sixty days thereafter procure the license certificate provided for in section 3165-1. Any person, firm or corporation offering any stallion or jack for sale for breeding purposes shall first procure the license certificate provided for in section 3165-1. [L. '11, p. 487, § 5½.]

§ 3165-6. Penalty.

Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding fifty dollars and for each and every subsequent violation of the provisions of this act shall be guilty of a misdemeanor and subject to a fine of not less than fifty dollars. [L. '11, p. 487, § 6.]

§ 3165-7. Complaint of Unsoundness.

When a complaint is made to the department of animal husbandry that a stallion or jack is unsound, and, on investigation, an examination is by the department deemed necessary, such examination shall be made by the state veterinarian, or his deputy; but the owner of the stallion or jack shall have the right to select some registered veterinarian to act with the state veterinarian, and in case these two shall fail to agree they shall appoint a third registered veterinarian to act as referee, and his decision shall be final. [L. '11, p. 487, § 7.]

§ 3165-8. Annual Report.

All moneys collected under the provisions of this act shall be expended by the professor of animal husbandry under the direction of the board of regents, in carrying out the provisions thereof, and such officer shall take vouchers for all moneys disbursed and shall keep an account of all moneys received and disbursed and shall make an annual report thereof, which report shall be published with and as a part of the annual report of the agricultural experiment station of said state college. If, at the expiration of any fiscal year, there shall be on hand moneys in excess of the disbursements made under the provisions of this act for the preceding year, such moneys shall be transmitted to the state treasurer and placed in the general fund. [L. '11, p. 487, § 8.]

CHAPTER IV.

STOCK RUNNING AT LARGE.

§§ 3166—3172.

Repealed. See L. '11, p. 94, § 6.

§ 3172-1. **Livestock Area.**

That the board of county commissioners of any county of this state shall have the power to designate by an order made and published, as provided in section 3172-3, certain territory within such county in which it shall be unlawful to permit livestock of any kind to run at large: Provided, That no territory so designated shall be less than two square miles in area: And provided further, That this act shall not affect counties having adopted township organization. [L. '11, p. 93, § 1.]

§ 3172-2. **Petition—Notice—Hearing.**

Whenever ten residents within a proposed district shall file with the county auditor a petition, asking, within the territory therein named, no livestock of any kind shall be permitted to run at large, the county commissioners shall, at their next meeting, make an order fixing a time and place when a hearing will be had upon such petition, which time shall not be less than twenty days nor more than ninety days from the filing of such petition; and shall cause notice of the time to be given by publishing such notice in some newspaper having a general circulation within such territory for three successive weeks before the day fixed in such order; if there be no newspaper having a general circulation in such territory, then by posting such notice in three public places in such territory at least twenty days before the day of hearing, and such notice shall set forth the petition. It shall be the duty of the board of county commissioners at the time fixed for such hearing, or at the time to which such hearing may be adjourned, to hear all persons interested in the question presented by such petition, and to determine whether such district shall be created. [L. '11, p. 93, § 2.]

§ 3172-3. **Commissioners Make Order.**

If the board of county commissioners shall determine to prohibit the running at large of livestock within the territory described in such petition or in any portion thereof, it shall make an order defining the boundaries of such territory, which shall be entered upon the records and published in a newspaper having general circulation in such territory for four successive weeks, or by posting in three public places in such territory for four weeks. [L. '11, p. 94, § 3.]

§ 3172-4. **Penalty.**

Any person, or any agent, employee or representative of a corporation, violating any of the provisions of such order after the same shall have been published or posted as provided in section 3172-3, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than two dollars, nor more than ten dollars, for each offense, and it shall be the duty of the prosecuting attorney of such county, on complaint of any

resident or freeholder of said territory, to forthwith enforce the provisions of this section. [L. '11, p. 94, § 4.]

§ 3172-5. Swine not Permitted at Large.

The owner of swine shall not allow them to run at large at any time or within any territory, and any violation of this section shall render such owner liable to the penalties provided for in section 3172-4: Provided, That swine may be driven upon the highways while in charge of sufficient attendants. [L. '11, p. 94, § 5.]

CHAPTER V.

DAMAGES BY DOMESTIC ANIMALS.

§ 3197. Trespass by Sheep on Lands of Another.

It shall be unlawful in this state for sheep to enter any land or lands, inclosed or uninclosed, belonging to or in the possession of any person other than the owner of such sheep, unless by the consent of the owner of said land other than the public lands of the United States. [L. '13, p. 519, § 1.]

§ 3198. Penalty for Driving Sheep upon Another's Land.

Any person, being the owner or having in his possession, charge, or control, as herder, or otherwise, any sheep, who shall herd or drive such sheep upon the lands of another for the purpose of pasture, against the consent of the owner of such lands, shall be deemed guilty of a misdemeanor. [L. '13, p. 519, § 2.]

§ 3202.

Repealed. See L. '13, p. 201, § 14.

§§ 3217, 3218.

Repealed. See L. '13, p. 201, § 14.

TITLE XVIII.

BANKS AND BANKING AND TRUST COMPANIES.

CHAPTER II.

BANKS, INCORPORATION, MANAGEMENT AND LIABILITIES.

§ 3315. Terms Defined.

The term "banking" within the meaning of this act shall mean the negotiations for, the discounting of, promissory notes, drafts, bills of exchange and other evidence of indebtedness, receiving deposits, selling and buying exchange, coin and bullion, and loaning money on personal, real and other securities, and other kindred financial operations; and also shall be construed and held to mean the receiving of moneys on deposit, or savings account subject to withdrawal on demand or subject to withdrawal by any method within four months from the opening of such account or subject to withdrawal at any subsequent time on less than one month's notice, and shall include any mutual or co-operative savings company or association, or a trust company, receiving money from time to time from persons, associations or corporations, to be held subject to withdrawal as aforesaid, whether received as a direct deposit or by way of payment on stock or certificates in any such mutual or co-operative association. The provisions of this act shall not be construed to apply to building and loan nor savings and loan associations organized under or transacting business conformably to the laws of this state. The term "bank" as used in this act shall be taken to mean and include every association, company or corporation (except national banks, and foreign banks not authorized to receive deposits) transacting a banking business in this state. The term "branch bank," as used in this act, shall be taken to mean an office of deposit or discount other than the bank's principal place of business. [L. '13 p. 463, § 1.]

§ 3316. Incorporation—Amount of Property Required—Capital Fully Paid—Penalty.

Any bank, branch bank, or foreign bank which shall receive money on deposit, whether on certificate or subject to check or payment on stock of co-operative savings associations, or other method of demand withdrawal, or subject to withdrawal by any method within four months from the opening of such account or subject to withdrawal at any subsequent time on less than one month's notice shall be considered as doing a banking business. And promissory notes, receipts, certificates or pass-books issued for money received on deposit or for payment on stock of co-operative associations where such promissory notes, receipts, certificates or pass-books authorize the owner or holder to withdraw such money as aforesaid shall be held to be certificates of deposit for the purposes of this act. And every such corporation, bank, branch bank or foreign bank receiving deposits as herein defined and provided shall be subject to all the provisions of this act and shall be subject to the same regulations, visitations and control. [L. '13, p. 464, § 2.]

§ 3330. May Hold Real Estate, for What Purposes.

Any bank transacting business in this state so far as not prohibited by the constitution of this state, may purchase, hold and convey real estate for the following purposes and no other:

(1) Such as shall be necessary for the convenient transaction of its business, including with its banking offices, other apartments in the same building to rent as a source of income.

(2) Such as shall be purchased by or conveyed to it in satisfaction, or on account of, debts previously contracted in the course of its business.

(3) Such as it shall purchase at sale under judgments, decrees, liens, or mortgage foreclosures, against securities held by it: Provided, That no such real estate, except that used in the transaction of its business, shall be carried as an asset on the books of the bank for a longer period than five years from the date of its purchase. [L. '13, p. 57, § 1.]

§ 3331.

See notes to § 2640.

§ 3339. Use of Words "Bank," etc., Prohibited—Penalty.

No person or persons, association or body corporate, except banks, or trust companies, incorporated under the laws of the United States, or the laws of the state of Washington, and existing foreign banks now doing business in the state of Washington, shall advertise or put forth a sign having thereon any of the following words: "Bank," "Banking Company," "Trust," or any other artificial or corporate name, or words indicating that such person, persons, association or body corporate is a bank, trust company, or savings bank, or shall in any way solicit or receive deposits as an incorporated bank. Every person, association, or body corporate, violating the provisions of this act, shall be fined not more than one thousand dollars (\$1,000.00) per day for each day of such violation. From and after the 1st day of January, 1915, no person, persons, copartnership, association, or body corporate except banks or trust companies incorporated under the laws of the United States or the laws of the state of Washington and existing foreign banks now doing business in the state of Washington, or mutual or co-operative savings companies or associations doing a banking business as defined in section 3315 of this act, shall transact a banking business in this state. [L. '13, p. 465, § 3.]

§ 3339½. Private Banks to Incorporate—Stock.

All firms or individuals who on January 1, 1913, were conducting private banks and receiving deposits as such and who desire to do a banking business on and after January 1, 1915, shall prior to that time incorporate under the laws of this state applicable thereto, and the capital stock of such corporation shall be in such a sum as is required by existing law, all of which shall be subscribed and at least ten thousand dollars thereof paid in in cash, and the balance of said capital stock must be paid in at such time and in such amounts as shall be required by the state bank examiner. [L. '13, p. 466, § 4.]

§ 3340. Deception as to Incorporation of Bank.

Any person or persons who shall put up, or cause to be put up, or exhibit, any sign or advertisement, purporting thereby to be an incorporated bank, or

shall do business under a corporate name when they are not such, shall, on conviction thereof, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding two hundred dollars. [L. '13, p. 466, § 5.]

§ 3340-1. Validity.

If any section, subdivision, sentence or clause of this act, for any reason, be held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. [L. '13, p. 466, § 6.]

CHAPTER III.

TRUST COMPANIES, INCORPORATION, POWERS AND DUTIES.

**§ 3346. Formation — Name — Capital, Subscription and Payment of—
Shares.**

Seven or more persons of full age may become a trust company on the terms and conditions and subject to the liabilities prescribed in this act; the name of every company formed under this act shall contain the word "trust," but shall not be that of any other existing corporation of this state; the capital stock of such trust company hereafter organized shall not be less than one hundred thousand dollars: Provided, That in cities having less than 25,000 inhabitants such companies may be organized with \$50,000.00 capital, and in cities having less than 10,000 inhabitants, such companies may be organized with \$25,000 capital, and shall be divided into shares of one hundred dollars each, all of which shall be paid in cash before any trust company shall be authorized to transact any business, and such payment shall be certified to the secretary of state under oath by the president and treasurer or secretary of the trust company; hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the state of Washington, except under this act, and no company hereafter organized under any other act shall use the word "trust" as a part of its name: Provided, That this act and chapter shall not apply to any foreign corporations engaged in the business of loaning money on mortgage security which does not accept deposits or receive from citizens of the state of Washington property or money in trust or on deposit or for investment. In case any foreign corporation whose name contains the word "trust," or whose articles of incorporation empower it to do a trust business, desires to engage in business of loaning money on mortgage security in this state, it shall file in addition to its articles of incorporation or association, a resolution of its governing board, duly attested by its president and secretary, expressly stating that it will not receive deposits in the state of Washington or accept from citizens and residents of the state of Washington property and money, or either, in trust for investment. [L. '11, p. 499, § 1.]

The fact that a realty and investment company is acting ultra vires in violation of the trust company act is not ground for the appointment of a receiver at the suit of

subscribers, since only the state can question the acts of the company on that ground: *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 107 Pac. 1029.

§ 3349. Corporate Powers.

As soon as the certificate of authority is issued by the bank examiner as provided in the preceding section, the persons named in the articles of incor-

poration and their successors shall thereupon and thereby become a corporation and shall have power:

(1) To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money.

(2) To transfer, register and countersign certificates of stock, bonds, or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise.

(3) To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities, and to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; and to buy, sell and exchange coin and bullion.

(4) To lease, hold, purchase and convey any and all real property necessary for and convenient in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation from any of its debtors.

(5) To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and to accept and execute any other municipality or corporate trust not inconsistent with the laws of this state.

(6) To accept trusts from, and execute trusts for, married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto.

(7) To act under the order, or appointment of any court of record as guardian, receiver or trustee of the estate of any minor, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party.

(8) To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipal or other authority, and it shall be accountable to [all] parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

(9) To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons or by any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive, take and hold any property or estate, real or personal, which may be the subject of any such trust.

(10) To purchase, invest in and sell stocks, promissory notes, bills of exchange, bonds, debentures and mortgages and other securities; and when moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

(11) To be appointed and accept the appointment of assignee or trustee, under any assignment for the benefit of creditors of any debtor, made pursuant to any statute or otherwise.

(12) To act under the order or appointment of any court of record or otherwise as receiver or trustee of the estate or property of any person, firm, association or corporation.

(13) To be appointed and to accept the appointment of executor of, or trustee under, the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as guardian of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards: Provided, however, The power hereby granted to trust companies to act as guardian or administrator, with or without the will annexed, shall not be construed to deprive parties of the prior right to have issued to them letters of guardianship, or of administration, as such right now exists under the laws of this state; and, be it further provided, That no trust company or other corporation, organized under this chapter which advertises that it will furnish legal advice, construct and prepare wills or do other legal work for its customers shall be permitted to act in the capacity as executor, trustee, assignee or otherwise serve in any fiduciary capacity; any such trust company or other corporation whose officers or agents shall solicit legal business for and on behalf of such trust company or corporation shall be disqualified from acting as trustee, assignee or from serving in any fiduciary capacity and shall be ineligible for appointment as such in any of the courts of this state.

(14) To exercise the powers conferred on and to carry on the business of a safe deposit company.

(15) To collect coupons on, or interest upon, all manner of securities when authorized so to do by the parties depositing the same.

(16) To receive and manage any sinking fund of any corporation, upon such terms as may be agreed upon between such corporation and those dealing with it.

(17) Generally to execute trusts of every description not inconsistent with the laws of this state or of the United States.

(18) To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company.

(19) To make and certify abstracts of title to real property and to insure any person or corporation claiming to own or to have any interest in any real property or encumbrance thereon by mortgage, lease, lien, contract or otherwise against loss by reason of liens, encumbrances or imperfections of title, or any adverse claim of title: Provided, however, That no company organized under this chapter shall be subject to any other insurance law of the state of Washington: Provided, further, That no trust company engaged in the business of banking shall be permitted to do any of the acts mentioned in this subdivision. [L. '13, p. 640, § 1.]

CHAPTER IV.

GENERAL PROVISIONS.

§ 3364. Withdrawal of Joint Deposits.

When a deposit has been made, or shall hereafter be made in any bank or trust company transacting business in this state in the name of two or more persons, payable to any of such persons, such deposit or any part thereof, or interest, or dividend thereon, may be paid to any of said persons, whether the others be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to such bank or trust company for any payment so made. [L. '13, p. 6, § 1.]

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TITLE XIX. BILLS AND NOTES.

CHAPTER I.

BILLS OF LADING AND RECEIPTS BY WAREHOUSEMEN.

§ 3369.

An instrument in writing signed by the agent of a warehouseman, describing freight so as to identify it, stating the names of the owners, terms of storage, and promising a delivery upon surrender of the writing, is a warehouse receipt, within this section: *Nowell v. Seattle Transfer Co.*, 63 Wash. 685, 116 Pac. 287.

A warehouseman who issued a warehouse receipt in exchange for a railroad delivery order without obtaining possession of the

goods, as required by this section, cannot evade liability for the loss of the goods, where it retained storage charges for two years, knowing that the goods were lost and never in possession, and not notifying the owners of the loss: *Nowell v. Seattle Transfer Co.*, 63 Wash. 685, 116 Pac. 287.

As to the negotiability of warehouse receipts, see note in 17 Ann. Cas. 670.

As to the general liability of warehousemen, see note in 136 Am. St. Rep. 245.

§ 3369-1. Persons Who may Issue Receipts.

Warehouse receipts may be issued by any warehouseman, and must be issued in manner and form as provided by this act. [L. '13, p. 279, § 1.]

§ 3369-2. Form of Receipts—Essential Terms.

Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored.
- (b) The date of issue of the receipt.
- (c) The constructive number of the receipt.
- (d) A statement whether the goods received will be delivered to the bearer, to a specified person or to a specified person or his order.
- (e) The rate of storage charges.
- (f) A description of the goods or of the packages containing them. If the same be issued for wheat it shall specifically state the variety of wheat by name.
- (g) The signature of the warehouseman, which may be made by his authorized agent.
- (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
- (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made, or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required. [L. '13, p. 279, § 2.]

§ 3369-3. Form of Receipt—What Terms may be Inserted.

A warehouseman may insert in a receipt, issued by him, any other terms and conditions: Provided, That such terms, and conditions shall not:

(a) Be contrary to the provisions of this act.

(b) In any wise impair his obligation to exercise that degree of care in the safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own; and any provisions so inserted contrary to the provisions of this act, shall, so far as they conflict with the provisions thereof be void. [L. '13, p. 280, § 3.]

§ 3369-4. Definition of a Non-negotiable Receipt.

A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt. [L. '13, p. 280, § 4.]

§ 3369-5. Definition of a Negotiable Receipt.

A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void. [L. '13, p. 280, § 5.]

§ 3369-6. Duplicate Receipts must be so Marked.

When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [L. '13, p. 281, § 6.]

§ 3369-7. Failure to Mark "Not Negotiable."

A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable" or "not negotiable." In case of the warehouseman's failure to do so, a holder of the receipt who purchased it for value, supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgment of an informal character. [L. '13, p. 281, § 7.]

§ 3369-8. Obligation of Warehouseman to Deliver.

A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

(a) An offer to satisfy the warehouseman's lien.

(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. [L. '13, p. 281, § 8.]

§ 3369-9. Justification of Warehouseman in Delivering.

A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is,

(a) The person lawfully entitled to the possession of the goods, or his agent.

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. [L. '13, p. 282, § 9.]

§ 3369-10. Warehouseman's Liability for Misdelivery.

Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than is authorized by subdivision (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either,

(a) Been requested, by or on behalf of the person lawfully entitled to right of property or possession in the goods, not to make such delivery; or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. [L. '13, p. 282, § 10.]

§ 3369-11. Negotiable Receipts must be Canceled When Goods Delivered.

Except as provided in sections 3369-36, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. [L. '13, p. 283, § 11.]

§ 3369-12. Negotiable Receipts must be Canceled or Marked When Part of Goods Delivered.

Except as provided in section 3369-36, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to anyone who purchases for value in good faith such receipt, for failure, to deliver all the goods specified in the receipt, whether such purchaser acquired title

to the receipt before or after the delivery of any portion of the goods by the warehouseman. [L. '13, p. 283, § 12.]

§ 3369-13. Altered Receipts.

The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was:

- (a) Immaterial
- (b) Authorized, or
- (c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. [L. '13, p. 283, § 13.]

§ 3369-14. Lost or Destroyed Receipts.

Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [L. '13, p. 284, § 14.]

§ 3369-15. Effect of Duplicate Receipts.

A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such a receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of issue of the duplicate, but shall impose upon him no other liability. [L. '13, p. 284, § 15.]

§ 3369-16. Warehouseman cannot Set Up Title in Himself.

No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman

from liability for refusing to deliver the goods according to the terms of the receipt. [L. '13, p. 284, § 16.]

§ 3369-17. Interpleader of Adverse Claimants.

If more than one person claim the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. [L. '13, p. 285, § 17.]

§ 3369-18. Warehouseman has Reasonable Time to Determine Validity of Claims.

If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him, or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [L. '13, p. 285, § 18.]

§ 3369-19. Adverse Title No Defense.

Except as provided in the two preceding sections and in sections 3369-9 and 3369-36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. [L. '13, p. 285, § 19.]

§ 3369-20. Liability for Nonexistence or Misdescription of Goods.

A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. [L. '13, p. 285, § 20.]

§ 3369-21. Liability for Care of Goods.

A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. [L. '13, p. 286, § 21.]

§ 3369-22. Goods must be Kept Separate.

Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued,

as to permit at all times the identification and redelivery of the goods deposited. [L. '13, p. 286, § 22.]

§ 3369-23. Fungible Goods Commingled, if Authorized.

If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such cases the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. [L. '13, p. 286, § 23.]

§ 3369-24. Liability of Warehouseman to Depositors of Commingled Goods.

The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. [L. '13, p. 286, § 24.]

§ 3369-25. Attachment or Levy upon Goods for Which a Negotiable Receipt has Been Issued.

If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the courts. [L. '13, p. 287, § 25.]

§ 3369-26. Creditors' Remedies to Reach Negotiable Receipts.

A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipts or in satisfying the claim by means thereof, as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. [L. '13, p. 287, § 26.]

§ 3369-27. Claims Included in Warehouseman's Lien.

Subject to the provisions of section 3369-30, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods, where default has been made in satisfying the warehouseman's lien. [L. '13, p. 287, § 27.]

§ 3369-28. Against What Property the Lien may be Enforced.

Subject to the provisions of section 3369-30, a warehouseman's lien may be enforced:

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. [L. '13, p. 287, § 28.]

§ 3369-29. How the Lien may be Lost.

A warehouseman loses his lien upon goods,

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act. [L. '13, p. 288, § 29.]

§ 3369-30. Negotiable Receipt must State Charges for Which Lien is Claimed.

If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 3669-27, although the amount of the charges so enumerated is not stated in the receipt. [L. '13, p. 288, § 30.]

§ 3369-31. Warehouseman Need not Deliver Until Lien is Satisfied.

A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. [L. '13, p. 228, § 31.]

§ 3369-32. Warehouseman's Lien Does not Preclude Other Remedies.

Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. [L. '13, p. 288, § 32.]

§ 3369-33. Satisfaction of Lien by Sale.

A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due.

(b) A brief description of the goods against which the lien exists.

(c) A demand that the amount of the claim as stated in the notice, and of such further claim, as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice, if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. [L. '13, p. 289, § 33.]

§ 3369-34. Perishable and Hazardous Goods.

If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman, after a reasonable effort, is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. [L. '13, p. 290, § 34.]

§ 3369-35. Other Methods of Enforcing Liens.

The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against per-

sonal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. [L. '13, p. 291, § 35.]

§ 3369-36. Effect of Sale.

After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. [L. '13, p. 291, § 36.]

§ 3369-37. Negotiation of Negotiable Receipts by Delivery.

A negotiable receipt may be negotiated by delivery,

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank to the bearer.

(c) Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. [L. '13, p. 291, § 37.]

§ 3369-38. Negotiation of Negotiable Receipts by Indorsement.

A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiations may be made in like manner. [L. '13, p. 292, § 38.]

§ 3369-39. Transfer of Receipts.

A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. [L. '13, p. 292, § 39.]

§ 3369-40. Who may Negotiate a Receipt.

A negotiable receipt may be negotiated,

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been intrusted, or if at the time of such intrusting the receipt is in such form that it may be negotiated by delivery. [L. '13, p. 292, § 40.]

§ 3369-41. Rights of Person to Whom a Receipt has Been Negotiated.

A person to whom a negotiable receipt has been duly negotiated acquires thereby,

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. [L. '13, p. 292, § 41.]

§ 3369-42. Rights of Persons to Whom a Receipt has Been Transferred.

A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods, for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. [L. '13, p. 293, § 42.]

§ 3369-43. Transfer of Negotiable Receipt Without Indorsement.

Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [L. '13, p. 293, § 43.]

§ 3369-44. Warranties on Sale of Receipt.

A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants,

(a) That the receipt be genuine.

(b) That he has a legal right to negotiate or transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and,

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby. [L. '13, p. 293, § 44.]

§ 3369-45. Indorser not a Guarantor.

The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. [L. '13, p. 294, § 45.]

§ 3369-46. No Warranty Implied from Accepting Payment of a Debt.

A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. [L. '13, p. 294, § 46.]

§ 3369-47. When Negotiation not Impaired by Fraud, Mistake or Duress.

The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress. [L. '13, p. 294, § 47.]

§ 3369-48. Subsequent Negotiation.

Where a person having sold, mortgaged or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. [L. '13, p. 294, § 48.]

§ 3369-49. Negotiation Defeats Vendor's Lien.

Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiations be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transit. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. [L. '13, p. 295, § 49.]

§ 3369-50. Issue of Receipt for Goods not Received.

A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a gross misdemeanor. [L. '13, p. 295, § 50.]

§ 3369-51. Issue of Receipt Containing False Statement.

A warehouseman or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a gross misdemeanor. [L. '13, p. 295, § 51.]

§ 3369-52. Issue of Duplicate Receipts not so Marked.

A warehouseman or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate" except in the case of lost or destroyed receipt after proceedings as provided for in section 3369-14, shall be guilty of a gross misdemeanor. [L. '13, p. 295, § 52.]

§ 3369-53. Issue for Warehouseman's Goods of Receipts Which Do not State That Fact.

Where there are deposited with or held by a warehouseman goods of which he is the owner, either solely or jointly, or in common with others, such warehouseman or any of his officers, agents, or servants who, knowing this ownership issues or aids in issuing a negotiable receipt for such goods, which does not state such ownership, shall be guilty of a gross misdemeanor. [L. '13, p. 296, § 53.]

§ 3369-54. Delivery of Goods Without Obtaining Negotiable Receipt.

A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 3369-14 and 3369-36, be found guilty of a gross misdemeanor. [L. '13, p. 296, § 54.]

§ 3369-55. Negotiation of Receipt for Mortgaged Goods.

Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a gross misdemeanor. [L. '13, p. 296, § 55.]

§ 3369-56. When Rules of Common Law Still Applicable.

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause shall govern. [L. '13, p. 296, § 56.]

§ 3369-57. Interpretation Shall Give Effect to Purpose of Uniformity.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [L. '13, p. 297, § 57.]

§ 3369-58. Definitions.

(1) In this act, unless the context or subject matter otherwise requires, "Action" includes counterclaim, setoff, and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

(2) A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. [L. '13, p. 297, § 58.]

§ 3369-59. Prior Receipts.

The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act. [L. '13, p. 298, § 59.]

§ 3369-61. Name of Act.

This act may be cited as the "Uniform Warehouse Receipts Act." [L. '13, p. 298, § 61.]

§§ 3370-3384.

Superseded. See §§ 3369-1 et seq., supra.

§ 3372.

See notes to § 3601.

§ 3380.

This section authorizes the parties to agree upon a bill of lading that is non-negotiable, although section 3377, declares that all bills of lading are negotiable: Bonds-Foster Lumber Co. v. Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877.

As to the negotiability of bills of lading, see note in 105 Am. St. Rep. 306.

CHAPTER II.

BILLS OF LADING BY CARRIERS.

§ 3390.

Delivery by the consignor of a carrier's bill of lading passes no right to the property, where the bill acknowledged receipt of

the property from the consignor, gave the name of the consignee and destination, and was stamped in large letters across its face, "not negotiable or assignable," and contained no stipulation reserving ownership in

the consignor, as the same is in effect but a receipt for the lumber with a contract that it shall not be assigned: *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 302, 101 Pac. 877.

Where defendant ordered a carload of lumber from C. to be shipped east, and C., being unable to fill the order, ordered the lumber from P., who loaded a car and took out and retained possession of a bill of lading in his own name, naming the eastern customer as consignee, and sent an invoice or bill of the lumber to C., the title of the lumber did not pass to C., who was never in possession of the bill of lading; and where P. delivered the bill of lading to plaintiff, a bank, upon plaintiff's agreement to forward the car and collect and guarantee the bill, and plaintiff sent the bill of lading to defendant, together with P.'s invoice to C., assigned by C. to plaintiff, explaining

the circumstances and stating that P. left the bill of lading with plaintiff for collection and that C.'s instructions were to forward to defendant and pay P. out of defendant's remittance, the defendant, upon retaining the bill and collecting the proceeds on delivery of the lumber, is liable to the plaintiff, who had paid P.'s bill, in an action on the bill of lading, although defendant notified the plaintiff to look to C.; and defendant's payment to C. is no defense to the action, since C.'s invoice was not a sale or evidence of a sale, and the title to the lumber remained in P. until he surrendered the bill of lading, and the defendant had notice of P.'s intention to make delivery of the lumber conditional on payment of its price: *Security State Bank v. O'Connell Lumber Co.*, 64 Wash. 506, 117 Pac. 271.

CHAPTER III.

NEGOTIABLE INSTRUMENTS.

§ 3392.

See notes to § 6250.

A promissory note for a specified sum payable on demand is not made conditional as to amount or uncertain as to time, so as to be non-negotiable, within the definition of this section by the addition of a provision that this note is given to take up the freight and rehandling of a certain car and proceeds from resale of car to apply on the note, since, construing all of the terms of the note together, the agreement does not make the note payable only out of the proceeds of the resale of the car, but was to apply proceeds in case of a resale before demand, and to reimburse the makers in case of a resale after demand: *First National Bank v. Sullivan*, 66 Wash. 375, Ann. Cas. 1913C, 930, 119 Pac. 820.

A note is negotiable, although due in installments, without showing upon its face the amount due at maturity, under this section and section 3393, providing that the sum is certain although it is to be paid with interest, by stated installments, with provision that all shall become due on any default, and for costs of collection or attorneys' fees if not paid on maturity: *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

§ 3394.

This section is but declaratory of the common law, and a note is negotiable if the general credit of the maker accompanies the note: *First National Bank v. Sullivan*, 66 Wash. 375, Ann. Cas. 1913C, 930, 119 Pac. 820.

As to what circumstances are sufficient to put a purchaser of negotiable paper on

the inquiry, see note in 29 L. R. A., N. S., 351.

§ 3395.

A contract not to negotiate a note to banks in the city of S. where the maker deals or is acquainted indicates an assent that it may be otherwise negotiated: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

The provisions of a mortgage securing a negotiable promissory note are not imported into the note so as to affect its negotiability: *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

As to misdescription of notes in the mortgage, see note in 49 Am. St. Rep. 208.

§ 3396.

See notes to § 6250.

§ 3407.

Evidence is competent to show that the delivery and indorsement of a check to a bank by a depositor, without restriction, is in fact conditional, and for the purpose of collection without passing title, under this section: *Morris-Miller Co. v. Von Presentin*, 63 Wash. 74, 114 Pac. 912.

As to title to paper held by bank for collection, see note in 77 Am. St. Rep. 614.

§ 3408.

A mortgage note promising to pay two thousand and twenty-five dollars and sixty cents in one hundred and twenty equal monthly installments of sixteen dollars and eighty-eight cents each, on account of the principal sum of a loan of twelve hundred

dollars and eight hundred and twenty-five dollars and sixty cents interest thereon, the same being total interest for one hundred and twenty months "calculated upon unpaid monthly balances," is, in the absence of fraud, a valid note as against a maker capable of understanding its terms and making a correct computation; and such note calls for interest at the rate of eleven and fifty-two hundredths per cent per annum, and each monthly payment decreased the principal until, after forty-eight payments, the decreased principal amounted to eight hundred and seventy-four dollars and eighty-four cents: *Equitable Sav. & Loan Assn. v. Bowes*, 70 Wash. 169, 126 Pac. 436.

§ 3410.

Since a draft drawn by an agent as such, disclosing the names of his principals, shows prima facie that he did not intend to bind himself personally, a complaint thereon, alleging that he was such agent duly authorized to make the draft, states a cause of action against the principals: *Citizens' National Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

§ 3416.

A note given in payment for a rate installment on an investment bond, the bond stipulating for annual payments and providing that the bond should be void in case the note is not paid upon maturity, is valid and upon sufficient consideration, where the holder of the bond elects to treat it as in force and sues upon the bond, since it can waive the provisions for its forfeiture, and the word "void" should be construed to mean "voidable": *Pacific Northwest Inv. Soc. v. Cunningham*, 54 Wash. 284, 103 Pac. 9.

The debt of a corporation and an extension of time for payment is sufficient consideration for the execution of the personal note of the president of the corporation: *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941.

A note given in consideration of an agreement to convey and furnish water to land on or before a certain date is based upon a valuable consideration, and there can be no failure of consideration until breach of the contract: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

A note given by a son, to cover a shortage of his deceased father, an officer in a bank, is not shown to be given for an unlawful consideration by the fact that it was desired to keep the defalcation quiet, where the bank forbore to make claim against the decedent's estate, since such forbearance constitutes a good consideration: *Galena Nat. Bank v. Ripley*, 55 Wash. 615, 26 L. R. A., N. S., 993, 104 Pac. 807.

Where a bona fide purchaser of illegally issued stock surrendered the same to the

corporation in consideration of the promissory note of the company, due in three months, indorsed by another, the acceptance of the note is settlement of the cause of action against the corporation and an extension of time for payment of the debt, and is a sufficient consideration for the note as between the payee and an accommodation indorser: *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

In such a case, that the illegal stock was retained as security for the payment of the debt, or that the stock certificate was void does not affect the consideration for the note: *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

§ 3419.

The maker of a note may show want of consideration: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to burden of proof in action on bill or note with respect to defense of want of consideration, see note in 135 Am. St. Rep. 769; also note in 18 Ann. Cas. 205.

It is a good defense to an action upon a dishonored draft, brought by the drawee against the drawer, that plaintiff had falsely represented to defendant that the proceeds of certain mining claims in which the parties had been interested and which now belonged to plaintiff had been deposited in bank to the credit of the defendant, and that defendant, relying thereon, and as an accommodation to plaintiff, had, without consideration, drawn the draft on the bank to enable plaintiff to draw down the funds; and evidence of such fact does not vary the written instrument, but is admissible to show want of consideration, within this section: *Preas v. Vollintine*, 53 Wash. 137, 101 Pac. 706.

As to recovery by bona fide holder when execution obtained by fraud, see note in 36 L. R. A. 441.

Upon the defense of fraud in an action upon a note, which had been detached from the written contract in consideration of which the note was given, the defendants are entitled to introduce the contract in evidence as part of the original transaction and to show the consideration for the note: *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801.

In an action upon a note, upon an issue as to whether the plaintiffs were holders in due course, it being claimed that they were mere figureheads and without interest in the suit, it is error to exclude evidence that two hundred dollars had been deposited with the clerk as security for costs and that the plaintiffs knew nothing about the deposit: *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801.

As to admission of parol evidence to prove relation of parties, see note in 1 L. R. A. 817.

An answer states a good defense to an action upon promissory notes, where it alleges that the defendant's signature was produced by fraud while he was so intoxicated that he did not know what he was doing and that the consideration for which the notes were given never passed: *Gibson v. Feeney*, 66 Wash. 531, 120 Pac. 97.

Failure to promptly deny liability on notes, procured by fraud while intoxicated, does not estop the defendant from asserting his defense, where he then claimed that he had no recollection of signing the notes: *Gibson v. Feeney*, 66 Wash. 531, 120 Pac. 97.

As to the validity of contracts by intoxicated persons, see note in 107 Am. St. Rep. 537.

An extension of time for the first payment to become due on a contract for the purchase of land is a sufficient consideration for a promissory note for the amount of the payment: *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62.

§ 3420.

See notes to § 3558.

The fact that renewal notes were not signed by indorsers of the original note raises a presumption that they signed only as sureties: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

Parol evidence is admissible to show that the indorsers signed as sureties, although the note recited that every party signing or indorsing the note bound himself as principal and not as surety: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to right to show by parol that indorsement unrestricted in form was for collection only, see note in 17 L. R. A., N. S., 838-840.

As to admission of parol evidence to affect indorsement, see note in 13 L. R. A. 52.

Under this section and section 3451, providing that the maker engages to pay it according to its tenor, and section 3582, defining a person "primarily" liable as one who is absolutely required to pay, an accommodation maker of a note is not discharged by an extension of time to the principal debtor, and therefore cannot show by parol that he signed only as surety: *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

As to bills and notes, parol evidence of conditions in, see note in 128 Am. St. Rep. 609.

There is sufficient evidence that notes, signed by the defendants in the left-hand corner, after they had been signed by others and indorsed for discount, were executed by defendants as principals and not as

sureties, where a bank had refused to discount the notes, and only did so on the strength of the signatures of the defendants, who signed and put up collateral for the purpose of getting the notes discounted: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

§ 3429.

The indorsement of a note "without recourse" does not let in equitable defenses, where the words "without recourse" were not written at the time the notes were acquired, but were subsequently inserted as an accommodation to the indorser in contemplation of a subsequent negotiation of the notes, the deal for which was not consummated: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837.

As to effect of indorsement without recourse, see note in 134 Am. St. Rep. 993.

§ 3442.

The indorsee of a note, indorsed for collateral security, although a holder in due course to the extent of his interests, cannot enforce the note in excess of the amount for which the note is security, where the maker has a defense against the original payee: *Canadian Bank of Commerce v. Sen-son Co.*, 68 Wash. 434, 123 Pac. 602.

§ 3443.

See notes to § 3450.

One who purchases a note for value before maturity without notice of any defect is a holder in due course, within this section and section 3447, and his rights cannot be defeated without proof of actual notice of defects or bad faith, even if he omitted precautions or was negligent: *Gray v. Boyle*, 55 Wash. 578, 133 Am. St. Rep. 1042, 104 Pac. 828.

A bank taking as collateral security a note given in consideration of a perpetual water right, before maturity and before any failure of consideration by default on the water contract, is a holder in due course, as defined by this section: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

A transferee of notes after dishonor and suit, as security for an antecedent debt, is not a bona fide purchaser: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

Where a check drawn in favor of a building contractor is marked "on contract" and the drawee had notice of the contract and had opened a separate account with the contractor thereon, the drawee on paying the check is not a holder in due course, under this section, and cannot apply the payment to other accounts of the contractor: *Hughes & Co. v. Flint*, 61 Wash. 460, 112 Pac. 633.

As to effect of notice of facts and circumstances in regard to the note, see notes in 10 L. R. A. 677, and 12 L. R. A. 41.

The payee of a check drawn by a stranger to him is not a purchaser of the check nor a holder in due course, and if he receives it he is bound to account to the drawer upon demand: *Bowles Co. v. Clark*, 59 Wash. 336, 31 L. R. A., N. S., 613, 109 Pac. 812.

This section and section 3450 must be construed in connection with section 3447; hence where the holder has established by undisputed evidence that it is a holder in due course without actual notice, the burden then devolves upon the maker to show that the holder was guilty of some act, neglect or inexcusable omission amounting to mala fides on its part sufficient to show dishonest dealing preventing it from being a holder in due course, negligence or the omission of precautions or the mere suspicion of an infirmity not being sufficient to constitute bad faith or to put upon inquiry: *Scandinavian-American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a direct verdict as a holder in due course; and it is not evidence of bad faith or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective. Where the prior transaction was closed and settled three months before the other note was in existence, and bore no relation to it, there was no occasion to prosecute any inquiry on the prior occasion, and inquiry would have disclosed nothing as to the note and transaction in question: *Scandinavian-American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a directed verdict as a holder in due course; and it is not evidence of bad faith, or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective, where the prior transaction was closed and settled three months before the note in question was negotiated to the bank, and bore no relation to it, and there was no occasion to prosecute any inquiry on the prior transaction: *Scandinavian-American Bank v. Appleton*, 63 Wash. 203, 115 Pac. 109.

Upon an issue as to whether a bank was the holder in due course of a note procured by fraud, the jury is not obliged to accept as conclusive the uncontradicted evidence of an officer of the bank that they took the note without notice of any defect or dishonor, the credibility of the witness being for the jury: *National Bank of Commerce v. Drewry*, 70 Wash. 577, 127 Pac. 102.

As to who are bona fide holders and who are not, see note in 61 L. R. A. 202.

§ 3446.

The title to a note, given in payment of a perpetual water right, is not "defective" as defined by this section, where the maker's signature was not obtained by fraud or unlawful means or an illegal consideration and it was negotiated before its consideration had failed: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

§ 3447.

See notes to § 3443.

The fact that the first of four mortgage notes was overdue at the time of the assignment of the mortgage and notes does not constitute notice of an infirmity in the three unmatured notes in the hands of innocent purchasers in good faith, especially where a payment of part of the principal and interest on the first note was indorsed as paid after its maturity, in view of this section: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to rights of one purchasing note after default in interest, see note in 30 Am. Rep. 701.

Findings that the drawer of a check, which he delivered to one who claimed to be the agent of the payee, exercised due care and cannot be held for loss on a forgery of the payee's indorsement, are sustained by the evidence, where it appears that the supposed agent applied for a loan claiming to act as agent for the owners of the property, who had been known to the drawer ten years previously, that the drawer inquired for their address, and wrote them a letter making inquiry about the loan, but received no answer, and the agent delivered a forged note and mortgage purporting to be executed by the payee of the check: *Goodfellow v. First National Bank*, 71 Wash. 554, 129 Pac. 90.

Where a check is drawn in favor of a principal and delivered to the payee's agent, the drawer does not vouch for the right of the agent or other person to indorse the name of the payee on the check; and in the absence of negligence or fault by the drawer, the bank must ascertain the identity of the payee before making payment, and is liable if it pays the check on a forged

indorsement: *Goodfellow v. First National Bank*, 71 Wash. 554, 129 Pac. 90.

As to who must bear loss when check or bill is issued or indorsed by impostor, see note in 50 L. R. A. 75.

§ 3449.

See notes to § 3450.

The bona fides of the purchase of notes made by a corporation to its president is not affected by the relations between the president and the corporation: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to the validity of a contract between a corporation and one of its officers, see note in 139 Am. St. Rep. 612.

While the innocent purchaser of a note after maturity takes the same subject to equities between the original parties, the rule has no application to, and he is not charged with, equities affecting intermediate holders or indorsers, where there was no illegality in the inception of the note: *Reardan v. Cockrell*, 54 Wash. 400, 103 Pac. 457.

Under this section, a bona fide holder in due course can pass a good title after maturity, although there has since been a failure of consideration as between the original parties, to the knowledge of the last assignee: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

This section must be construed in connection with other sections of the act restricting the defenses, and refers only to such defenses as are permitted by the act itself, or such as do not deny the tenor of the bill: *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

Under the negotiable instruments act, a holder for value and a holder in due course are in the same position to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself: *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

The transferee of a note is not deprived of his character as bona fide holder in due course, by knowledge that it was given in consideration of an executory contract, where he had no notice of any breach of the contract at the time the same was transferred to him: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

As to effect of notice had by bona fide purchaser of facts and circumstances respecting note, see notes in 10 L. R. A. 677, and 12 L. R. A. 41.

§ 3450.

See notes to § 3443.

In an action upon a note procured by fraud, the burden being upon the plaintiff

to show that he is the holder in due course, it is error for the court to decide, as a matter of law, that the plaintiff had no notice of the fraud, where there was no evidence as to the manner, consideration, or time of the purchase of the note, save that of one of the plaintiffs, and one installment of interest was past due at the time, since the credibility of the witness would be for the jury, although he was not contradicted by any direct evidence: *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801.

In an action upon a promissory note, defended on the ground of failure of consideration, breach of warranty and fraud in its inception, clearly established by the evidence, the burden of proof is upon the plaintiff to show that it is the holder in good faith, under this section and section 3443, defining a holder in due course: *Cedar Rapids Nat. Bank v. Myhre Bros.*, 57 Wash. 596, 107 Pac. 518.

In an action by an indorsee upon a promissory note given for the purchase price of a horse, defended on the ground of fraud and breach of warranty, in which plaintiff relied upon a prima facie case without proof of the manner of acquiring the note, sufficient evidence that the payee procured the note and a waiver of the warranty by fraud shifts the burden to the plaintiff to establish that it is a holder in due course: *City Nat. Bank v. Mason*, 58 Wash. 492, 108 Pac. 1071.

In an action by an indorsee of a note given for the purchase price of fixtures, evidence that the maker procured the note by fraud and removed and refused to deliver the fixtures, and that when the note was presented by a bank for payment after maturity, it did not have any indorsements thereon, is sufficient to put the plaintiff upon proof that he was a holder in good faith before maturity: *Gottstein v. Simon*, 59 Wash. 178, 109 Pac. 596.

Under this section, where the title to a note is not defective, the burden can never be upon the holder of a note to show that he is a holder in due course: *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

Where it was shown by defendants that a promissory note, given in part payment of a stallion, was tainted with fraud in the hands of the original payees, who were dealers in horses, the stallion having been returned because of false representations, in a suit on the note by a bank as indorsee, the burden of showing that it was a holder in due course for value before maturity, within this section, is not sustained so as to entitle plaintiff to a directed verdict, where the only evidence of the bank's alleged ownership other than possession and a blank indorsement was that of its cashier, an interested witness, who testified that he had known the payees for years, and the character of their business; that he purchased the note before maturity with twenty-five

others of like character, and had previously purchased others in which litigation had arisen; that he expected the original payees to protect the bank on this note for expenses of litigation, although there was no written agreement to that effect, and that none of the makers were known to the bank or their solvency investigated; in view of the fact that his credibility was for the jury, that he carefully refrained from giving any of the attending circumstances, and that no other witnesses to the transaction, or books or records were produced: *Citizens' Savings Bank v. Houtchens*, 64 Wash. 275, 116 Pac. 866.

Notes taken as collateral security for a pre-existing debt are acquired for value, where the purchaser surrendered other security given when the debt was incurred: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837.

Negotiable promissory notes executed by the maker cannot be held void for want or illegality of consideration, when in the hands of holders for value, before maturity, without notice of any defect: *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

The purchasers of notes secured by mortgages are not put upon inquiry as to want of consideration from the fact that the property was not worth the face of the note, or that a note was indorsed by a trustee of the payee, where it appears that they either looked at the property and were satisfied that it was good, or knew the payee and the trustee who had authority to make the indorsement, and relied on the indorsement, their only duty being to inquire into the regularity of the indorsement: *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

False representations on the sale of a draying outfit by a bank to a partnership are not a defense to a note for five hundred dollars, given by one of the partners and another person to the bank in connection with the sale, and discounted, and placed to the credit of the copartnership, and used in part payment of the outfit, since the consideration of the note was an actual loan of five hundred dollars: *Aurora Land Co. v. Keewan*, 67 Wash. 305, 121 Pac. 469.

It is no defense to an action on a draft, drawn by defendant's agent and discounted by the plaintiff, a bank, that the draft was given for fruit purchased which was in bad condition, when the agent had authority to purchase on his own inspection: *Citizens' National Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

In an action on a promissory note, the plaintiff has sustained the burden of proving that he is a holder in due course, as required by this section, where it appears that the note for two thousand dollars was given in payment of stock and was within a few days sold and indorsed to a corpora-

tion in payment of a stock subscription, and in a few weeks sold and indorsed by the corporation for nineteen hundred dollars paid in cash, neither indorsee having any notice of fraud, and that the maker himself did not learn for two months that he had been defrauded; since (1) plaintiff purchased in good faith, within section 3447, and (2) derived his title through a holder in due course, within section 3449: *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

The fact that a note for two thousand dollars was discounted one hundred dollars, and that the purchaser relied entirely on the credit of the indorser, does not impart notice of a defect in title so as to render him not a holder in due course, where it was represented that both the maker and another indorser were men of financial responsibility: *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

In an action on a promissory note, upon an issue as to whether plaintiff was a holder in due course, what the maker would have said if asked whether he had a defense to the note is immaterial, where there was nothing to put the plaintiff upon inquiry: *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

As to the burden of proving bona fide ownership of note, see notes in 11 Am. St. Rep. 823, and 61 L. R. A. 202.

§ 3451.

See notes to § 3420.

The negotiable instrument act was intended to change the law with reference to the liability of accommodation parties who signed as joint makers of a promissory note: *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

§ 3459.

Semble, that a husband and wife, as joint indorsees of a negotiable instrument, sustain the same relation to a third party in reference to it as any other joint holders, irrespective of community rights: *Barkley v. American Sav. Bank & Trust Co.*, 61 Wash. 415, 112 Pac. 495.

§ 3461.

Presentment and demand is not a condition precedent to an action upon an ordinary overdue promissory note: *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816.

As to presentment and notice of non-payment as fixing the liability of drawer or indorser of check, see note in 17 Am. St. Rep. 807.

As to demand, when note payable on demand is overdue as between maker and indorser, see note in Ann. Cas. 1912A, 475.

As to the law governing liability of drawer or indorser of bill or note as de-

pendent on presentment, protest or notice, see note in 12 Ann. Cas. 455.

§ 3464.

Where no place of payment is expressed in a note, it is payable where the maker resides or at his usual place of business: *Bradsley v. Washington Mill Co.*, 54 Wash. 553, 132 Am. St. Rep. 1133, 103 Pac. 822.

As to presentment and demand at place named in note, as condition precedent to suit against maker, see note in 7 Ann. Cas. 693.

§ 3476.

Upon a promise to pay a note as soon as the promisor "is able to spare the money, or a reasonable time," is not a promise to pay upon condition, but is an absolute promise to pay within a reasonable time, which has expired after the lapse of nearly three years: *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987.

The maker of a promissory note upon sufficient consideration cannot, in the absence of fraud or mistake, set up any collateral agreement exempting him from liability: *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941.

As to negotiability of note as affected by uncertainty of time of maturity, see note in 1 L. R. A., N. S., 1120. See, also, note in 27 L. R. A., N. S., 1017.

§ 3486.

Where an indorser of a note had its custody for collection as agent for the owner, it was his duty to present it for payment, and knowing that the maker was in the hands of a receiver and that presentment would be an idle ceremony, he was not entitled to further notice as an indorser, under this section: *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518.

§ 3498.

Default in the payment of interest is not notice to a holder in due course of dishonor, but it is competent upon the question of good faith: *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801.

§ 3502.

Where a depositor was put upon notice of the failing condition of his bank, was reducing his deposits, and knew that it could not obtain funds to meet its obligations, he is not injured by, and cannot complain of negligence in the failure to notify him of nonpayment of a check which he had drawn and sent to another city, whereby several days would elapse before any steps could be taken to collect the check, during which time he learned of the dishonor at a time when the bank had sufficient cash to pay it,

but made no attempt to protect himself either by insisting upon payment of the check or withdrawing the deposit, and the bank was insolvent: *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912.

In an action by the drawer of a check to charge the payee with negligence in failing to collect it, the burden is upon the plaintiff to prove that the drawee was solvent and the claim good and collectible: *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912.

As to burden of proof of loss by reason of delay in presenting check for payment, see note in Ann. Cas. 1913B, 1293.

§ 3512.

Under this section the maker cannot show an oral agreement to release him from liability when the note was not surrendered, as "renunciation" is used in the statute in the sense of "release": *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941.

§ 3515.

One of two accommodation indorsers of a note is not the agent of the other for the purpose of procuring its discount with authority to consent to a material alteration, where they were not partners and had no interest in and derived no benefit from the note or its discount: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

Under this section the addition of new signatures to procure their discount is a material alteration, which discharges an accommodation indorser who had no notice of the alteration: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

An accommodation indorser who assents to the alteration of a note by the addition of new signers is liable on the note for his contributory share thereof: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

As to the rights inter se of accommodation parties in commercial paper, see note in 28 L. R. A., N. S., 1039.

§ 3520.

Where a sight draft is drawn by an agent upon his principal in payment of logs purchased for the drawee, the effect is that of a bill drawn upon the drawer himself, which the holder may treat as a promissory note, under this section: *Clemens v. Stanton Co.*, 61 Wash. 419, 112 Pac. 494.

As to the liability of principal upon negotiable paper signed by agent, see note in 21 L. R. A., N. S., 1046.

§ 3533.

The holder of a note cannot exercise the option expressed therein to declare the whole sum due for default in the payment of an interest installment, without pre-

sentment, demand and refusal, where the note specified no place for payment, and the makers had an established place of business known to the holder and were at all times ready to pay the interest due: *Bardsley v. Washington Mill Co.*, 54 Wash. 553, 132 Am. St. Rep. 1133, 103 Pac. 822.

As to condition in note giving payee option to declare the amount due before maturity, see note in 125 Am. St. Rep. 200.

There is sufficient evidence to sustain a finding that a note remained in the custody of an indorser, as agent of the owner, from the time it was made until it came due so that notice of dishonor was not necessary, where he had had such possession as such agent and delivered it to an attorney for collection, since it was under his control and continued in his possession: *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518.

As to sufficiency of notice to indorser, see note in 12 L. R. A. 731.

§ 3557.

See notes to § 3558.

§ 3558.

An indorsee of a note in blank being liable as an indorser, if dishonored and notice given, regardless of actual consideration, under this section and sections 3557 and 3420, a finding that by the indorsement, which was admitted, defendant promised to pay the note, etc., is not error, where by other findings dishonor and notice were established: *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518.

§ 3575.

See notes to § 2601.

§ 3576.

Where a bank paid a check drawn upon it under the mistaken belief that the drawer had funds there subject to check, it cannot recover the payment from the payee, since that would destroy the certainty pertaining to such transactions; and it is immaterial that the mistake was due to the confusion incident to paying the check after banking hours, as an accommodation, when the drawer's deposits had been withdrawn the same day: *Spokane & Eastern Trust Co. v. Huff*, 63 Wash. 225, Ann. Cas. 1912D, 491, 33 L. R. A., N. S., 1023, 115 Pac. 80.

As to right of bank to recover money paid by mistake, see note in Ann. Cas. 1912D, 494.

Failure to present checks is not excused because it was difficult and inconvenient to leave camp and present the checks in person, where the checks could have been presented in due course of mail, and would have been paid if so presented: *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538.

§ 3579.

A customer's indorsement of a check without restriction, and its deposit with credit subject to check, does not pass the title to the bank, where there was an understanding and custom that the bank was to receive it for collection and charge it back to the customer if dishonored: *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912.

As to whether a bank check operates as an assignment of the fund, see note in 19 Am. St. Rep. 609.

§ 3582.

See notes to §§ 976, 3420.

TITLE XXI.

BUILDING AND LOAN ASSOCIATIONS.

§ 3601.

A building association contract confers more than a mere option, and imposes the duty to make a bona fide effort to secure substitute contract holders for forfeited contracts, where it provides that the association may, in case of defaults, cancel contracts and make another contract of the same number with another person, and providing for a certain distribution among contract holders of sums paid in to the credit of such contract number; hence the association would be liable to contract holders of a series the maturity of whose contracts were delayed by a breach of the clause and by contracts designated by half, fourth, and three-fourth numbers inserted in the series: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

In an action by contract holders to recover damages from a building association for fraud in connection with the contracts, other contract holders are not necessary parties to the action, where no receivership is sought, but only a personal judgment against the association is asked: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

Where a building association has forfeited contracts and deprived the holders of all standing in the association, the holders may sue to recover the money paid through fraudulent representations without first offering to surrender the contracts, where demand was first made for the money and refused: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

An action for relief against the forfeiture of building association contracts and to recover money paid, on the ground of false representations in the inception of the contracts and breach in performance, is barred by the three-year statute of limitations for actions for relief on the ground of fraud, and the discovery of the fraud is properly fixed by the time when the holders ceased to pay on their contracts: *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

As to the objects, powers, rights and obligations of building associations, see note in 89 Am. Dec. 158.

As to forfeitures under contracts between building associations and their members, see note in 29 L. R. A. 127.

A suit is warranted by the attorney general to dissolve a corporation which was doing a building and loan association business without complying with the laws relative to such corporations, and without investing any capital of its own, where it had so extravagantly and wastefully managed its affairs that it had cost the investors one hundred thousand dollars to invest fifty thousand dollars of their own money: *State ex rel. Tanner v. Northwestern Investment Co.*, 70 Wash. 381, 126 Pac. 895.

Engaging in the business of a building and loan association without complying with the laws governing such corporations is against public policy, and the fact that the state auditor gave his consent thereto on the advice of the attorney general does not estop the state from proceeding against the corporation to prevent a continuance of the business: *State ex rel. Tanner v. Northwestern Investment Co.*, 70 Wash. 381, 126 Pac. 895.

Where a corporation illegally engaging in a building and loan association business has accumulated a fund that belongs to the investors, and seeks to transfer its assets to a legally incorporated company, the investors are entitled to have the fund distributed without further reduction than the necessary cost of administering it; and the newly organized building and loan association should be dissolved, where it appears to be organized for the sole purpose of taking over and administering the fund: *State ex rel. Tanner v. Northwestern Investment Co.*, 70 Wash. 381, 126 Pac. 895.

As to quo warranto suits dissolving private corporations, see note in 125 Am. St. Rep. 643.

§§ 3601—3638.

Repealed. See L. '13, p. 345, § 28.

§ 3601-1. Creation of Building and Loan Associations, etc.

Ten or more persons, citizens of the state of Washington, may form a savings and loan association or savings and loan society for the purpose of accumulating the savings and funds of its members and lending its shareholders or others the funds so accumulated by the making and acknowledging in quadruplicate and by filing as hereinafter required articles of incorporation specifying:

(a) The name of the proposed association, which shall terminate with the words "Savings and Loan Association," or "Savings and Loan Society."

(b) The city, town or village and the county wherein the principal place of business of the association is to be located and which must be within the state of Washington.

(c) The number of its directors, which shall not be less than seven nor more than fifteen. The first board of directors shall hold office for a term to be specified in said articles of not less than two, and not more than six months from the time said association is authorized to do business.

(d) The names, occupation and postoffice addresses of its first directors.

(e) The names, occupation and postoffice addresses of the subscribers to the articles of incorporation, and a statement of the number of shares which each has agreed to take. The matured value of the total number of shares so subscribed shall be at least \$25,000.00.

(f) The limit of capital to be accumulated.

(g) The time of duration of said association, which shall not exceed fifty years.

Said articles shall be filed in the first instance in the office of the state auditor pending his approval thereof and of the by-laws of said association as hereinafter provided for.

The articles of incorporation may be amended by a vote of at least two-thirds in number of the shareholders voting at any general meeting, or by a special meeting called for that purpose, and a copy of the resolution making said amendment shall be certified in quadruplicate by the president and secretary under the seal of said corporation, and when so certified shall be so filed and kept the same as in the case of original articles, and from the time of said filing, said amendment shall have the same effect as if embraced in the original articles of incorporation: Provided, however, That no increase in the authorized capital shall be made unless three-fourths of the capital previously authorized has actually been issued. [L. '13, p. 326, § 1.]

§ 3601-2. By-laws—Approval.

Each association shall adopt by-laws for its government and therein describe the manner in which its business shall be transacted, which by-laws shall be in conformity with the provisions of this act, and the laws of this state, and at all times be open to the inspection of the state auditor and the members of the association at its home office. All by-laws shall be subject to the approval of the state auditor before going into effect, and in case any provision in such by-laws shall be contrary to the provisions of this act, or to the laws of this state, or be detrimental to the interests of the members of such organization, or against public policy, he may, under the advice and consent of the attorney general, require the same to be stricken out. [L. '13, p. 327, § 2.]

§ 3601-3. Responsibility of Incorporators.

Whenever said articles of incorporation are in due form and regularly executed and the by-laws have been duly approved as above required, the state auditor thereupon shall ascertain from the best source of information at his command the responsibility, character and general fitness of the incorporators. If he shall be satisfied concerning the several matters speci-

fied above, he shall, within a reasonable time, issue under his hand and official seal a certificate reciting in substance the filing in his office of the articles of incorporation and by-laws; that said articles and by-laws conform to all the requirements of law; that he has approved the same, and that he verily believes the incorporators are fit and proper to conduct the business of a savings and loan association as defined in this act and said by-laws. Said certificate shall be made in quadruplicate and attached to each copy of the articles of incorporation, one of which shall be retained by the state auditor and the other three shall be returned to the incorporators who shall forthwith file one copy thereof in the office of the secretary of state, one in the office of the auditor of the county in which the chief place of business of said association is located, and the other shall be retained by the association, whereupon the incorporation of said association shall be deemed complete. [L. '13, p. 328, § 3.]

§ 3601-4. Oath of Directors—Bonds.

Each officer and director, when appointed or elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association, and will not knowingly violate the by-laws or any of the provisions of law applicable to such association.

Each officer or agent having the custody of money or securities of an association shall be required to give bond to such association in an amount to be determined by the board of directors of such association commensurate with his liability. [L. '13, p. 328, § 4.]

§ 3601-5. Limitation on Charges, etc.

The membership of the association shall consist of those persons holding shares therein.

The by-laws may provide for an entrance, membership or withdrawal fee, but the total of such fees shall not exceed two dollars upon each share, and no other fee, penalties, fines or forfeitures shall be charged, except reasonable charges for expenses in closing loans, and for delinquency in making payments on stock and loans.

The above provision shall not apply to dividends which may revert to the association as provided in section 3601-7. [L. '13, p. 329, § 5.]

§ 3601-6. Value of Shares—Free Shares—Stock.

The capital of every such association shall consist of the accumulated payments made by its members and dividends credited thereon, and shall be represented by shares. Every share issued shall have a matured value of one hundred dollars. Every such association shall be either permanent or serial in character as provided by the terms of its by-laws. A permanent association may issue shares at any time and credit its dividends upon the pass-books of its members. A serial association may issue shares in series and credit its dividends equally upon each share issued in such series. No shares of a prior series shall be issued after the issuing of shares in a later series, when issued upon the serial plan, except at the book value at the last distribution of profits plus the dues and accumulated earnings thereon since such distribution. Shares which have not been transferred to the

association as security for the repayment of a loan shall be called free shares. Shares that have been so transferred shall be called pledged shares.

No preferred stock shall be issued, i. e., stock upon which a different or stipulated rate of dividends shall be guaranteed or paid before or regardless of the amount of dividends distributed to other classes of shares, neither shall any shares be issued which shall be exempt from bearing their pro rata portion of loss: Provided, however, That nothing herein contained shall be held to prohibit any association already having reserve stock outstanding from continuing to have an equal amount of such stock outstanding, and from issuing, if necessary, additional reserve fund stock so as to equal five per cent of the capital as defined in this section; and when so provided in its by-laws, such reserve fund stock may participate in all earnings equitably with the general stock and be chargeable with all real estate taken under foreclosure or otherwise in the adjustment of delinquent loans together with all direct losses of whatever nature sustained by the association in the general course of business and in consideration of such guaranty against loss, and when provided in the by-laws such stock may receive additional dividends, and such stock shall not be subject to withdrawal until all other classes of stock and all other liabilities of the association shall first have been liquidated, and any such association may agree to mature its other classes of stock at a fixed time, providing any deficiency arising therefrom shall be chargeable only to such reserve fund stock.

Any association may issue the shares classified below when so provided by its by-laws:

(a) Installment shares upon which a regular stipulated payment of dues shall be made at stated periods expressed in the by-laws.

(b) Savings shares, upon which payments shall be made in such sums and at such times as the holder thereof may elect until the shares reach their matured value or are withdrawn.

(c) Fully paid shares, upon which a single payment amounting to one hundred dollars per share shall be paid at the time of subscription.

(d) Juvenile shares. Any association may issue juvenile shares to, or in the name of, any minor which shall be held for the exclusive right and benefit of such minor and free from the control or lien of all other persons; and the accumulated savings on these shares together with the dividends credited thereon shall be paid to the persons in whose name the shares have been issued and the receipt or acquittance of such minor shall be valid and sufficient release and discharge to the association for such accumulated savings, together with the dividends credited thereon or any part thereof. [L. '13, p. 329, § 6.]

§ 3601-7. Dividends.

Profits and losses shall be ascertained and distributed semi-annually or annually. Dividends shall be taken from the net earnings of the association and, subject to the provisions of section 3601-6 relating to reserve fund stock shall be distributed ratably to all classes of shares and to each share in proportion to the accumulation made thereon: Provided, That when stock is withdrawn within two years of its issuance, the withdrawing member shall receive only such proportion of the dividends as may be provided in the by-laws, but when such stock is more than two years old, the withdraw-

ing member shall receive at least seventy-five per cent of the dividends. The remaining dividends may revert to the undivided earnings. No dividends shall be credited or paid except by a vote of the board of directors duly entered upon the minutes, whereupon shall be recorded the vote by ayes and nays. It shall be lawful for the association, in addition to the contingent fund required by section 3601-13, to hold in its fund of undivided earnings, such sum as the board of directors may from time to time deem necessary or wise: Provided, however, That when the undivided earnings, including the contingent fund, exceed fifteen per cent of the dues and dividends credited to members, the board of directors shall declare such extra dividend in excess of the dividend regularly apportioned, as may be necessary to distribute among the shareholders the accumulation in excess of such authorized surplus. [L. '13, p. 331, § 7.]

§ 3601-8. Loans, How Made—Investments.

For every loan made, except a loan from one association to another, a note or bond secured by first mortgage on improved real estate shall be taken, which security shall be conservatively worth at least twice the value of the loan. No mortgage loan shall be made except upon the report in writing of an appraiser or a committee of appraisers appointed by the board of directors, which report shall state the conservative value of the mortgage security. The directors in their discretion may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value, and may loan upon or invest in bonds of the United States and of the state of Washington, and in such classes of bonds and warrants of the counties, school districts and other municipalities, as well as local improvement districts, in this state, as the state auditor may from time to time approve. Any association having a surplus for which there is no demand for loaning purposes or for the payment of withdrawals or matured shares, may loan the same to another domestic association, and such association may borrow from other associations or otherwise for loaning purposes or for the payment of withdrawals or matured shares: Provided, That no association shall borrow any amount or amounts which in the aggregate shall exceed twenty-five per cent of the actual value of mortgages on deposit with the state auditor, as shown by the last preceding semi-annual statement of the borrowing associations, as provided in section 3601-9.

In borrowing said amount or amounts for the purposes specified, any such association may, at its election, borrow the same or any part thereof upon its debenture bonds, maturing on or before five years after date and bearing interest not exceeding six per cent per annum, interest payable semi-annually. In no case shall any such bonds be issued when there are sufficient funds on hand or receivable in time to meet approved applications for loans or for the payment of maturing stock or withdrawals of stock. Such debenture bonds may be retired by action of the board of directors at any time after one year from date of issue, by the secretary of the association giving notice in writing sixty days or more prior to the next interest date to the recorded holders thereof, and on return of said retired bonds, together with the coupons attached, said holders shall receive their par value. At the expiration of said interest period, the bonds so called shall cease to draw interest. Whenever the state auditor shall deem any indebtedness incurred

under the provisions of this section to be detrimental to the interests of the shareholders of any such association, he shall notify such association to reduce its indebtedness to such amount as he shall consider reasonable, giving such association such reasonable time as may be necessary to effect such reduction of indebtedness. [L. '13, p. 332, § 8.]

§ 3601-9. Securities Deposited With State.

Every savings and loan association heretofore or hereafter incorporated under the laws of this state, and governed by this act, shall deposit and keep with the state auditor, or with a duly chartered trust company of this state, approved by the state auditor, in trust for all its members and creditors, all mortgages and notes secured thereby, received by it in the usual course of business. When deposited with a trust company such company shall certify to the state auditor the possession of such securities, and the same shall not be surrendered without the authority or sanction of the state auditor. All associations except such as confine their business operations wholly to the county in which such associations are incorporated and adjoining counties, not having or owning mortgages to the amount of twenty-five thousand dollars, shall deposit with the state auditor additional securities to make with the securities so owned and deposited a total value of not less than twenty-five thousand dollars. Such additional securities shall consist of bonds of the United States and of the state of Washington, and such classes of bonds and warrants of the counties, school districts and other municipalities, as well as local improvement districts, in said state, as the state auditor may from time to time approve, and such additional securities may be withdrawn from time to time when mortgage securities of corresponding value shall be deposited, as provided in this act, or when other securities of like character are substituted therefor, and it shall be the duty of the state auditor, from time to time, to examine said associations to ascertain whether all of its securities are deposited, as required by this act: Provided, That all securities heretofore taken in any other state, territory or nation, by any association organized under the laws of this state, and subject to the provisions of this act, and there deposited under the laws of such state, territory or nation, with some officer, authorized to receive the same, shall not be deposited with the auditor of the state of Washington. But in every such case a certificate of such deposit shall be filed with the auditor of this state, and renewed annually, together with a statement verified by the affidavit of some officer of such association, who has knowledge of the facts, showing all of the securities taken by such association, in such other state, territory or nation, at the time of the filing of such certificate; and in case any securities taken in any such state, territory or nation are not deposited there, then the same shall be deposited here, as required by this act.

Every foreign association doing business in this state and governed by this act shall deposit and keep with the auditor of this state, or with a duly chartered trust company of this state, approved by the state auditor, in trust for all its members and creditors in this state, all mortgages heretofore received by it in this state and now in effect, and all mortgages hereafter received by it in the usual course of its business in this state. Such securities shall be kept and dealt with by the state auditor or by such trust

company in like manner as the securities deposited by savings and loan associations organized under the laws of this state. Every association governed by this act shall on or before the first day of February and on or before the first day of August in each year, file with the state auditor a verified statement of the total amount due to the association from the borrowers, upon the mortgage loans on deposit with the state auditor upon respectively the thirty-first day of December and the thirtieth day of June last preceding. Payments upon stock pledged to the association for a loan, which payments are accumulated for the purpose of meeting the loan at or prior to its maturity, shall be considered as payments upon such loan within the intent of this section. [L. '13, p. 333, § 9.]

§ 3601-10. Surrender of Securities.

All interest and dividends which may accrue on securities held by the state auditor or such trust company as provided for herein and all dues, or monthly payments, which may become payable on stock pledged as security for loans, and notes and mortgages for which are deposited in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages, so long as such association remains solvent and faithfully performs all contracts with its members, and when any mortgage shall have been fully paid to said association the same shall be surrendered by said state auditor, or under his order, upon filing with him a certificate of the auditor of the county where the real estate is situated, to the effect that the satisfaction of said mortgage has been filed for record. Any mortgage upon which default has been made may be surrendered as aforesaid, upon filing with the state auditor an affidavit sworn to by the president and secretary of the association owning the same, stating that such mortgage is in default and that it is withdrawn for the purpose of foreclosure. [L. '13, p. 335, § 10.]

§ 3601-11. May Hold Real Estate—Limitation.

Any savings and loan association may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment, lien, or other encumbrance or in which it may have any interest, and may sell, convey, lease or mortgage the same at pleasure to any person or persons, but shall not otherwise acquire or deal in real estate: Provided, That any such association may acquire such real estate or a leasehold interest therein as may be necessary or convenient for a location for the transaction of its business: Provided further, That no such association shall use more than ten per cent of its assets at any time in acquiring real estate for its business location: Provided further, That all real estate except that used for its business location shall be sold by said association within five years from and after the time that title thereto is acquired. [L. '13, p. 335, § 11.]

§ 3601-12. Checking Accounts Prohibited.

No savings and loan association shall carry any demand, commercial or checking account and no such association shall receive any savings account or any sum of money on deposit without issuing shares of stock for the same. [L. '13, p. 336, § 12.]

§ 3601-13. Contingent Fund.

At each periodical distribution of profits, unless such association already has issued paid-up reserve fund stock equal to five per cent of the amount credited to members to which losses may be chargeable as provided in section 3601-6, the board of directors shall reserve and carry to a contingent fund, a sum equal to at least five per cent of the net earnings during the period since the last previous dividend was declared, until such contingent fund shall be equal to at least five per cent of the amount credited to members. The directors may at any time carry to such contingent fund any further portion of the undivided earnings that in their discretion may seem wise, except as herein provided. Losses of the association may be paid therefrom, and whenever the contingent fund is reduced below five per cent the board of directors shall at each periodical distribution of profits carry to such contingent fund at least five per cent of the net earnings during the period since the last dividend was declared until such contingent fund shall again be equal to at least five per cent of the amount credited to members. [L. '13, p. 336, § 13.]

§ 3601-14. Losses.

Whenever the losses of an association exceed the contingent fund, or the reserve fund, if reserve fund stock has been issued as provided in section 3601-6, they may be charged against the undivided earnings, if any, and in the event that they also exceed such undivided earnings, shall be charged pro rata against all classes of shares according to the withdrawal value thereof. [L. '13, p. 336, § 14.]

§ 3601-15. Expenses.

The expenses of such association shall be paid from its earnings, and no deduction from dues shall be made either directly or indirectly for that purpose. No such association shall pay or be or become liable to pay either directly or indirectly in the course of any calendar year as salaries, commissions, fees or other compensation to its officers, directors, auditor, attorneys, agents, clerks and all other employees and for rent, advertising, and all other operating expenses, sums of money the aggregate of which shall exceed two and one-half per cent of the average amount of assets of such association during such year. The term "operating expenses" as used in this connection shall not be construed to include membership fees, taxes, assessments, repairs or insurance on real estate or commissions on the sale of real estate, or on the placing of loans, or any interest which the association may have paid or become liable to pay, proper legal charges for searching titles or the preparation of legal papers, expenses of foreclosure suits or other bona fide litigation, nor charges for examinations made by the direction of the state auditor. The provisions of this section, in so far as they limit the expenditure for expenses, shall not apply to any association whose accumulated capital is less than forty thousand dollars: Provided, however, That the annual expenses of every such latter association shall not exceed a total of one thousand dollars. The provisions of this section shall apply as well to foreign as to domestic corporations doing business under the permission and certificate of the state auditor and said auditor shall not

renew such permission or issue such certificate to any corporation that shall have violated the provisions of this section. [L. '13, p. 337, § 15.]

§ 3601-16. Withdrawal of Shares—Payment of Value.

Shares shall not be withdrawn until after a lapse of three months from the time of issuance of such shares and not then except at the option of the association, and after one day's written notice of intention to withdraw such shares shall have been given subsequent to the expiration of such three months; but shares may be withdrawn at any time after one year from the time of issuance and after one day's written notice of such withdrawal has been given to the association. The withdrawing shareholder shall be paid the amount of the withdrawal value of the shares, as shown by the last prior distribution of profits and as determined by the by-laws, together with all the dues paid thereon since such distribution: Provided, That upon withdrawal of shares pledged to the association for a stock loan or stock loans, the association shall first deduct therefrom the indebtedness due the association. Withdrawals shall be paid in the order of their filing, except as hereinafter provided, and it shall be the duty of the secretary or other officer discharging such duties to enter upon each notice the order and date of such filing. Except as hereinafter provided, not more than two-thirds of the receipts of the association in any month shall be applied to the payment of withdrawals and matured shares without the consent of the board of directors. Whenever an application for withdrawal shall have been on file or the payment of matured shares demanded and either shall have remained unpaid for a period of six months, all the receipts of the association in any month from dues, loans repaid, and the proceeds of all other investments, shall, after the payment of expenses and general indebtedness, be applied toward the payment of withdrawals and matured stock; and the board of directors, or the state auditor, in his discretion, may direct that withdrawals be paid upon a ratable and proportionate basis. After filing the notice of withdrawal provided herein, the withdrawing member shall be entitled to the dividends credited to the same class of shares, until the final payment of his shares is made; and membership in the association shall remain unimpaired so long as any accumulation remains to his credit. No officer, director, attorney, clerk or agent of such association, and no person in any way interested or concerned in the management of its affairs shall discount or directly or indirectly purchase a share of any such association, whether filed for withdrawal or not, except by payment therefor of the withdrawal value of such share as determined herein. The board of directors of any association may retire all classes of free shares by enforcing withdrawals of the same: Provided, That the by-laws shall clearly state the manner in which such withdrawals may be enforced: And provided also, That the holders thereof shall be paid the full value of the shares, including, in such case, their proportion of the contingent fund. [L. '13, p. 337, § 16.]

§ 3601-17. Exemption from Taxation.

Shares held by members shall be exempt from taxation and the association itself shall not be taxable, except that its tangible personal and real property shall be taxed as other tangible personal and real property is taxed. [L. '13, p. 339, § 17.]

§ 3601-18. Annual Reports—License Fees.

On or before the first day of September in each year every savings and loan association doing business in this state shall deposit with the state auditor a report of its affairs and operations for the year ending on the thirtieth day of June immediately preceding. Such report shall be verified under oath by the president and secretary or by three directors of the association, and shall contain such information as the state auditor from time to time request. Upon filing such report, there shall be paid to the state auditor for the state general fund, in lieu of all other corporation fees or licenses, a fee determined as follows: If the assets of the association as shown by said report amount to fifty thousand dollars or less, a fee of ten dollars; if more than fifty thousand dollars and less than one hundred thousand dollars a fee of twenty dollars; if more than one hundred thousand dollars and less than two hundred fifty thousand dollars, a fee of thirty dollars; if more than two hundred fifty thousand dollars and less than five hundred thousand dollars, a fee of forty dollars; if more than five hundred thousand dollars and less than one million dollars, a fee of sixty dollars; and if more than one million dollars, a fee of one hundred dollars. If such association shall fail to furnish to the auditor of the state any report required by this act, at the time so required, it shall forfeit the sum of twenty-five dollars per day for every day such report shall be delayed or withheld; and an action shall be started in the name of the state to recover such penalty and the same shall be paid into the treasury of the state. After receiving such report, the auditor, if satisfied that such association has complied with all the provisions of this act and is entitled to do business in this state, shall issue a certificate stating the compliance with such provisions, and that such association is entitled to do business in this state, which certificate shall be in force for the period of one year unless sooner revoked. [L. '13, p. 339, § 18.]

§ 3601-19. Examination—Inspector—Expenses.

The state auditor shall have supervision of all such associations doing business in this state, and shall be charged with the execution of the laws of this state relating thereto. At least annually but not oftener than twice a year except in cases of extreme necessity he shall make or cause to be made an examination into the affairs of all such associations doing business in this state. Such examinations shall be made by an inspector of savings and loan associations to be appointed by the state auditor, and who shall hold office during his pleasure. Such inspector shall be paid for the time actually spent in examining the affairs of any association at the rate of eight dollars per diem and railroad fare. Such compensation shall be paid by the association and where several associations are examined in the course of a single trip made by the examiner, the railroad fare shall be equitably proportioned by the state auditor among the associations so examined. All examinations made by such inspector shall be full and complete, and in making the same he shall have full access to, and may compel the production of all books, papers, moneys, and records of the association under examination, and may administer oaths to and examine the officers of such association or any person connected therewith as to its business and affairs,

and any willful false swearing shall be deemed perjury and be punishable as such: Provided, Whenever by the laws of the state under which any foreign association is organized, annual examinations of such association are required and are made pursuant thereto, then such foreign association shall not be examined hereunder: Provided, Such foreign association shall furnish to the auditor of this state annually a certificate of the proper officer of such other state that he has made an examination pursuant to the laws of such other state, and that the affairs of such association are in accord with the laws of such other state: And provided further, That the auditor of this state may, whenever he deems it advisable, cause examination of such foreign association to be made as is required in the case of associations organized under the laws of this state. [L. '13, p. 340, § 19.]

§ 3601-20. State Auditor to Take Charge of Association, When—Receiver.

Whenever it shall appear to the state auditor that the affairs of any savings and loan association are in an unsound condition or that it is conducting its business in an unsafe or unlawful manner, the state auditor shall at once notify the board of directors of such association, giving them twenty days in which to restore its affairs to a safe and sound condition or to discontinue its illegal practices. If after twenty days such restoration shall not have been made, or such illegal practices shall not have been discontinued, the state auditor shall direct the inspector of savings and loan associations to take possession of all books, records and assets of every description of such association and hold and retain the possession of same pending the further proceedings herein specified. Should the board of directors, secretary or person in charge of such association refuse to permit the said inspector to take possession as aforesaid, the state auditor shall communicate such fact to the attorney general, whereupon it shall become the duty of the attorney general at once to institute such proceedings as may be necessary to place such inspector in immediate possession of the property of such association. Upon taking possession of the effects of the association as aforesaid said inspector shall prepare a full and true statement of the affairs and conditions of such association, including an itemized statement of its assets and liabilities, and shall receive and collect all debts, dues and claims belonging to it and pay the immediate and reasonable expenses of his trust. Said inspector shall be required to execute to the state auditor a good and sufficient bond in a sum required by the state auditor conditioned upon the faithful discharge of his duties as custodian of such association, which said bond shall be approved by the state auditor, and the expense of which shall be borne by the association under examination.

When the condition of such association has been fully ascertained, and it shall appear that the affairs of said association are in fact in an unsound condition, or that it is in fact continuing its business in an unsafe or unlawful manner, the state auditor shall report the facts to the attorney general and it shall thereupon become the duty of the attorney general to institute proceedings in the superior court of the proper county for the appointment of a receiver and for the dissolution of such association, or such other proceedings as the occasion may require. [L. '13, p. 341, § 20.]

§ 3601-21. Disbarred from State, When—Re-entry.

Any savings and loan association organized under the laws of any other state or territory that shall remove any action that shall be commenced against it in a court of this state to a United States court, or that shall fail to pay any judgment rendered against it upon a suit in any court in this state within sixty days after the rendition of final judgment in such case, or that shall fail to make reports to the state auditor as provided in this act, or to do any other act to be done or performed as required by law, and after the continued failure to do such act for twenty days after notice in writing from the state auditor of such failure, shall have no right or authority to do or transact any further business within the limits of this state, and the state auditor shall thereupon cause notice of the termination of such authority to do business to be mailed to such association, and to be published in some newspaper of general circulation at the capital of the state, and shall communicate the facts to the attorney general of this state, who shall institute such proceedings in the matter as the case may require: Provided, Any such corporation may be again authorized to commence business upon such terms as the state auditor may deem just and proper, and upon full compliance with the provisions of this act. [L. '13, p. 342, § 21.]

§ 3601-22. Penalties.

Any officer, director or agent of any savings and loan association or any other person who shall sell or issue or knowingly cause to be sold or issued to any resident of this state, any stock of said association while said association does not have on deposit with the state auditor as required by this act, securities of the value and at the time herein prescribed, or while such association shall not have the certificate of the state auditor authorizing it to do business as herein prescribed shall be guilty of a gross misdemeanor. [L. '13, p. 343, § 22.]

§ 3601-23. Act Exclusive as to New Organizations.

After the passage and approval of this act, it shall be unlawful for any person, association or persons or domestic associations not already organized and doing business under sections 3601 to 3638, both inclusive, of Remington & Ballinger's Annotated Codes and Statutes of Washington, to conduct a business in the form or of a character similar to that authorized by this act without first incorporating under this act. After the passage and approval of this act no foreign association not already lawfully engaged in the state of Washington in the business of a savings and loan association shall be permitted to conduct such a business in this state, and hereafter no savings and loan associations organized under the laws of this state not already lawfully engaged in the business of a savings and loan association outside of the state of Washington shall be permitted to engage in business outside of this state: Provided, That no such association shall loan on property outside of this state more than the aggregate of the amount from time to time standing to the credit of members outside of the state. [L. '13, p. 343, § 23.]

§ 3601-24. Advertising Limited.

It shall be unlawful for any savings and loan association to make, publish, or circulate any advertisement, sign, circular or statement intended or

calculated to induce persons to purchase stock of such association in the belief that such stock is subject to withdrawal on demand or that a stipulated or agreed rate of interest or dividend is payable thereon, except as provided in section 3601-6. [L. '13, p. 343, § 24.]

§ 3601-25. Names Prohibited.

After the passage and approval of this act, no person, association of persons, or corporation conducting a business not in the form and of a character similar to that authorized by this act shall have or continue to use for a part of its title or corporate name any combination of two or more of the following words, to wit: "building," "savings," "loan," "home," "association" or "society." [L. '13, p. 344, § 25.]

§ 3601-26. Act Exclusive—Existing Contracts not Impaired.

The powers, rights, duties, privileges and obligations of every association heretofore or hereafter organized and doing business in the form or of a character similar to that authorized by this act, shall be governed, controlled, construed, extended, limited and determined by the provisions of this act, to the same extent and effect as if said association had been organized and incorporated under or pursuant to the provisions of this act, and the articles of incorporation, by-laws, and rules of every such association heretofore made or existing are hereby modified, altered and amended to conform with the provisions of this act and the same are declared void where such articles of incorporation, by-laws or rules are inconsistent with the provisions of this act; except that the obligations of any existing association, whether between such association and its shareholders or any one of them or any other person or persons or any valid contract between the shareholders of such association existing at the time this act takes effect shall not be in any way impaired by the provisions of this act; and with such exceptions every savings and loan association shall possess the powers, rights, duties and privileges, and be subject to the obligations, restrictions and liabilities conferred and imposed by this act, notwithstanding anything to the contrary in its articles of incorporation, by-laws or rules. All obligations to any such association heretofore contracted shall be enforceable by it and in its name, and demands, claims and rights of action against any such association may be enforced against it as fully and completely as they might have been enforced before. [L. '13, p. 344, § 26.]

§ 3601-27. Offenses.

Every officer, director, agent or other employee of any savings and loan association, who shall willfully violate or fail to comply with any of the provisions of this act, shall be guilty of a misdemeanor. [L. '13, p. 345, § 27.]

§ 3620.

Repealed. See L. '13, p. 345, § 28.

Where the state auditor orally notified the attorney general that he deemed it unsafe or inexpedient for a building and loan asso-

ciation to continue to transact business, which by this section is a prerequisite to suit by the attorney general, such notice may be proved by any competent witness who was present and heard the communication: State ex rel. Tanner v. Northwestern Investment Co., 70 Wash. 381, 126 Pac. 895.

TITLE XXII.

CEMETERIES AND CEMETERY ASSOCIATIONS.

§ 3640.

This section is broad enough to exempt from local assessments the burial lots in a cemetery deeded to private owners, to be used exclusively for burial purposes, although the cemetery is owned by a cemetery company organized as a private corporation for profit, and not as a charitable association as contemplated by section 3639, authorizing the association of individuals for that purpose: In re Sixth Avenue West, Seattle, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

A cemetery company organized as a private corporation, which has sold burial lots

to be used for that purpose only, is not entitled to the exemption of its unsold property from local improvement assessments, under sections 3640, 3645, exempting from taxation the lands of cemetery associations incorporated or conducted under the law relating to charitable associations: In re Sixth Avenue West, Seattle, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

As to liability of cemetery or the lots therein to special assessments, see note in Ann. Cas. 1912A, 1051.

§ 3645.

See notes to § 3640.

TITLE XXIII. CHATTEL MORTGAGES AND CONDITIONAL SALES.

CHAPTER I. CHATTEL MORTGAGES.

§ 3659.

The owner of a machine, having included it in a chattel mortgage executed by him on behalf of a corporation of which he owned all the stock, is estopped to assert that the same is his property and not subject to the mortgage: *First Nat. Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038.

As to the legal title, ownership and possession of mortgaged chattels after condition broken, see note in 137 Am. St. Rep. 893.

The lien of a senior chattel mortgage on a crop of wheat to secure certain enumerated notes cannot be extended to cover advances subsequently made for seed, provisions, storage, and harvesting expenses, as against the lien of a junior mortgage, where the mortgage made no provision for future advances or for such items: *Inland Trading Co. v. Edgecombe*, 57 Wash. 257, 106 Pac. 768.

As to the lien on growing crops of a chattel mortgage, see note in 18 Am. St. Rep. 770.

A chattel mortgage of a stock of goods which permits the mortgagor to remain in possession, and by contemporaneous parol agreement to sell goods for the purpose of replenishing his stock and paying expenses instead of applying all of the proceeds to the payment of the mortgage debt, is not fraudulent as to creditors unless it was given for the purpose of aiding the mortgagee to accomplish that purpose: *Van Winkle v. Mitchum*, 66 Wash. 296, 119 Pac. 748.

As to a chattel mortgage allowing the mortgagor to retain possession and sell the property, see note in 15 Am. St. Rep. 913.

§ 3660.

The invalidity of a chattel mortgage by reason of failure to record it, valid as between the parties, cannot be asserted by creditors who had acquired only liens against the real property of the mortgagor: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

As to the effect of failure to record a chattel mortgage, see note in 137 Am. St. Rep. 493.

§ 3661.

A chattel mortgage "dated" December 9th, but not delivered until December 13th, is not "executed" until the latter date, and is filed

within ten days as required by statute from "execution" if filed December 21st: *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492.

Under this section and section 3665, providing that chattel mortgages to secure the sum of three hundred dollars may be "recorded" and indexed with like force and effect as if this act had not been passed, but that they shall "also be filed and indexed as required by this act," a chattel mortgage for over three hundred dollars, if recorded, need not remain on file, in order to give notice thereof to creditors of the mortgagor: *Van Winkle v. Mitchum*, 66 Wash. 296, 119 Pac. 748.

§ 3662.

The transfer of the possession and title of mortgaged chattels to a bona fide mortgagee, in satisfaction of the debt is valid as against an attachment by a subsequent creditor, without regard to the validity of the mortgage: *Urquhart v. Coss*, 60 Wash. 249, 110 Pac. 1001.

A prior creditor who has actual notice of a chattel mortgage given by the judgment debtor to a third person cannot set up insufficiency of the description in the chattel mortgage, and claim priority on attaching the property: *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492.

As to actual notice and its effect in the case of an unrecorded chattel mortgage, see note in 13 L. R. A. 389.

Where an understanding that a corporation was to purchase and pay for certain personal property, delivered to and used by it, was not carried out or completed until after the other party thereto had given a chattel mortgage thereon, there was at most but an executory contract of sale when the mortgage was given, and the completed sale was subject to the mortgage: *In re Commercial Bank of Snohomish County*, 57 Wash. 381, 106 Pac. 1124.

A subsequent creditor of a mortgagor cannot assert the invalidity of a chattel mortgage for want of acknowledgment and affidavit of good faith, where he had acquired no lien until the mortgagee had obtained possession and title in discharge of the debt; and any interest of a third person could not help such a creditor: *Urquhart v. Coss*, 60 Wash. 249, 110 Pac. 1001.

A chattel mortgage filed within ten days of execution takes priority over an attach-

ment levied after execution of the mortgage:
Fenby v. Hunt, 53 Wash. 127, 101 Pac. 492.

§ 3665.

See notes to § 3661.

Under this section it is not necessary to record a chattel mortgage where the debt secured is less than three hundred dollars, and filing in the auditor's office within ten days after execution is sufficient, under section 3661: Fenby v. Hunt, 53 Wash. 127, 101 Pac. 492.

CHAPTER II.

CONDITIONAL SALES.

§ 3670.

See notes to § 1182.

The burden of proving actual notice of an unrecorded conditional bill of sale, or of a claim not of record, is upon the party asserting the priority of the sale or claim: Scott v. Farnam, 55 Wash. 336, 104 Pac. 639.

This section is designed to protect subsequent creditors, and renders a sale absolute if the filing is not made as required, although the memorandum was filed before creditors asserted their claims: American Multigraph Sales Co. v. Jones, 58 Wash. 619, 109 Pac. 108.

TITLE XXIV.

CONGRESSIONAL DISTRICTS.

§ 3673a. First District.

The city of Seattle and Kitsap county shall constitute the first congressional district and shall be entitled to one representative in Congress of the United States. [L. '13, p. 275, § 1.]

§ 3674a. Second District.

The counties of Clallam, Jefferson, Snohomish, Skagit, Whatcom, San Juan Island and that portion of King county outside of Seattle, shall constitute the second congressional district and shall be entitled to one representative in Congress of the United States. [L. '13, p. 275, § 2.]

§ 3675a. Third District.

The counties of Chehalis, Mason, Thurston, Pierce, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke and Skamania shall constitute the third congressional district and shall be entitled to one representative in Congress of the United States. [L. '13, p. 275, § 3.]

§ 3675-1. Fourth District.

The counties of Klickitat, Yakima, Benton, Kittitas, Whitman, Grant, Adams, Franklin, Walla Walla, Columbia, Garfield and Asotin shall constitute the fourth congressional district and shall be entitled to one representative in Congress of the United States. [L. '13, p. 276, § 4.]

§ 3675-2. Fifth District.

The counties of Ferry, Stevens, Lincoln, Spokane, Chelan, Okanogan, Douglas and Pend Oreille shall constitute the fifth congressional district and shall be entitled to one representative in Congress of the United States. [L. '13, p. 276, § 5.]

§ 3676a. Election in Each District.

At the next general election to be held on the first Tuesday after the first Monday in November, 1914, one representative in the Congress of the United States shall be elected in each of the congressional districts by the qualified electors therein and the votes for said representatives shall be given, received, returned and canvassed as the same are now given, received, returned and canvassed for electors for President and Vice-President of the United States. [L. '13, p. 276, § 6.]

TITLE XXV. CORPORATIONS.

CHAPTER I.

ORGANIZATION AND MANAGEMENT GENERALLY.

§ 3677.

The failure to execute articles in triplicate and keep one copy in the office of the corporation does not affect the de facto existence of a corporation otherwise duly incorporated, and followed by user; and in such case the incorporation cannot be collaterally attacked in a civil action between the corporation and third persons: *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824.

As to the burden of proof as to bona fides of purchaser claiming against prior unrecorded conveyance or encumbrance, see note in 36 L. R. A., N. S., 1124.

Waiver of proof of incorporation and payment of a corporate license fee does not waive proof of the subscription to the capital stock of the petitioner: *State ex rel. Hulme v. Gray's Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

The provision of this section, that no railroad company shall institute proceedings to condemn land until the whole of its capital stock is subscribed is a rule of public policy, and is not waived by the land owner's failure to raise it by plea in abatement: *State ex rel. Hulme v. Gray's Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

An allegation of the incorporation of a railroad company seeking to condemn land is not a compliance with this section providing that no railroad company shall institute such proceedings until the whole amount of the capital stock is subscribed, as that condition is not essential to incorporation: *State ex rel. Hulme v. Gray's Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

The objection that the stock of a railroad company seeking to condemn property is held by aliens must be raised by plea in abatement or by proof offered in defense: *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200.

LIABILITY FOR CORPORATE DEBTS AND ACTS.—The transaction of business by a corporation before all of its capital stock is subscribed, contrary to this section, does not render its officers individually liable for the debts upon the insolvency of the corporation, since the liability of officers is restricted to certain other cases by sections 3697, 3698, etc.: *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A., N. S., 453, 105 Pac. 630.

A subscription to the capital stock of a railroad company by trustees is sufficient to authorize it to exercise the right of eminent domain, especially where the stock is all paid in: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

The transaction of business by a corporation before all of its capital stock is subscribed, contrary to this section, does not render its contracts void, since only the state can complain of violation of the statute: *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A., N. S., 453, 105 Pac. 630.

As to who may question right of an alleged corporation to exercise corporate powers, see note in 70 Am. St. Rep. 178.

This section and section 3698, measuring and limiting the liability of stockholders in a corporation, do not protect a stockholder from the consequences of fraudulent representations inducing the extension of credit to the corporation when insolvent: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

§ 3682.

In condemnation proceedings, the triplicate copy of the articles of incorporation, held in the office of the company, is sufficient evidence of the incorporation; and a certificate and receipts of the secretary of state showing the filing of the articles and payment of filing and license fees are prima facie proof of its existence, this section making a certified copy of the articles prima facie proof not being exclusive: *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444.

§ 3683.

A corporation is bound by a contract for the purchase of land scrip where it was interested in that business and placed its vice-president and secretary in sole charge of its head office with apparent authority to deal in scrip, and they designated an agent as the corporation's agent with authority to represent it in the purchase of scrip, and did not promptly disavow a contract made by the agent: *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co.*, 56 Wash. 529, 106 Pac. 207.

A sales agent for a corporation has apparent authority to enter into a contract, and may therefore bind the company to

refund all purchase money paid after payment of six monthly installments, if the purchaser is then dissatisfied, where it appears that the agent had general authority to make sales, and that the officers and agents met at frequent intervals to discuss the affairs of the company, on which occasions the president authorized the sales agents to make such a contract with purchasers, since the sales agents had a right to assume that the corporation was speaking through its president, unless the contrary appears: *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125.

Under this section authorizing the trustees of a corporation to appoint such officers, agents and servants as the business of the corporation shall require, fix their compensation, and remove them at will, an attorney and general manager employed at a fixed salary for the term of three years may be removed by the trustees at any time, without rendering the corporation liable to him for compensation for the remainder of the unexpired term: *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, Ann. Cas. 1913B, 667, 118 Pac. 30.

A corporation is liable upon its promissory notes executed without express authority of its trustees, where they were signed by the secretary (one of the trustees) with the knowledge and consent of the president, the only other trustee, this was the habitual method of transacting its business, and the notes were used to raise funds to finance the corporation and purchase machinery and equipment: *National Bank of Commerce v. Puget Sound Biscuit Co.*, 61 Wash. 192, 112 Pac. 265.

The recovery of judgment against a corporation on contract is conclusive that the officers had authority to make the contract: *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A., N. S., 453, 105 Pac. 630.

A domestic corporation is expressly authorized by this section to hold, sell and convey real estate; and where the articles authorize it to hold real estate for specific purposes, a properly executed deed vests it fully with title, even though the property is acquired for other purposes: *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

Only the state can question a conveyance to a corporation as not authorized by its charter; and if not questioned, it can pass good title by a conveyance which cannot be questioned as ultra vires after the lapse of a reasonable time: *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

As to the effect of ultra vires purchase of land by corporation, see note in 17 Ann. Cas. 529.

Where a report was made to the directors of a corporation that an employee's books were examined by a bookkeeper on a certain day and that the cash deposited

exceeded the receipts, the corporation is put upon inquiry and charged with such knowledge as a cursory examination would have revealed, so as to be bound by representations to the contrary made by an officer: *Poultry Producers' Union v. Williams*, 58 Wash. 64, 137 Am. St. Rep. 1041, 107 Pac. 1040.

Where the by-laws of a corporation empowered the board of trustees, alone, to employ servants and assistants, a custom to allow the manager to make an oral contract of hire of a clerk, with weekly or monthly wage payments and without fixing the term, is not sufficient to authorize the manager to hire a clerk for a period of twenty-six weeks, when the clerk had actual knowledge of the extent of the manager's authority: *Francis v. Spokane Amateur Athletic Club*, 54 Wash. 188, 102 Pac. 1032.

A treasurer of a corporation is personally liable upon a contract wherein he agreed with the subscriber to the capital stock of the corporation, that "I will, upon demand, accept a return of his stock, and refund to him the money he has paid," on certain conditions, although to his signature he affixed "Treas.," since that was descriptio personae only, and an agent may become personally bound by the form of his promise: *Gavazza v. Plummer*, 53 Wash. 14, 42 L. R. A., N. S., 1, 101 Pac. 370.

There is sufficient prima facie evidence of the execution of a note by a corporation, where it is shown that the note was given for obligations of the corporation, and was executed by an officer to whom the trustees had intrusted the sole management of its financial affairs: *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414.

A prospecting and speculating mining company, organized for the purpose of buying, selling, and trading in real and personal property, will not be enjoined from making a sale of all its property (a lease of coal lands) at an alleged inadequate price, where there was no evidence of fraud, the officers exercised their best judgment, and the sale was ratified by a vote of a majority of the stockholders, and the value of the land was purely speculative, especially where the company was embarrassed financially and unable to prevent forfeiture of the land: *Smith v. Flathead River Coal Co.*, 66 Wash. 408, 119 Pac. 858.

As to what corporation may sell all their assets, see note in 103 Am. St. Rep. 548.

A complaint by a corporation need not allege that the action was authorized by its board of directors, since it will be presumed until the contrary appears: *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691.

If a sale of stock to a corporate employee, with an agreement by the cor-

poration to repurchase its own stock in case of discharge, was ultra vires, it was divisible, and not being void in toto, the sale was absolute: *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

§ 3684.

This section authorizing corporations to own and hold stock in other corporations is constitutional: *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

As to power of corporation to hold and own stock in other corporations, see note in 36 Am. St. Rep. 134.

§ 3686.

A minority stockholder is estopped from maintaining a suit to compel a syndicate, consisting of officers and a majority of the stockholders, to pay to the corporation a profit realized by them in the purchase of a competing business, to save the life of the corporation, and a resale by them to the corporation at a profit, where such minority holder, after objecting to the sale, made a written waiver of his objections and ratified the sale, in order that certain bonds of the corporation could be sold: *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912C, 859, 112 Pac. 647.

Where the continued existence of a corporation requires the purchase of a competing business, a syndicate consisting of officers and a majority of the stockholders of the corporation may, after full disclosure of all the facts, acquire the property and resell it to the corporation at a profit to themselves, and are not within the rule preventing officers of a corporation from dealing in property of the corporation: *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912C, 859, 112 Pac. 647.

Where, in an action by a stockholder to recover from officers and other stockholders a profit realized by them in dealings between themselves and the corporation, payments are made to the corporation by stockholders who do not care to contest the matter, it is proper to allow the plaintiff an attorney's fee, although the payments were voluntary: *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912C, 859, 112 Pac. 647.

As to the acceptance by stockholder of benefits of ultra vires act of corporation as affecting his right to equitable relief, see note in 6 Ann. Cas. 126.

A stockholder transferring stock in consideration of an agreement that he be employed as sales agent may be discharged from such position for inefficiency: *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A., N. S., 63, 114 Pac. 908.

A pooling contract for the voting of corporate stock is not void as against public policy, because of provisions in the agreement, relating to the employment of an agent and the election of a director, where there was no fraud and nothing unlawful about it and nothing which necessarily affected the rights of minority stockholders: *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A., N. S., 63, 114 Pac. 908.

Where a stockholder sold a controlling interest in the stock in consideration of one thousand dollars and of a contract to employ him as secretary for one year, the obligation is mutual and he is subject to discharge for diverting property and violating the by-laws, and cannot recover the value of his stock for failure of consideration: *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274.

As to the effect of a secret arrangement between corporation and shareholder, see note in 3 L. R. A. 797.

Upon the dismissal for good cause of an officer of a corporation employed for one year, his recovery is limited to quantum meruit for the service rendered up to the time of the discharge: *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274.

The evidence is sufficient to show that an officer of a corporation had overdrawn his account, where there was a dispute as to the amount of his salary, but he had kept the books, and entered the salary as claimed by the corporation, had admitted to others that such sum was correct, and that he had overdrawn his account, and the books showed that he had taken more than the salary entered: *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824.

Authority to the president and secretary of a corporation to enter into a lease may be shown by parol as well as by minutes of the board of trustees, where no minutes were necessary: *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, Ann. Cas. 1913A, 262, 116 Pac. 459.

A corporation accepts a lease and is liable for the rent, where the trustees authorized the officers to enter into it, the lease was delivered to the officers, who accepted it on behalf of the corporation, and directed that rents received from tenants in possession be applied upon the rent reserved in the lease: *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, Ann. Cas. 1913A, 262, 116 Pac. 459.

A formal act of the trustees, required by the by-laws, is not essential to bind the corporation by a lease executed by the officers pursuant to the assent and previous authority of all the trustees, constituting all of the stockholders: *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, Ann. Cas. 1913A, 262, 116 Pac. 459.

As to authority of president and vice-president in respect to contracts for the

company generally, see note in 14 L. R. A., N. S., 356.

As to power of president and secretary to sign commercial papers for company, see notes in 2 Ann. Cas. 520, and 18 Ann. Cas. 729.

As to power of president to sell or mortgage corporate property, see note 19 Ann. Cas. 623.

An appeal by a corporation will be dismissed on motion of a majority of its executive committee, in whom the management of its affairs is vested subject to revision by the directors, where it appears that all the directors and members of the executive committee save the president desire it, and a majority of the committee so expressed themselves at a meeting, though a formal resolution was not adopted: *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

As to legality of action by a majority of quorum of directors, see note in 13 Ann. Cas. 786.

The foreman in charge of a large ranch belonging to a corporation had authority to purchase an engine and hay baler, where it appears that he managed the ranch, employed laborers and purchased supplies, and pending the negotiations, the president of the corporation was called over the telephone to discuss the terms of sale and informed the seller's agent that if the deal was satisfactory to the foreman it would be satisfactory to the company: *Adams County Mercantile Co. v. Walla Walla Livestock Co.*, 64 Wash. 285, 116 Pac. 669.

Where a deed by a corporation is executed by its president and secretary and authenticated by its seal, it is presumed that it was authorized by the corporation, and prima facie title is shown thereby without the production of other evidence: *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32.

The evidence sufficiently shows that certain properties and stock were secured by the president of a corporation for the use and benefit of the corporation, so as to constitute consideration for the corporation's note to repay the purchase price advanced, where the corporation took a formal assignment of the stock of the company holding title to the properties, and continued in the possession and control of the same: *Sesnon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

A general fiscal agent and a director of a company has no implied authority to employ brokers to sell stock of the corporation upon a commission; and in the absence of any evidence of authority or of the nature of the business of the company or his connection with it, it is not liable on his agreement to pay a broker's commission on stock sold, especially where it does not appear that the stock sold was the stock of the company: *Dempsey v. United Wireless Tel. Co.*, 66 Wash. 167, 119 Pac. 1.

The evidence sufficiently shows that a contract was made by the plaintiff direct with a corporation, rather than with its officers

individually, where negotiations were carried on in the name of the corporation and plaintiff's offer and letters were addressed to it: *Sweeney v. Lewis Construction Co.*, 66 Wash. 490, 119 Pac. 1108.

Where the superintendent of a corporation in charge of its business and of a building in which it repaired its taxicabs, had general power to employ and discharge men, a written contract whereby he employed plaintiff to do all the company's trimming and painting for one year, and leased a part of the second story of the building to plaintiff as a shop, is within the apparent scope of his authority and binding on the corporation, so far as the employment of the plaintiff is concerned, although the superintendent's actual authority was limited to verbal employment of men from day to day: *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 39 L. R. A., N. S., 435, 121 Pac. 67.

As to binding force of contracts for corporation made by its agents, see notes in 12 L. R. A. 715 and 27 L. R. A. 401.

As to agent's power to contract for medical services so as to bind company, see notes in Ann. Cas. 1912C, 474, and 4 L. R. A., N. S., 58.

Where, in consideration of ninety-eight per cent of the stock of an irrigation company, the purchaser entered into an agreement to furnish water for specified tracts of land, and agreed to execute a water deed therefor as soon as he was made president of the corporation, the company ratifies the contract by furnishing water and receiving payments therefor under the contract: *Ulrich v. Pateros Water Ditch Co.*, 67 Wash. 328, 121 Pac. 818.

As to sanctional dealings between corporation and officer, see note in 139 Am. St. Rep. 612.

As to ratification of acts of directors by stockholders, see note in 36 L. R. A., N. S., 199.

Under the rule that persons dealing with corporate agencies have a right to rely upon the apparent authority of those in charge, and the rule that, whenever one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it, mortgages and notes executed by the secretary of a holding company, by authority of its active managers holding the stock as trustees, which notes and mortgages were given in consideration of the stock of a fire insurance company without the knowledge or consent of the cestui que trust and real owner of the stock, are valid and binding obligations, as between the cestui que trust and the creditors of the fire insurance company, where it appears that the holding company, organized primarily for that purpose, was in fact more than a holding company, and had power to purchase the stock of other companies and to do a general agency and traffic business, that all of the stock of such company was, by the owner and president, placed in the absolute control of

trustees as active managers and stockholders, who did engage in an agency and other business with the approval of the cestui que trust, and their purchase of the stock of the fire insurance company, in consideration of the notes and mortgages of the holding company, executed by one of the trustees as secretary who was in charge of the principal office, was ratified by a vote of the stockholders holding practically all of the stock for the purpose of managing and controlling the company: *Parker v. Hill*, 68 Wash. 134, 42 L. R. A., N. S., 267, 122 Pac. 618.

As to implied authority of secretary of private corporation to act for or bind the company, see note in *Ann. Cas.* 1912D, 296.

A resolution fixing the salaries of two officers of a corporation at fifty dollars and thirty dollars per week, "it being understood that the said salaries would be paid out of the net proceeds of the business," makes the salaries conditional, and the only fund out of which they can be paid is the net proceeds during the time the offices were held: *Mutual Adjustment Co. v. Ouellette*, 70 Wash. 693, 127 Pac. 301.

A prima facie case of authority of the president of a corporation to hire automobiles is established, where the company owned a platted addition where it was selling lots, and the principal use of the automobiles was to carry prospective purchasers from the city to the addition to inspect lots: *Merrill v. Caro Investment Co.*, 70 Wash. 482, 127 Pac. 122.

Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager, without any express contract therefor: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

As to contracts for employment of officer of company at a salary, see notes in 139 Am. St. Rep. 619 and 3 L. R. A., N. S., 378.

Failure of a general manager working on a regular salary to charge himself on the books with all the items properly chargeable to him, does not necessarily render him guilty of such fraud as to forfeit all his salary, especially where explanations are wanting through his decease, and all doubts were resolved against his estate: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

A corporation is not estopped to question the legality of a transaction whereby one of its officers gave the note of the corporation in renewal of his personal note, as the transaction was presumptively ultra vires, and one dealing with such officer is presumed to know that he cannot bind the company in matters in which he is adversely interested, especially where the company derived no benefit from the transaction: *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225.

In such case, there can be no ratification by the corporation through acts of the officer implicated, where a trustee whose author-

ity was a necessary prerequisite had no notice of the acts: *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225.

An assignment of an account by a corporation executed by its assistant treasurer is prima facie proof of the assignment: *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069.

A judgment creditor of an insolvent corporation may maintain an action against stockholders, where there is a prayer for a receiver and general relief: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

As to creditors and stockholders in connection with proceedings looking to appointment of a receiver, see note in 118 Am. St. Rep. 198.

As to right of creditor of corporation to proceed against stockholder, see note in 2 L. R. A. 270.

§ 3687.

Where there was a deadlock between two equal stockholders of a corporation, an action to settle their rights, appoint a receiver, and wind up the corporation should be allowed to go to final adjudication before requiring a sale of the assets, unless necessity therefor exists; and it is error, upon appointing a receiver, to direct a sale and enjoin the parties from taking any steps in the proceedings to secure an accounting and determine the rights and equities of the parties: *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 116 Pac. 269.

§ 3690.

The undisclosed owner of corporate stock is not entitled to notice of a stockholder's meeting, where the stock stood in the name of his brother who managed it and was notified and appeared by proxy and voted at the meeting: *Wright v. Tacoma Gas & Elec. Light Co.*, 53 Wash. 262, 101 Pac. 865.

As to stockholders' meetings generally and who may vote at them, see note in 12 L. R. A. 783.

A stockholder's proxy clothes the proxyholder with full power to represent such portions of the stock, and binds the absent owner, in the absence of fraud: *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, *Ann. Cas.* 1912C, 859, 112 Pac. 647.

As to voters by proxy at stockholders' meetings, see note in 29 L. R. A. 844.

§ 3691.

Failure to comply with this section and section 3692, requiring a corporation to file a list of its officers with the county auditor, does not prevent the corporation from moving to set aside a judgment secured on service upon one who was not an officer of the corporation: *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785.

§ 3693.

See notes to § 234.

This section, providing that transfers of stock in a corporation are void until entered on the books of the company, is for the benefit of the company and may be waived by it; and a company is estopped to deny that an assignee of stock not entered is a stockholder, after electing him a trustee and recognizing him as a stockholder by various acts: *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

As to the sufficiency of a transfer of capital stock, see note in 12 L. R. A. 781.

As to the duty to register transfers on the books of the company, see note in 136 Am. St. Rep. 1030.

A stockholder in an insolvent corporation is not liable to a creditor for unpaid stock subscriptions, where it appears that he sold his shares while the corporation was a going concern and solvent, before the creditor acquired his claim, and that the stock-books and the certificate stubs show the transfer according to the usual custom of the corporation, although it did not keep a stock ledger or strictly comply with this section and section 3701, concerning the record of transfers of stock, since subsequent creditors stand in the same situation as the corporation: *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130.

As to the liability attaching to one subscribing to stock of a corporation, see note in 3 L. R. A. 797.

Under this section, a certificate for stock fair on its face, but wrongfully and fraudulently issued by officers of the corporation is not valid or binding on the corporation in the hands of an innocent purchaser until it has been entered on the books of the company, the statute being for the protection of the company and the transfer of the stock being ineffectual until registered: *Whitfield v. Nonpareil Consolidated Copper Co.*, 67 Wash. 286, 41 L. R. A., N. S., 187, 123 Pac. 1078.

Under this section, making registration on the books of the company essential to a valid transfer of corporate stock except as between the parties, a purchaser of stock who allows several months to lapse before asserting any right to have the stock transferred is bound by a judgment, rendered in an action promptly brought by the corporation against the record owners of the stock, canceling the same as fraudulently issued: *Whitfield v. Nonpareil Consolidated Copper Co.*, 67 Wash. 286, 41 L. R. A., N. S., 187, 123 Pac. 1078.

As to right of corporation to refuse to transfer stock on its books because of objections of former holder, see note in 27 L. R. A., N. S., 200.

§ 3694.

Subscription to the capital stock of a corporation is not essential to its legal existence

or liability on its contracts: *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A., N. S., 453, 105 Pac. 630.

An agreement that a stockholder was to receive one hundred thousand shares of stock "free of assessment" until stock held by other stockholders had been paid for in full does not mean "free from any charge or payment" so as to relieve the stockholder from paying for his stock in the first instance: *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956.

The evidence is insufficient to show fraud in securing a subscription to the stock of a corporation to be paid for by the conveyance of land, upon representations that all the stock was subscribed and that a plant for the manufacture of steel castings would be constructed on the land, where it merely appears that the work of constructing the steel plant was suspended on account of a financial depression and not abandoned, and all the stock was subscribed, although part of the subscribers were probably not financially responsible, there being, however, no such want of ability to pay and knowledge by the corporation as to support a charge of fraud in procuring the subscriptions, especially where the plaintiff consummated the land deal by a deed without conditions after suspension of the work of construction of the plant: *Jones-Thompson Inv. Co. v. Cascade Steel Foundry Co.*, 59 Wash. 601, 110 Pac. 417.

As to liability on stock subscription made conditionally on whole amount of stock having been subscribed, see note in 16 Ann. Cas. 1253.

A corporation cannot maintain an action to cancel stock issued to its promoters in exchange for property taken at an overvaluation, where no rights of creditors are involved and subsequent stockholders obtained full value in the purchase of their stock; and it is immaterial that the promoters were trustees of the corporation and in a measure dealing with themselves: *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499.

In an action by a corporation to cancel corporate stock issued to promoters in trust for the corporation, and fraudulently exchanged by them for property taken at an overvaluation, a complaint alleging fraudulent representations, whereby subsequent stockholders were induced to take corporate stock, is demurrable for want of sufficient facts, where it fails to allege that the subsequent stockholders did not have opportunity to investigate the value of the property, or did not receive full value for their stock, and no rights of creditors were involved, since the fraud did not cause any actionable injury: *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499.

As to the relation that subsists between a corporation and its promoters, see notes in 4 Ann. Cas. 669 and 17 Ann. Cas. 269.

A contract identifying a certificate of ten thousand shares of corporate stock, placed in escrow, to be delivered to one of the parties on expiration of the escrow, and declaring it to be his property, is an acknowledgment, as between the parties, that the title thereto is in such party: *Bell v. Scranton Coal Mines Co.*, 59 Wash. 659, 110 Pac. 628.

As to the operation and effect of the delivery of an escrow, see note in 130 Am. St. Rep. 935.

Statements in fine print in a signed application to purchase corporate stock do not estop the maker of promissory notes given for the price of the stock from setting up the defense of want of consideration and fraudulent representations, although, technically construed, the statements might be deemed admissions contrary to the facts proven: *Cunningham v. Morris*, 56 Wash. 341, 105 Pac. 839.

As to fraud and misrepresentation in procuring subscription to stock, see note in 136 Am. St. Rep. 748.

A sale of stock in a foreign mercantile company and a deed given in exchange is properly rescinded for fraud, where the vendors represented that it was solvent, doing a prosperous business, and that they had sold shares to their son at eight dollars per share, the statements being false and implicitly relied upon by the vendees: *Rock v. Joseph*, 60 Wash. 531, 111 Pac. 783.

A delay of three months, after hearing of false representations, in bringing suit to rescind a sale of corporate stock and cancel a deed, will not preclude a recovery, where the delay was at the request of the plaintiff's son, connected with the corporation, and for the reason that it was being pressed by creditors: *Rock v. Joseph*, 60 Wash. 531, 111 Pac. 783.

As to right to rescind or repudiate stock subscription on the ground of fraud after insolvency of the corporation, see note in 16 Ann. Cas. 178.

The false statement of the owner of corporate stock as to what it had actually cost him, for the purpose of inducing a sale, is a misrepresentation of a material fact, for which rescission and damages may be had, especially where future business relations were to grow out of the sale: *Kohl v. Taylor*, 62 Wash. 678, 35 L. R. A., N. S., 174; 114 Pac. 784.

As to fraud in the respect of false statements as to cost, etc., of property to induce purchaser, etc., see note in 35 L. R. A., N. S., 174.

The purchaser of mining stock is entitled to rescind where it was represented that the same was treasury stock and that the money paid was to be used in development, when in fact it was the personal stock of the seller: *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

The evidence is insufficient to warrant a rescission of the sale of stock for fraudulent representations respecting its value, notwithstanding expressions of the seller's opinion

that the stock was worth what it had brought at recent sales, and statements from the books showing overvaluation of goods on hand, where it appears that the parties were dealing on equal footing, that before the deal was closed, the purchaser, with ample opportunity and actual knowledge, made his own investigation, disregarded advice of the officers, attended several meetings of the stockholders held in an endeavor to raise a large working capital, upon which every one understood the fate of the enterprise depended: *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142.

Where the president of a corporation, in order to secure his personal debt, turned over a certificate for corporate stock that he had wrongfully and fraudulently issued, the assignee has no claim against the corporation as an innocent holder, either to compel the transfer of the stock on the books of the company or for its value, the company not being liable for acts of its officers in dealing with stock for their personal benefit: *Whitfield v. Nonpareil Consolidated Copper Co.*, 67 Wash. 286, 41 L. R. A., N. S., 187, 123 Pac. 1078.

As to liability of the corporation for the fraud or forgery of its officers in the issue of stock, see note in 19 L. R. A. 331.

Where a promoter bought an electric light plant, incorporated a company, sold the plant to it, and took stock and bonds in payment, he is the owner of the stock and bonds and not a trustee for the corporation, and it is immaterial that he borrowed the money to put the deal through: *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005.

As to the relation of promoter to corporation and stockholders, see notes in 4 Ann. Cas. 669 and 17 Ann. Cas. 269.

Where an incorporator sold his one-half interest in the assets and stock of the corporation, except and reserving his one-half interest in his coinorporator's indebtedness to the corporation, making him in effect an assignee of one-half of that claim, and subsequently advanced money to the corporation in good faith, in an action by him for an accounting, he is not entitled to recover from the corporation one-half of his coinorporator's indebtedness to the company, since the same was an asset, not a liability, of the company; but he can recover of the corporation the money advanced to it, and from the coinorporator his interest in that indebtedness to the company: *Hall v. Wilson*, 68 Wash. 278, 123 Pac. 2.

Where one subscribed for stock as a trustee for certain creditors, it is immaterial to his liability on his subscription, so far as third persons dealing with the company are concerned, whether the creditors consented or not, since the subscriber was the owner, either as trustee, or as an agent who subscribed in his own name: *Munson v. Gunder*, 70 Wash. 629, 127 Pac. 193.

In an action for the price of stock sold, in which the only issue is whether defendant

agreed to buy it from the original subscriber, it is prejudicial error to instruct that the defendant would not be liable to the plaintiff if he subscribed for or agreed to take the stock of the company and pay it therefor, since it injected an immaterial matter as potentially determinative of the case: *Munson v. Gunder*, 70 Wash. 629, 127 Pac. 193.

An agreement providing that, in case plaintiff should be discharged from defendant's employ, the defendant would, within six months thereafter, at plaintiff's option, take redelivery of defendant's corporate stock purchased by plaintiff, and repay plaintiff par therefor, fixes an option for a fixed period which must be exercised within the six months by redelivery of the stock, and it is not sufficient that notice of election to redeliver, with a demand, was made by letter posted within the time limit: *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

Failure to answer a letter giving notice of an election to exercise an option to redeliver stock, posted on the last day of the option period, does not constitute a waiver, of the failure to tender the stock as required by the option, where the letter was not received until the option period had expired: *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112.

Where corporate stock was pledged by two promoters as collateral to a note, which was paid by one of them, who thereupon took the stock and held it until transferred to him in satisfaction of a judgment in his favor for contribution, an assignment, pendente lite, to a third person by the defendant who did not have possession or control of it, not made in good faith, is ineffectual and void: *Soderberg v. McRae*, 70 Wash. 235, 126 Pac. 538.

EFFECT OF TRANSFER—LIABILITY.—A wife of a stockholder, taking his stock on a pre-existing debt, with full knowledge of how he acquired it, is not an innocent purchaser, and takes subject to the debt of her husband to the corporation for fraudulent diversion of the proceeds of treasury stock, where the by-laws prohibited transfers until the stockholder's debt to the company was first paid: *Eureka Min., Smelting & Power Co. v. Lively*, 59 Wash. 550, 110 Pac. 425.

As to conveyances from husband to wife, see note in 133 Am. St. Rep. 607; also note in 69 L. R. A. 353.

The purchaser of stock in a coal mining company at about one-half its par value is not liable to creditors upon an unpaid stock subscription where the stock on its face was issued as fully paid and nonassessable, the purchaser had no notice that it was not fully paid, and acted in good faith, the presumption being that he was a bona fide purchaser: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

A stockholder who advanced money for the corporation and demanded and received

stock in return, issued as fully paid-up stock, is not liable to creditors upon an unpaid stock subscription thereon, where he had no notice that it had been issued originally in return for property received at an overvaluation; and the fact that it was returned to the company as treasury stock does not put him on notice of such overvaluation: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

The bona fides of a purchase of stock by one advancing money for the corporation is not affected by the fact that indebtedness was subsequently incurred upon the purchaser's representations: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

Persons receiving large blocks of stock in a coal mining company for services rendered in selling a much smaller amount of stock are put upon inquiry as to the fact that the stock was not fully paid up, and it is incumbent upon them to show that they purchased for value and in good faith, in order to avoid liability to creditors upon unpaid stock subscriptions: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

As to right to assess stock issued as paid up, see note in 76 Am. St. Rep. 130.

A corporation being liable to an innocent purchaser of an illegal issue of stock, the transfer of such stock to the corporation by a bona fide purchaser, in consideration of reimbursement of the purchase price paid, in the shape of a promissory note of the company, amounts to surrender of the stock, in settlement of the company's liability: *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

As to illegal issue of stock and rights and remedies of persons concerned, see note in 87 Am. St. Rep. 847.

The fact that a corporation stockholder and officer gave expert accountants assistance after the books had been obtained by legal process does not show that he never refused an accounting, or defeat the right thereto, where it appears that he did not acknowledge the correctness of the experts' statement or admit any liability thereon: *Lee v. Steinhart Lumber Co.*, 66 Wash. 572, 119 Pac. 1117.

Where stock was voted upon by a by-law prohibiting transfers until indebtedness to the company was first paid, as the stock of one of the original subscribers then indebted to the company, it must be presumed to have been his stock at the time: *Eureka Min., Smelting & Power Co. v. Lively*, 59 Wash. 550, 110 Pac. 425.

Incorporators of a corporation who accept stock without fully paying up for the same are liable to creditors upon an implied subscription for the stock although no express contract was made by them: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

Where incorporators accepted fully paid-up stock in a coal mining company knowing that it was issued in exchange for property taken at an overvaluation, they are liable to creditors upon stock subscriptions to the

extent of the amount unpaid thereon: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

In an action by a receiver on behalf of creditors to recover for unpaid stock subscriptions upon stock issued in return for property taken at an overvaluation, a creditor who dealt with the corporation with knowledge that the stock was issued for property of less value than the par value of the stock, is estopped to participate in the fund or seek enforcement of the liability: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

As to the liability undertaken by subscribing to stock, see note in 93 Am. St. Rep. 352.

Since a corporate creditor may waive his right to enforce the stockholder's liability, unpaid stock subscriptions cannot be collected to pay corporate bonds which provide that there shall be no recourse to stockholders for the payment of the bonds or any interest thereon: *Grady v. Graham*, 64 Wash. 436, 36 L. R. A., N. S., 177, 116 Pac. 1098.

There can be no specific performance of a contract made by a stockholder for the issuance of corporate stock to him in exchange for property where the corporation had no unissued stock and was not authorized to issue any more: *Smith v. Flathead River Coal Co.*, 64 Wash. 642, 117 Pac. 475.

As to specific performance of contract to sell corporate stock, see note in 135 Am. St. Rep. 689.

ACQUIRING ADVERSE TITLE OR INTEREST.—Part of the stockholders of an insolvent corporation may, as individuals, subscribe a fund with which to purchase the corporate assets upon the foreclosure of a bona fide mortgage thereon, where the stock was nonassessable and other stockholders would not raise funds by a pro rata voluntary assessment; and such transaction is not a fraud on creditors where the property was openly and fairly purchased at a public execution sale: *Boyes v. Turk Min. Co.*, 56 Wash. 515, 106 Pac. 475.

As to right of majority stockholders to purchase corporate property, see note in 14 Am. St. Rep. 920.

Equity will not give relief to a stockholder of a corporation, who, in bad faith, made arrangements with a creditor whereby the corporation's property was subject to execution sale, under an agreement whereby the same was to be redeemed and deeded to the stockholder, who tried to defeat a redemption by the corporation when he might have paid the judgment or redeemed and held as equitable owner for the company: *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956.

SUING OR DEFENDING ON BEHALF OF CORPORATION.—A complaint, by minority stockholders, of an alleged "freeze-out" is demurrable where it fails to show that they have exhausted their remedies in the corporation, or any excuse for failure

so to do: *Seattle & Northern R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27.

As to suit by minority stockholders and the exhausting of efforts for relief within the company as essential prerequisite, see note in 139 Am. St. Rep. 621.

Minority owners of corporate stock are guilty of laches precluding them from maintaining an action to set aside a sale of all the corporate assets to another company, where it appears that they delayed six months before beginning suit, during which time they were waiting to see whether they could make a favorable sale of bonds of the old company held by them, and that during such time the new company had issued and sold thousands of bonds and expended a great amount of money in alterations and completing large operations: *Wright v. Tacoma Gas & Elec. Light Co.*, 53 Wash. 262, 101 Pac. 965.

An action by one claiming stock in a corporation and for an accounting and equitable relief is barred by laches, where he was not diligent in the prosecution of his remedy for breach of the contract for his stock, but delayed seven years after knowledge of the breach, during which time he jeopardized the property of the corporation and subjected it to forced sale to the end that the title should come under his personal control: *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956.

The courts of this state have jurisdiction of the subject matter of an action brought by nonresidents to compel a foreign corporation to issue stock to the plaintiffs, where the president and secretary and the individual stockholder improperly in possession of the stock were residents of the state, the company had a branch office and was doing business in the state and where, in case of inability to enforce the decree, a money judgment for the value of the stock could be entered against the defendants: *Lively v. Huseby*, 60 Wash. 47, 110 Pac. 673.

As to right of courts to interfere with the internal affairs of foreign corporations, see note in 137 Am. St. Rep. 307. See, also, note in 19 Ann. Cas. 84.

As to power of court to compel foreign corporation to register transfer of stock, see note in 3 L. R. A., N. S., 551.

Where the promoters of a mining corporation conveyed the mines and property to the corporation in consideration of the stock, subscribed for and issued to themselves, application by the officers of the proceeds of treasury stock, to repay advances for the purchase price of the mines and the cost of securing patents is a fraud upon the corporation and the purchasers of treasury stock, the proceeds of which should have been used for development; and judgment against such promoters is properly entered for the sums so diverted.—*Eureka Min., Smelting & Power Co. v. Lively*, 59 Wash. 550, 110 Pac. 425.

As to the rights and liabilities of promoters, see note in 13 Am. St. Rep. 27. See, also, notes in 4 Ann. Cas. 669 and 17 Ann. Cas. 269.

Where one of two incorporators of a company had agreed to advance money to the corporation, but sold his half of the stock and interest in the assets and subsequently advanced money to the corporation in good faith, in an action by him for an accounting, he is entitled to recover from the corporation the amount of the advance; and it is error to allow him but one-half of the sum as a charge against his co-owner and holder of the other half of the stock: *Hall v. Wilson*, 65 Wash. 137, 118 Pac. 16.

Where an incorporator sold his half interest in the assets and stock of the corporation, excepting and reserving his half interest in his incorporator's indebtedness to the corporation, in an action by him for an accounting he is entitled to a personal claim against his incorporator; but he cannot complain that a bank is given a first lien upon assets of the corporation which it had subsequently acquired in good faith as security for a loan, there being no evidence to sustain a charge of fraud: *Hall v. Wilson*, 65 Wash. 137, 118 Pac. 16.

A complaint by a receiver of an insolvent corporation having liabilities of about four thousand dollars, against a stockholder to recover two hundred and forty thousand dollars due on his subscription, by reason of the fact that he had attempted to pay for the same in property taken at an overvaluation, does not state a cause of action, where it merely alleges that the court directed the receiver to proceed against him as one of the stockholders, without any notice having been given to stockholders or any determination of the amount necessary to be paid by each stockholder, the court having no power to single out a single stockholder; and where it fails to allege that the creditors of the corporation had no knowledge that the stock was paid for in property of less value than the face value of stock and were misled in that connection: *Beddow v. Huston*, 65 Wash. 585, 118 Pac. 752.

As to powers of assignees and receiver with respect to unpaid subscriptions, see note in 3 Am. St. Rep. 833.

As to necessity of notice to stockholder to bind him by an order for unpaid stock subscription in insolvency proceedings, see note in 36 L. R. A., N. S., 177.

Findings to the effect that, on the formation of a corporation by three stockholders, all the debts of a former copartnership existing between two of them were not agreed to be paid by the new concern, are sustained, where of the three, two interested witnesses testified that only certain specified debts were included, one of them testifying against his own interest: *Lee v. Steinhart Lumber Co.*, 66 Wash. 572, 119 Pac. 1117.

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As to admissibility of parol evidence to show that subscription to stock was conditional, see note in 19 Ann. Cas. 883.

A minority stockholder may maintain an action for an accounting on behalf of the corporation against a stockholder and officer where the majority of the stockholders and of the trustees do not desire an accounting and refuse to act: *Lee v. Steinhart Lumber Co.*, 66 Wash. 572, 119 Pac. 1117.

As to who may sue as stockholder, and therein as to a holder of an insignificant share of stock, see note in 97 Am. St. Rep. 52.

The claimant of corporate stock is entitled to bring an action to recover the same at the place where the company is incorporated, notwithstanding the certificates are in the possession of a nonresident: *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060.

Where a corporation issued fully paid stock to stockholders in a corporation which it superseded, in consideration of the assets and goodwill of the first company, it cannot claim that the stock was not fully paid for because certain stock of the first company was not fully paid up; especially where it issued additional stock to equalize the prices paid for the stock of the first company: *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596.

As to consolidation of companies and the rights of stockholders in that connection, see note in 89 Am. St. Rep. 623.

The assets of a corporation being a trust fund for creditors, its capital stock can be reduced only in the manner provided by statute; and persons appropriating the same are liable therefor: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

Where an agent, selling stock on a commission, induced plaintiff to purchase the stock by representations which he knew to be false respecting the personnel of the stockholders and the financial strength of the company, and which were relied on, he is liable to the purchaser in an action for damages for deceit: *Wentworth v. Moore*, 71 Wash. 396, 128 Pac. 634.

Stockholders who induced the extension of credit to an insolvent corporation by false representations as to the amount of stock subscribed are liable for the loss to the extent that the represented stock exceeds the amount actually subscribed: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

As to the invalidity of a subscription to stock through fraud or misrepresentation in procuring it, see note in 136 Am. St. Rep. 748.

§ 3696.

In an action to foreclose a pledge of corporate stock, it is error to grant a nonsuit where plaintiff's evidence showed that he sold

the stock to defendant, but retained possession as collateral security for a note for the purchase price, which was due and unpaid, the burden of proving an affirmative defense being upon the defendant: *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

As to burden of proof of payment or part payment of bill or note, see note in 20 Ann. Cas. 518.

§ 3697.

See notes to §§ 159, 3677.

An increase in the salary of an officer of a corporation who was a trustee and owned half of the stock, through his own vote and the votes of trustees subservient to him, is fraudulent and illegal; and this, regardless of the value of the services, where it was improperly made in violation of an agreement with the owner of the other half of the stock: *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

As to contract for salary by officer with company voting through directors of whom he is one, see note in 139 Am. St. Rep. 619. And see, also, notes in 11 Ann. Cas. 773 and 19 Ann. Cas. 1260.

§ 3698.

See notes to § 3677.

Where the president and general manager of a corporation directs a trespass to be committed, both are jointly and severally liable for the torts of the latter: *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash. 559, 111 Pac. 774.

As to liability of officers of corporation for torts, see note in 74 Am. St. Rep. 610. See, also, note in 8 Ann. Cas. 383.

The liability of officers for corporate debts depends upon statutory provisions or the legal existence of the corporation: *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A., N. S., 453, 105 Pac. 630.

As to the character of corporate "debts" for which directors are liable, see note in 12 Ann. Cas. 807.

In the absence of evidence of power in the charter so to do, a corporation cannot become a surety upon a note: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to liability of a corporation on accommodation paper, see note in Ann. Cas. 1913A, 1313. And see note in 9 L. R. A., N. S., 193.

A corporation is not estopped to set up the defense of ultra vires to an action upon a surety obligation, where the evidence that it received the benefit of the contract is vague and uncertain: *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

As to estoppel by receipt of benefits, see notes in 70 Am. St. Rep. 167 and 6 Ann. Cas. 126.

As to estoppel in pais as a question of law or fact, see note in Ann. Cas. 1913A, 1072. See, also, note in 6 Ann. Cas. 126.

Majority stockholders are not liable for the wrongful discharge by the corporation of one of its officers: *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274.

§ 3699.

A corporation cannot question the authority of its secretary to execute a promissory note, where it retained possession of stock for which the note was given, and paid interest on the note: *Sesnon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

A corporation executing a note jointly with three others, for which it received one-fourth of the consideration for which the note was given, cannot claim that it was only a surety as to the other makers and that the note was therefore ultra vires, it being authorized to borrow money: *Sesnon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

As to ultra vires, see notes in 70 Am. St. Rep. 156, 2 L. R. A. 420, and 6 L. R. A. 290.

§ 3700.

The pledgee of corporate stock, holding the same as collateral security for a loan made by him to the corporation, the stock being represented to him as issued to another and fully paid for, is not liable upon the statutory liability of stockholders to creditors for unpaid subscriptions, although the stock was reissued in his name and stands on the books as his absolute property, in view of this section: *Johnstone v. Black*, 59 Wash. 144, 109 Pac. 367.

As to the liability of persons holding stock of corporation as security, see notes in 68 Am. St. Rep. 542 and 121 Am. St. Rep. 197.

§ 3701.

See notes to § 3693.

This section and section 3702 is a penal statute in so far as the penalty is concerned, and to be strictly construed, since the penalty is not given as compensation for any injury, and was intended as a punishment, allegation and proof of actual injury being unnecessary: *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135.

As to liability of corporation for non-feasance, see note in 5 Ann. Cas. 514. And see note in 26 L. R. A., N. S., 710.

§ 3702.

See notes to § 3701.

Construing strictly that portion of this section, imposing a penalty in favor of the "injured party" upon any officer of a corporation who shall refuse to exhibit to a stockholder or creditor the stock-book or any

papers "placed on file," in order to subject an officer to the penalty there must be a demand for inspection of the book named or a designated paper or papers lodged with and kept by the corporation pertaining to the corporate business, and the demand must be made by a party having an interest in such inspection, a demand to inspect the "books and papers" not being sufficient: *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135.

§ 3703.

A promoter of a corporation who sought to make exorbitant profit, at the expense of investing stockholders, by the sale to the corporation of land held under option without any actual investment, cannot recover from the corporation on the ground of fraud because the corporation refused to perform the contract and after forfeiture of the option bought the land direct at a low figure, since promoters owe the utmost good faith to stockholders and are accountable for secret profits: *Mangold v. Adrian Irr. Co.*, 60 Wash. 286, 111 Pac. 173.

As to the rights and liabilities of promoters, see notes in 17 Am. St. Rep. 161. And see notes in 4 Ann. Cas. 669 and 17 Ann. Cas. 269.

§ 3704.

See notes to § 159.

That the assets of an insolvent corporation constitute a trust fund for the benefit of creditors does not affect the validity of a foreclosure sale under a mortgage given by the corporation before insolvency: *Boyes v. Turk Min. Co.*, 56 Wash. 515, 106 Pac. 475.

As to the assets of an insolvent corporation as a trust fund, see note in 42 Am. St. Rep. 767.

§ 3708.

Where, owing to the obstinacy of two parties each owning one-half of the stock of a corporation, there was no board of trustees to manage its affairs, and the deadlock prevented an election, the parties are in *pari delicto*, and there can be no recovery by one from the other by reason of business losses, or failure to repair and operate the plant after a loss by fire: *Weymouth v. Oudin*, 56 Wash. 315, 105 Pac. 1027.

§ 3714.

This section has no application to a corporation organized for fraternal purposes having no capital stock, which can accordingly maintain an action without payment of such a fee: *Ellensburg Lodge No. 20, I. O. O. F. v. Collins*, 68 Wash. 94, 122 Pac. 602.

§ 3715.

The objection that a corporation could not maintain an action because it was not alleged or proved that it had paid its annual license fee under this section, is waived if not taken by answer or demurrer; or at least by specific objection to testimony on that ground, where the action was completely at issue before the passage of the act: *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655.

An action, whether at law or in equity, against a corporation abates upon the loss, *pendente lite*, of its franchise by having its name stricken from the records of the secretary of state for failure to pay its annual license fee, pursuant to this section, and failure to apply for a reinstatement pursuant to section 3715a, where its receiver or trustees are not substituted as parties: *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

Sections 3715 and 3715a violate no contract rights of creditors of the corporation, since they are not parties to the contract between the state and the corporation or its stockholders, and still have a remedy against its assets: *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

This section is not unconstitutional on the theory that a forfeiture of corporate franchises cannot be decreed except by a court of competent jurisdiction: *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

In an action between corporations, in which the plaintiff failed to plead payment of its annual license fee, required by this section, and the defendant, although attacking plaintiff's capacity to sue, set up a counterclaim, the plaintiff is entitled to oppose defendant's action to the extent of resisting the counterclaim, although it had no capacity to sue (overruling 63 Wash. 376, 115 Pac. 855): *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605.

Objection to the capacity of a defendant corporation to set up a counterclaim by reason of its failure to allege the payment of its annual license fee is waived if not raised by demurrer or answer (overruling 63 Wash. 376, 115 Pac. 855): *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605.

A complaint states a cause of action for the appointment of a receiver of an insolvent corporation and the collection of unpaid stock subscriptions, where it alleges that the defendant stockholders induced the plaintiff to extend credit to it by falsely representing that its capital stock of twenty-five thousand dollars was fully paid up, when not to exceed thirteen thousand two hundred dollars thereof had been subscribed, that defendants diverted and appropriated the capital stock, and that the corporation

was insolvent, and a return of nulla bona had been made in another suit: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

A foreign corporation, to which a policy of fire insurance is made payable in case of loss, may maintain an action on the policy without having paid an annual license fee or otherwise complied with the laws relating to the doing of business in this state by foreign corporations: *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 28 L. R. A., N. S., 596, 110 Pac. 36.

The act prohibiting any corporation from commencing or maintaining any suit or action without alleging and proving that it has paid its annual license fee should be enforced by the courts as a license tax or revenue measure; and hence judgment for defendant on a counterclaim, in an action between two corporations, should be reversed and the action dismissed where neither corporation proved its capacity to sue, although the objection was not specially urged against the corporation in whose favor the judgment was rendered: *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 63 Wash. 376, 115 Pac. 855.

This section applies to a suit by a foreign corporation which had for several years maintained a marine superintendent at a port in this state whose duty it was to attend to the upkeep and maintain crews for three ocean-going steamships owned by plaintiff and entering such port: *Boston*

Tow Boat Co. v. Sesnon Co., 64 Wash. 375, 116 Pac. 1083.

This section does not make the certificate the only competent proof, and the payment may be established by the evidence of the officer making the same: *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462.

The corporate existence and prepayment of license fee, as a prerequisite to suit by a corporation, may be established by oral evidence, notwithstanding sections 3682 and 3715, providing for "prima facie" proof by the certificate of the secretary of state: *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069.

In an action upon an account assigned by a corporation, it is not necessary prerequisite to prove the corporate existence and payment of the license fee of the assignor, which the statute makes a prerequisite to suit by the corporation, where there was prima facie proof of the assignment: *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069.

The insolvency of a corporation is prima facie shown, under this section, by failure to pay its annual license fee for one year after due date: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

The insolvency of a corporation is shown by judgment and return of nulla bona at the suit of a third party: *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

As to the effect of insolvency to work a dissolution, see note in 2 L. R. A. 256.

§ 3715a. Striking Delinquent Corporations—Reinstatement.

Every corporation whose name has been, or shall hereafter be, stricken from the records of the office of the secretary of state in pursuance of law for failure to pay its annual license fee for two years is hereby authorized and permitted to apply to the secretary of state for reinstatement at any time after its name has been stricken from the records of the office of the secretary of state. Any corporation stricken from the records and dissolved, as provided in this chapter may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up their affairs, such method of procedure is hereby validated and approved. [L. '11, p. 135, § 1.]

See notes to § 3715.

Mandamus will not issue to require the secretary of state to strike the name of a corporation from the records for nonpayment of license fees, pursuant to Laws of 1907, page 272, on the application of a new corporation that sought to take the same name, after the first corporation's name had been stricken by mistake pending negotiations for the adjustment of the first corporation's delinquent license fees, which it was making

an honest effort to ascertain and pay: *State ex rel. Harper v. Howell*, 56 Wash. 694, 106 Pac. 470.

As to the doctrine that the courts do not favor forfeiture of franchise and that substantial performance prevents forfeiture for misuser, see note in 8 Am. St. Rep. 179.

Sections 3715a and 3715b, having provided that a corporation whose name has been stricken from the records for failure

to pay its annual license fee might apply, at any time within six months, for reinstatement upon paying all fees and a penalty of twenty-five dollars, the amendment thereof by Laws of 1911, page 135, by changing the time within which the application could be made from six months to "any time after its name has been stricken," and increasing the penalty to one hundred dollars, was intended to render inoperative section 3715d, providing that a corporation failing to make application for reinstatement within six months shall be thereby dissolved; since the acts are purely revenue measures, and the intent of the amendment

was to permit reinstatement upon the conditions prescribed at any time, thereby increasing the revenues of the state: State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861.

Such act does not violate constitution, article 12, section 3, prohibiting the legislature from remitting the forfeiture of any corporate franchise or charter, the striking of delinquent names for failure to pay license fees not being the forfeiture of a franchise or charter within the meaning of the constitution: State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861.

§ 3715b. Condition—Prepayment of Fees and Penalty.

Any corporation so applying for reinstatement shall at the time of its application pay to the secretary of state, for the use of the state, all license fees and penalties then due from it and the sum of one hundred dollars as additional penalty: Provided, That this shall apply to the reinstatement of corporations, the names of which shall have been stricken at the present time, and hereafter whenever any corporation shall have its name stricken from the records by the secretary of state it shall, in applying for reinstatement, pay all license fees and penalties then due from it and the additional sum of twenty dollars for each and every year that its name has been stricken from the records, and upon the making of such application and such payment, it shall be the duty of the secretary of state to enter upon his records a notation that such corporation is reinstated. [L. '13, p. 135, § 2.]

See notes to § 3715a.

§ 3715d.

See notes to § 3715a.

Where the secretary of state has dissolved a corporation for nonpayment of its license fees, it is deemed effective until set aside, and an action to recover its property may be maintained by the only trustee who is a stockholder, in view of this section, providing that on such dissolution, its trustees hold its property for the benefit of its stockholders and creditors: Soderberg v. McRae, 70 Wash. 235, 126 Pac. 538.

Where an old corporation had been dissolved by the secretary of state for nonpayment of its license fees, without notice to its trustees, who, when they learned of the fact, organized a new corporation and conveyed to it all the assets without other consideration than the issue of its capital stock to the old stockholders, thereby absorbing the old company, the new corporation is liable upon all the obligations of the old corporation: Jones v. Francis, 70 Wash. 676, 126 Pac. 307.

CHAPTER II.

FOREIGN CORPORATIONS.

§ 3720.

Directors of a foreign corporation who have taken the oath of office and entered upon their duties are de facto officers, and entitled to dismiss an appeal taken by the corporation; and their authority cannot be collaterally impeached by the fact that they had not filed a written acceptance of their trust as required by the laws of the state

where incorporated: Young v. Schenck, 64 Wash. 90, 116 Pac. 588.

§ 3723.

The dissolution of a corporation by the secretary of state for nonpayment of its license fees will not abate an action for personal injuries brought against it by an employee, where the assets were all trans-

ferred to the trustees and by them to a new corporation which assumed all the obligations and was an absorption or continuation of the old corporation: *Jones v. Francis*, 70 Wash. 679, 126 Pac. 307.

As to the payment of franchise tax as condition of corporation's being allowed to continue, see note in 9 L. R. A. 37.

CHAPTER III.

EDUCATIONAL, RELIGIOUS, SOCIAL AND CHARITABLE CORPORATIONS AND ASSOCIATIONS.

§ 3741.

A section in a constitution of a league of baseball clubs or associations providing that the membership of a club may be terminated by a unanimous vote of the remaining clubs, while only a by-law, is not repealed by a resolution amending a one year franchise granted by resolution so as to grant a franchise or membership for the term of five years, there being no reference to the constitution, and nothing to show that the resolution was unanimous: *State ex rel. Rowland v. Seattle Baseball Assn.*, 61 Wash. 79, 31 L. R. A., N. S., 512, 111 Pac. 1055.

A league of baseball clubs or associations acts without jurisdiction in the expulsion of a member without notice and an opportunity to be heard; and the presence of the member without previous notice of the action does not confer jurisdiction, when such member does not consent: *State ex rel. Rowland v. Seattle Baseball Assn.*, 61 Wash. 79, 31 L. R. A., N. S., 512, 111 Pac. 1055.

As to notice and opportunity to be heard in defense as prerequisite to expulsion of member, see note, 114 Am. St. Rep. 27.

A baseball club may be deprived of its membership in a league under a clause in the constitution providing for the expulsion of a club on the unanimous vote of the other members if for business reasons the same appears desirable: *State ex rel. Rowland v. Seattle Baseball Assn.*, 61 Wash. 79, 31 L. R. A., N. S., 512, 111 Pac. 1055.

Where the membership of a baseball club in a league was illegally terminated without giving required notice, the courts will not by mandate enforce its reinstatement where

it appears that it will be expelled on due notice, under a clause in the constitution authorizing such expulsion for business reasons, by a unanimous vote of the remaining members: *State ex rel. Rowland v. Seattle Baseball Assn.*, 61 Wash. 79, 31 L. R. A., N. S., 512, 111 Pac. 1055.

§ 3746.

The clerk of a local camp of a fraternal beneficial society is the agent of the society, and his knowledge is its knowledge, notwithstanding by-laws to the contrary effect, where he was the officer who collects, receipts for, and transmits the assessments, and the society had no other fund from which to pay death losses and no other means of collecting the assessments: *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531.

Notwithstanding by-laws of a fraternal beneficial society limiting the right of delinquent members to reinstatement to those in good health, and providing that no local camp or officer can waive the by-laws, the society is liable on a death loss where after knowledge of suspension it accepted and retained his monthly assessments collected and transmitted by the local clerk with knowledge that the member had become insane, such notice of bad health to the local clerk being notice to the society whether communicated or not: *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531.

As to the doctrine that notice to the agent is notice to the principal, see note in 24 Am. St. Rep. 228.

CHAPTER VI.

CO-OPERATIVE ASSOCIATIONS.

§ 3766-1. Co-operative Associations—Who may Organize—Purposes.

Any number of persons, not less than five, may associate themselves together as a co-operative association, society, company or exchange for the transaction of any lawful business on the co-operative plan. For the purposes of this act the words "association," "company," "exchange," "society" or "union" shall be construed the same. [L. '13, p. 50, § 1.]

§ 3766-2. Articles—Contents.

Every association formed under this act shall prepare articles of association in writing, which shall set forth:

1. The name of the association.
2. The purpose for which it was formed.
3. Its principal place of business.
4. The term for which it is to exist which shall not exceed fifty years.
5. The amount of capital stock, the number of shares and the par value of each share. [L. '13, p. 50, § 2.]

§ 3766-3. Articles—Verification—Filing—When Legally Organized.

The original articles of associations organized under this act or a true copy thereof verified to be such by the affidavits of two of the signers thereof, shall be filed with the secretary of state. Whenever a certified copy of the same accompanied by a certificate of the secretary of state showing that the same has been filed in his office, is filed with the county auditor of the county in which is located the principal place of business of said association, the said association shall be deemed to be legally organized. [L. '13, p. 50, § 3.]

§ 3766-4. Filing Fees.

For filing articles of association organized under this act there shall be paid to the secretary of state the sum of twenty-five dollars and for the filing of an amendment of such articles there shall be paid the sum of ten dollars. For recording such articles of association or an amendment thereto, the county auditor shall charge the sum of fifteen cents for each one hundred words thereof, and fifteen cents for filing and indexing the same. [L. '13, p. 51, § 4.]

§ 3766-5. Trustees—Election—Duties—Election of Officers.

Every such association shall be managed by a board of not less than three trustees. The trustees shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office during the term for which they were elected and until their successors are elected and qualified; but a majority of the stockholders shall have the power at any regular or special meeting, legally called for that purpose to remove any trustee or officer for cause, and fill the vacancy. The officers of every such association shall be a president, one or more vice-presidents, a secretary and a treasurer who shall be elected annually by the trustees. Each of said officers must be a member of the association. All elections shall be by ballot. [L. '13, p. 51, § 5.]

§ 3766-6. Amendments—How Adopted—Recording.

The articles of association may be amended by a majority vote of the stockholders at any regular stockholders' meeting or at any special stockholders' meeting called for that purpose, on twenty days' written notice being given to the stockholders. Said power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, The amount of the capital stock shall not be diminished below the amount of the paid-up capital stock at the time such amendment is adopted. Within thirty days after the adoption of an amendment to its articles of association, the association shall cause a copy of such amend-

ment adopted to be recorded in the office of the secretary of state and of the county auditor of the county where its principal place of business is located. [L. '13, p. 51, § 6.]

§ 3766-7. Business Authorized to be Conducted—Lawful Business Defined.

An association created under this act, being for mutual welfare, the words "lawful business" shall extend to every kind of lawful effort for business, agricultural, dairy, mercantile, mining, manufacturing or mechanical business, on the co-operative plan. [L. '13, p. 52, § 7.]

§ 3766-8. Stock—Issues—Limit—Vote.

No stockholder in any such association shall own more than one-fifth of the stock of the association, except as hereinafter provided. No stockholder at any meeting shall be entitled to more than one vote. [L. '13, p. 52, § 8.]

§ 3766-9. Subscription of Stock in Other Associations.

At any regular meeting or any regularly called special meeting at which at least a majority of all the stockholders shall be present, or represented, an association organized under this act may by a majority vote of the stockholders present or represented, subscribe for shares and invest its reserve fund or any part thereof in the capital stock of any other co-operative association. [L. '13, p. 52, § 9.]

§ 3766-10. Purchasing Business of Other Associations—Payment—Stock Issued.

Whenever an association organized under this act shall purchase any stock of another association or the interest or any part thereof of any person or persons, firm or partnership engaged in any lawful business as defined in section 3766-7, it may pay for the same in whole or in part by issuing to the selling association or person, firm or partnership, shares of its capital stock to an amount which at par value, would equal the fair market value of the stock or interest so purchased and in such case the transfer to the association of such stock or interest so purchased at such valuation shall be equivalent to payment in cash for the shares of stock so issued. [L. '13, p. 52, § 10.]

§ 3766-11. Certificates of Stock—When Held in Trust—Issued.

In case the cash value of such stock or interest so purchased exceeds one-fifth of the par value of the purchasing association, the trustees of the purchasing association are authorized to hold the shares in excess of one-fifth of the par value of the purchasing association, in trust for the vendor and dispose of the same to such person or persons and within such time as may be mutually agreed upon by the parties in interest, and shall pay the proceeds thereof as currently received to the former owners thereof. Certificates of stock shall not be issued to any subscriber until fully paid for, but the by-laws of the association may allow subscribers to stock to vote as stockholders: Provided, That one-fifth of the stock subscribed for has been paid for by such subscriber. [L. '13, p. 53, § 11.]

§ 3766-12. Stockholders may Vote by Mail.

At any regular, called, general or special meeting of the stockholders, a written vote received by mail from any absent stockholder and signed by him may be read in such meeting and shall be equivalent to a vote of each of the stockholders so signing: Provided, He has been previously notified in writing of the exact motion or resolution upon which such vote is taken and a copy of same is forwarded with and attached to the vote so mailed by him. [L. '13, p. 53, § 12.]

§ 3766-13. Earnings—Apportionment.

The trustees shall apportion the net earnings by first paying dividends on the paid-up capital stock at a rate not exceeding eight per cent per annum; then setting aside not less than ten per cent nor more than twenty-five per cent of the remainder annually of the net profits for a reserve fund and the remainder of said net profits by dividends proportioned upon the amount of business transacted with said association and proportioned upon the wages and salaries of employees: Provided, That nonshareholders shall only be entitled to one-half as much dividends from said net profits as shareholders: And provided further, That no dividend shall be paid out or declared on any business transacted with the association by any person, persons, firm or corporation engaged in the buying, selling or handling of agricultural products for profit or to any sale to said association by any person or persons, firm or corporation engaged as a wholesaler or jobber in the distribution of manufactured products. Dividends remaining uncalled for six months after the same have been declared shall revert to the association. [L. '13, p. 53, § 13.]

§ 3766-14. Distribution of Dividends.

The profits or net earnings of such association shall be distributed to those entitled thereto at such time and in such manner not inconsistent with this act as its by-laws shall prescribe, which shall be as often as once a year. [L. '13, p. 54, § 14.]

§ 3766-15. Annual Reports—Contents—Filing.

Every association organized under the terms of this act shall, annually on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state and a general statement as to its business, showing the total amount of business transacted, the amount of capital stock subscribed for and paid in, the number of stockholders, the total expenses of operation, the amount of its indebtedness or liability and its profits and losses. [L. '13, p. 54, § 15.]

§ 3766-16. Co-operative Associations Heretofore Organized—May Adopt Provisions of This Act.

All co-operative associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business shall have the benefit of all the provisions of this act and be bound thereby on filing with the secretary of state signed and sworn to by the president and secretary, manager or other officer managing said business,

to the effect that said co-operative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions of this act. No association organized under this act shall be required to do or perform anything not specifically required herein in order to become an association or to continue its business as such. [L. '13, p. 54, § 16.]

§ 3766-17. Use of Term "Co-operative" Limited to Associations Under This Act.

No corporation or association organized or doing business for profit in this state shall be entitled to use the term "co-operative" as a part of its corporate or other business name or title, unless it has complied with the provisions of this act; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any stockholder or any association legally organized hereunder. [L. '13, p. 55, § 17.]

§ 3766-18. When to Do Business—Liability.

No co-operative association organized under the provisions of this act shall be permitted to do business until three-fourths of the capital stock shall have been subscribed for and one-fourth of the capital stock of said association shall have been paid in to said association. The liability of each stockholder shall be limited to the amount remaining unpaid on his subscription to the capital stock of said association. [L. '19, p. 55, § 18.]

§ 3766-19. May Pass By-laws.

Any association formed under this act may pass by-laws to govern itself in the carrying out of the provisions of this act which are not inconsistent with the provisions of this act. [L. '13, p. 55, § 19.]

§ 3766-20. Constitutionality.

If any section or part of a section of this act shall for any cause be held unconstitutional such fact shall not affect the remainder of this act. [L. '13, p. 55, § 20.]

TITLE XXVI.

COUNTIES.

CHAPTER I.

BOUNDARIES OF COUNTIES.

§ 3790-1. Pend Oreille County.

Pend Oreille county shall be and consist of all that portion of Stevens county bounded and described as follows, to wit:

Beginning at the southeast corner of section 36 in township 30 north, range 42 east of the Willamette meridian, which is a point on the boundary line between Stevens and Spokane counties; thence running north, along the east line of said township 30 north, range 42 east of the Willamette meridian, to the northeast corner of section 1, in said township 30; thence west to the southeast corner of section 34 in township 31 north, range 42 east of Willamette meridian; thence north, along the west line of sections 34, 27 and 22 of said township 31, north, range 42 E. W. M.; thence north on a line from said northwest corner of section 22 in said township 31 to a point on the north line of said township 31, midway between the northeast corner and the northwest corner of said township 31, which line will be the west line of sections 15, 10 and 3 of said township 31, when the same are surveyed; thence to the center point on the south line of township 32, north range 42 east of Willamette meridian; thence north on the north and south center line of said township 32, which line will be the west line of sections 34, 27, 22, 15, 10, and 3 of said township 32 when the same shall be surveyed, to the north line of said township 32; thence to the center point on the south line of township 33 north, range 42 east of Willamette meridian; thence north, on the north and south center line of township 33 north of range 42 east of Willamette meridian, which line will be the west line of sections 34, 27, 22, 15, 10 and 3 of said township 33, when the same shall be surveyed, to the north line of said township 33; thence to the center point on the south line of township 34 north, range 42 east of Willamette meridian; thence north on the north and south center line of said township 34, which line will be the west line of sections 34, 27, 22, 15, 10 and 3 of said township 34 when the same shall be surveyed, to the north line of said township; thence to the center point on the south line of township 35 north, range 42 east of Willamette meridian; thence north, on the north and south center line of township 35 north, range 42 east Willamette meridian, which line will be the west line of sections 34, 27, 22, 15, 10 and 3 of said township 35 when the same shall be surveyed to the north line of said township 35; thence to the southwest corner of section 34 in township 36 north, range 42 east of Willamette meridian; thence north, along the west line of sections 34, 27, 22, 15, 10 and 3 to the northwest corner of section 3 of said township 36; thence west along the south line of township 37 north, range 42, and township 37 north, range 41, east of the Willamette meridian, to the center point on the south line of said township 37 north, range 41 east of the Willamette

meridian, which point will be the southwest corner of section 34 in said township 37 north, range 41 east of the Willamette meridian, when the same shall be surveyed; thence north along the north and south center line of said township 37 north, range 41 east of the Willamette meridian, which line will be the west line of sections 34, 27, 22, 15, 10 and 3 of said township when the same shall be surveyed, to the north line of said township 37; thence east, along the south line of township 38 north, range 41 east of the Willamette meridian to the southeast corner of said township 38 north, range 41 east of the Willamette meridian; thence to the southwest corner of section 31 in township 38 north, range 42 east of Willamette meridian; thence north, along the west line of said township 38, to the northwest corner of said township 38; thence east along the north line of said township 38, to the center point on the south line of township 39, north range 42 east of Willamette meridian, which point will be the southwest corner of section 34 of said township 39 when the same shall be surveyed; thence north along the north and south center line of said township 39, which line will be the west line of sections 34, 27, 22, 15, 10 and 3 of said township 39, when the same shall be surveyed, to the north line of said township 39; thence east along the south line of township 40, north, range 42, east of Willamette meridian to the southeast corner of said township 40; thence north, along the east line of said township 40, to the international boundary line; thence east along said international boundary line, to the intersection of the state line between the states of Washington and Idaho with said international boundary line; thence south along said state line, to the southeast corner of section 31, township 30 north, range 46 east of Willamette meridian, being a point on the boundary line between the counties of Stevens and Spokane in said state of Washington; thence west along said boundary line between said counties of Stevens and Spokane, to said southeast corner of section 36, township 30 north, range 42 east of Willamette meridian, the place of beginning, is hereby detached from Stevens county and created into a new county, to be known and designated as Pend Oreille county, by which name it shall have corporate succession and possess corporate powers, and be subject to the corporate liabilities conferred by law upon counties of the state of Washington. [L. '11, p. 98, § 1.]

CHAPTER III.

GENERAL RIGHTS, DUTIES AND POWERS.

§ 3831-1. Buildings for County and City—Joint Construction.

Where the county seat of any county in this state shall be within the corporate limits of any incorporated city such county and city may contract one with the other for the joint purchase, acquisition, leasing, ownership, control and disposition of land and other property suitable as a site for a county courthouse and city hall and for the joint construction, ownership, control and disposition of a building or buildings thereon for the use by such county and city as a county courthouse and city hall. Any such county or city now owning a site or any interest therein, or a site with buildings thereon, may, upon such terms as shall appear fair and just to the board of county commissioners of such county or to the city council or commission

of such city, contract with reference to the joint ownership, acquisition, leasing, control, improvement and occupation of such property as herein provided. [L. '13, p. 272, § 1.]

§ 3831-2. Contract—Terms.

All contracts made in pursuance hereof shall be for such period of time and upon such terms and conditions as shall be agreed upon. Such contract shall fully set forth the amount of money to be contributed by such county and city towards the acquisition of such site and the improvement thereof and for the manner in which such property shall be improved and the character of the building or buildings to be erected thereon. Such contract may provide for the amount of money to be contributed annually by such county and city for the upkeep and maintenance of such property and the building or buildings thereon, or it may provide for the relative proportion of such expense which such county and city shall annually pay. Such contract shall specify the parts of such building or buildings which shall be set apart for the exclusive use and occupation of such county and city. [L. '13, p. 272, § 2.]

§ 3831-3. Funds.

The money to be contributed by such county or city may be raised by a sale of the bonds of such county or city, or by general taxation as now or hereafter authorized by law. Any such county or city now possessing funds or having funds available for a county courthouse or city hall from the sale of bonds or otherwise, is herewith authorized to contract for the expenditure of such funds as herein provided. [L. '13, p. 273, § 3.]

§ 3831-4. Approval of Contract.

Such contract shall be made only after a proper resolution of the board of county commissioners of such county and ordinance of such city duly passed specifically authorizing the same. Such contract when made shall be binding upon such county or city during the life of the same or until the same be modified or abrogated by mutual consent evidenced by a proper resolution and ordinance of such county and city. [L. '13, p. 273, § 4.]

§ 3831-5. Joint Armory Sites.

Any city or county in the state of Washington is hereby authorized and empowered to expend money from its or their current expense funds in payment in whole or in part for an armory site whenever the legislature of the state of Washington shall appropriate money for or authorize the construction of an armory within such city or county for use of such organization or organizations of the National Guard of Washington, as may be stationed within such city or county. [L. '13, p. 273, § 1.]

§ 3831-6. Warrants Declared Valid.

All warrants and obligations heretofore issued or incurred by any county in the state of Washington for the purchase of, or in payment for,

any armory site upon which an armory building may have been constructed with the aid, in whole or in part, of appropriations of the legislature of the state of Washington, are hereby declared legal and valid. [L. '13, p. 275, § 1.]

CHAPTER V.

SALE OR DISPOSAL OF COUNTY PROPERTY.

§ 3854. Lease—Term.

At the day and hour designated in such notice or at any subsequent time to which such meeting may be adjourned by said board of county commissioners, but not more than thirty days after the day and hour designated for the meeting in said published notice, the board of county commissioners may, at their discretion, lease the property in such notice described for a term of years and upon such terms and conditions as to the said board of county commissioners shall seem just and right in the premises; but for no longer term in any one instance than ten (10) years, and no renewal of a lease once executed and delivered shall be had, except by a re-leasing and reletting of said property according to the terms and conditions of this act: Provided, That where a county owns property within the corporate limits of any city or town suitable for municipal purposes, or for commercial buildings, or owns property suitable for manufacturing or industrial purposes, the board of county commissioners may lease same for said purposes for any period not to exceed thirty-five years. Where property is leased for municipal purposes or for commercial buildings or manufacturing or industrial purposes the lessee therein shall prior to the execution of such lease file with said board of county commissioners general plans and specifications of the building or buildings to be erected thereon for such purposes. All leases when executed shall provide that the same shall be canceled by failure of the lessee to construct such building or buildings or other improvements for such purposes within two years from date of such lease, and in case of failure so to do the lease and all improvements thereon, including the rentals paid, shall thereby be forfeited to the county. No change or modification of said plans shall be made unless same be first approved by the board of county commissioners. If at any time during the life of said lease the lessee shall fail to use the same for the purposes leased, without first obtaining permission in writing from the board of county commissioners so to do, said lease shall be forfeited. Any lease made for a longer period than ten (10) years shall contain provisions requiring the lessee to permit the rentals for every five-year period thereafter, or part thereof, at the commencement of such period, to be readjusted and fixed by the board of county commissioners. In the event that the lessee and said board of county commissioners cannot agree upon the rentals for said five-year period, the lessee shall submit to have said disputed rentals for said subsequent period adjusted by arbitration. The lessee shall pick one arbitrator and the board of county commissioners one, and the two so chosen shall select a third. No board of arbitrators shall reduce the rentals below the sum fixed or agreed upon for the last preceding period. All buildings, factories or other improvements made upon property leased under this proviso shall belong to and become property

of such county, unless otherwise stipulated, at the expiration of the lease. No lease so made shall be assigned without such assignment being first authorized by resolution of said board of county commissioners and the consent in writing of at least two (2) members of said board indorsed on such leases and all leases when drawn shall contain this provision. [L. '13, p. 552, § 1.]

CHAPTER VII. COUNTY COMMISSIONERS.

§§ 3884—3887.

Repealed. See L. '11, p. 338, § 2.

§ 3884-1. Compensation for Extra Services—Allowance by Court.

Whenever a member of the board of county commissioners of any county shall have a claim for compensation for per diem and expenses for attendance upon any special or extra session of the board of county commissioners of which he is a member or a claim for compensation for extra services or expenses incurred as such commissioner such claim shall be verified by him and after being approved by a majority of the board of county commissioners of such county shall be filed with the clerk of the superior court and be approved by the superior judge of such county or any superior judge holding court in such county. If the judge so approve it or any part thereof the same shall be certified by the clerk under the seal of his office and be returned to the county auditor who shall draw a warrant therefor: Provided, The superior judge may make such investigation as he shall deem necessary to determine the correctness of such claim and may, after such investigation, approve or reject any part of such claim: Provided further, The superior court shall not be required oftener than once in each month to pass upon any such claims and the court may fix a time in each month by general order filed with the clerk of the board of county commissioners on or before which such claims must be filed with the clerk of the superior court. [L. '11, p. 337, § 1.]

§ 3890.

Justices of the peace not being county officers, under our constitution, their offices pertaining to judicial business, the county commissioners, under their general authority and control over county business and officers, are not authorized to employ bailiffs or assistant clerks for justices of the peace, the legislature having expressly authorized the employment of one clerk for each justice of cities of the first and second class: *McElwain v. Abraham*, 58 Wash. 26, 107 Pac. 832.

Under this section, subdivision 6, giving the county commissioners power to prosecute and defend all actions, the commissioners have power to direct the dismissal of an appeal from a judgment against the county, taken by the prosecuting attorney: *Prentice v. Franklin County*, 54 Wash. 587, 103 Pac. 831.

As to counties as quasi corporations, see note in 1 L. R. A. 757.

Under this section, conferring upon county commissioners the general management of county expenditures and business, they have authority to employ an alienist when his services are necessary to aid the prosecuting attorney in connection with the defense of insanity in a prosecution for homicide; and such employment is not unauthorized as relating only to judicial business: *Williamson v. Snohomish County*, 64 Wash. 233, 116 Pac. 675.

As to the authority of county to employ "tax ferret," see note in 4 L. R. A., N. S., 339. Also note in 38 L. R. A., N. S., 261.

As to like authority to appoint expert accountant, see note in Ann. Cas. 1913B, 1087. And see note in 29 L. R. A., N. S., 652.

Under this section, giving the county commissioners the care of county property and the power to prosecute and defend actions, the commissioners have power to compromise a controversy as to the validity of a county tax sale and deed by conveying the land to

the owner on his payment of the taxes, regardless of whether suit has been commenced; and it is immaterial that the transaction was called a "redemption," which was not authorized by law: *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999.

As to delegation of powers of taxation to county authorities, see note in 15 L. R. A., N. S., 62.

§ 3909.

A presentation of a claim by a widow for herself and minor children for the death of her husband through the fall of a county bridge is a sufficient presentation on behalf of the children, under this section, especially in view of section 5932, giving such

parent control of the children and their estate: *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459.

A claim against a county made by C., as attorney for S. P. M. and his wife H. M., for injuries sustained by the wife, filed on a certain date, is sufficiently identified and shown to have been rejected by a record of the county commissioners reciting the filing of a claim on said date by C., as attorney for H. M., referring to the place of the accident and amount of the claim, and stating "claim was rejected"; and an action thereon is barred within three months, under this section, although the claim was a community property claim, action upon which would have to be brought by the husband: *Maynard v. Jefferson County*, 54 Wash. 351, 103 Pac. 418.

CHAPTER IX.

COUNTY AUDITORS.

§ 3917.

Under this section, subdivision 9, directing the county auditor, as clerk of the board of county commissioners to "perform all other duties required by law or any rule or order of the board," it is a breach of the auditor's official bond to embezzle liquor license fees deposited with him as clerk of the board, after he had been ordered by the board to issue the licenses and pay the fees over to the county treasurer: *Skagit County v. American Bonding Co.*, 59 Wash. 8, 109 Pac. 199.

§ 3918.

Upon the rejection, by the county commissioners, of a legal claim, the claimant becomes entitled to interest on the total amount of the claim from the date of its

rejection: *State ex rel. Maltbie v. Will*, 54 Wash. 433, 103 Pac. 479, 104 Pac. 797.

As to interest on county warrants, etc., see note in 3 Ann. Cas. 459. And see note in 17 L. R. A., N. S., 552.

This section, requiring claims against a county to be presented to the county commissioners for allowance before any action can be brought thereon has no application to an equitable suit to restrain the county from interfering with or diverting the flow of springs claimed by the plaintiff: *Kiser v. Douglas County*, 70 Wash. 242, 126 Pac. 622.

As to affect of allowance or rejection by county of claim against it, see note in 55 Am. St. Rep. 203.

As to estoppel on county to contest illegal claims and expenditures, see note in 137 Am. St. Rep. 358.

CHAPTER X.

COUNTY TREASURERS.

§ 3937.

Under this section and section 8344, providing that every office shall become vacant upon the incumbent's refusal or neglect to take his oath of office or give or renew his official bond, no vacancy occurs authorizing an appointment by the county commissioners, upon the refusal of an officer elect to qualify, since he was not an "incumbent"; and the term of his predecessor continues until a successor, "elected" by the same electoral body which elected the incumbent, has qualified: *State ex rel. Vanderveer v. Gormley*, 53 Wash. 543, 102 Pac. 435.

As to acceptance of office and resignation, see note in 36 Am. St. Rep. 523.

§ 3939.

Under this section, empowering county treasurer to appoint one or more deputies, a deputy has power to execute a tax deed required by statute to be executed by the county treasurer: *Huber v. Brown*, 57 Wash. 634, 107 Pac. 850.

As to deputy, acting in name of principal officer, see note in 106 Am. St. Rep. 829.

As to when sheriff may act by deputy, see note in 3 L. R. A. 440.

As to the validity of an acknowledgment of instrument by principal taken by deputy, see note in Ann. Cas. 1912B, 332. Also, see note in 5 L. R. A., N. S., 957.

§ 3947.

Under this section, requiring city warrants to be paid in the order of their issuance, the holder of warrants suing to compel the city to provide funds for their payment cannot acquire any preference over other prior warrants of the same class, although the holders thereof had not made any efforts to obtain like relief: *State ex rel. Polson v. Hardcastle*, 68 Wash. 548, 124 Pac. 110.

§ 3956.

A reference in a tax deed describing land in Cowlitz county as being in township 10 west, instead of 10 north, is manifestly a clerical error which would not invalidate the deed: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

As to the effects of recitals in tax deeds, see note in 31 Am. St. Rep. 233.

As to sufficiency of tax deed in respect to designation of grantee, see note in Ann. Cas. 1913A, 1195.

As to tax deed as subject for reformation, see note in 20 Ann. Cas. 437.

CHAPTER XIV.**SHERIFFS.****§ 4003.**

Under this section, the officer has the unqualified right to demand a bond in any case requiring a levy on personal property involving the taking of actual possession, and not merely in cases where the bond "is required by law," as in sections 573 and 1888, relating to adverse claims to property levied upon: *Canfield-Caulkins Implement Co. v. Cowden*, 70 Wash. 587, 127 Pac. 216.

This section applies to constables when their duties in connection with process are

exactly the same as the duties of sheriffs; the terms "sheriff, deputy sheriff, or coroner," being used in a generic sense: *Canfield-Caulkins Implement Co. v. Cowden*, 70 Wash. 587, 127 Pac. 216.

As to indemnity to executing officer as implied from having him proceed, etc., see note in 89 Am. St. Rep. 448.

As to indemnity bonds to protect sheriffs in execution proceedings, etc., see note in 86 Am. St. Rep. 554.

CHAPTER XV.**CORONERS AND INQUESTS.****§ 4007.**

Coroners abolished except in cities of the first class, see § 4030-9.

§ 4030-1. Justice of Peace at County Seat to Perform Duties of Coroner.

Whenever information is given to the prosecuting attorney of any county that the dead body of any person has been found in such county, and there shall exist reasonable grounds for the belief that such death was caused by unlawful means, the prosecuting attorney shall, as a part of his official duties, direct a justice of the peace residing in the county seat of the county to forthwith go to the place where such dead body was found and make an investigation, which shall be public and shall be held at such time and place as shall give any person interested therein an opportunity to be present and to be represented by counsel, and in cases where said justice of the peace receives no salary he shall receive a compensation of five dollars for each investigation, and, in addition thereto, said justice of the peace shall receive his actual and necessary expenses in going to and returning from the place where said investigation is made. [L. '13, p. 165, § 1.]

§ 4030-2. May Subpoena Witnesses.

The justice of the peace in the conduct of such investigation is hereby empowered to summon and compel the attendance of any witness deemed

necessary or requested by any person interested therein, to administer oaths to such witnesses, to examine such witnesses in all matters pertinent to such investigation, to have their testimony taken down and transcribed, and to cause an autopsy to be performed if deemed advisable by the prosecuting attorney of said county. [L. '13, p. 166, § 2.]

§ 4030-3. Report of Prosecuting Attorney.

Immediately after the conclusion of such investigation, said justice of the peace shall make a full report to, and file same with, said prosecuting attorney together with all evidence taken at such investigation, and the prosecuting attorney shall file said transcript of the testimony given in such investigation and all evidence taken together with his written opinion as to how such person came to his death, in the office of the county clerk of said county. [L. '13, p. 166, § 3.]

§ 4030-4. Personal Property of Deceased.

Except where otherwise provided by law, the said justice of the peace shall take into his custody any money or other property found upon such dead body or belonging to the deceased and shall deliver the same as soon as practicable to the prosecuting attorney. [L. '13, p. 166, § 4.]

§ 4030-5. Burial.

As soon as practicable after such investigation the justice of the peace shall cause such dead body, unless the same be demanded by a legal claimant, to be delivered to a competent undertaker, designated by the board of county commissioners of the county, who shall decently bury the same, and such undertaker shall receive reasonable compensation, not exceeding thirty-five dollars, therefor: Provided, That such compensation shall, as far as possible, be paid by the prosecuting attorney out of any money or property found upon or belonging to the deceased. [L. '13, p. 166, § 5.]

§ 4030-6. Witness Fees.

All witnesses appearing at such investigation shall be entitled to the same fees and mileage as witnesses in the superior court. [L. '13, p. 167, § 6.]

§ 4030-7. Witness Refusing to Appear.

The failure or refusal of any witness to appear or testify at such investigation, when such witness has been duly summoned, shall be a misdemeanor. [L. '13, p. 167, § 7.]

§ 4030-8. Excess Funds.

The prosecuting attorney shall, after paying the burial expenses provided for by section 4030-5, pay the balance of any money in his hands to the executor or administrator of such deceased, if one has been appointed, and, if not, to the county treasurer of the county. [L. '13, p. 167, § 8.]

§ 4030-9. Coroner Abolished.

The office of county coroner is hereby abolished as to all counties of this state except counties of the first class, and none of the provisions of this act shall apply to or in counties of the first class. [L. '13, p. 167, § 9.]

§ 4030-10. Repeal.

All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [L. '13, p. 167, § 10.]

§ 4030-11. Present Officers Serve Out Term.

This act shall take effect on the second Monday of January, 1915, and at said time all coroners affected by this act shall deliver to the prosecuting attorneys of their respective counties all property which had theretofore come into their possession by virtue of their official capacity as coroners. [L. '13, p. 167, § 11.]

CHAPTER XVI.**SALARIES OF COUNTY OFFICERS, COSTS AND FEES.****§ 4031.**

The salary of a county officer cannot be increased during the term for which he was elected by reason of an increase in the population of the county changing its classification by which the salary of its officers are determined, constitution, article 11, section 8, providing that his compensation shall not be increased after his election during his term of office; but a county officer is entitled to the salary for the classification to which the county in fact belonged at the time of his election, although the county commissioners did not determine the fact until after the election: *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

As to constitutional provision against change of salary of public officer during his

term, and application of said provision to office held during pleasure of appointing power, see note in *Ann. Cas.* 1913A, 316.

As to application of same to person appointed to office to fill unexpired term, see note in 16 *Ann. Cas.* 1027.

As to application of same where new duties are imposed upon officers, see note in 18 *Ann. Cas.* 408.

Under this section, the federal census automatically controls the classification of counties until such time as the population of the county shall be otherwise determined by competent authority; although prior to the census the county commissioners had entered an order declaring the county to be in another class having a greater population: *Faucher v. Rosenoff*, 65 Wash. 416, 118 Pac. 315.

§ 4033-1. Salaries of County Commissioners.

In all counties other than counties of the first class which have adopted or may hereafter adopt and put in force township organization, the compensation of county commissioners shall be and the same is hereby fixed at five dollars (\$5.00) per day for each and every day actually employed in the discharge of their duties: Provided, That they shall not be entitled to nor receive such per diem for more than two hundred (200) days in any one year: And provided further, That such county commissioners shall be entitled to all actual traveling and other necessary expenses incurred in the discharge of their duties. [L. '13, p. 58, § 1.]

§ 4046. Of Fourteenth Class.

County auditor, fifteen hundred dollars; county clerk, fourteen hundred dollars; county treasurer, fifteen hundred dollars; county sheriff, fifteen hundred dollars; county attorney, fourteen hundred dollars; county superintendent of common schools, twelve hundred dollars; county commissioners, four dollars per day; county assessor, fifteen hundred dollars; county coroner, such fees as are allowed by law. [L. '13, p. 356, § 4.]

§ 4047. Of Fifteenth Class.

County auditor, fifteen hundred dollars; county clerk, thirteen hundred and fifty dollars; county treasurer, fourteen hundred and fifty dollars; county

sheriff, fourteen hundred and fifty dollars; county attorney, thirteen hundred dollars; county superintendent of common schools, eleven hundred dollars; county commissioners, four dollars per day; county assessor, four dollars per day; county coroner, such fees as are allowed by law. [L. '13, p. 355, § 1.]

§ 4048. Of Sixteenth Class.

County auditor, fifteen hundred dollars; county clerk, thirteen hundred and fifty dollars; county treasurer, fourteen hundred dollars; county sheriff, fourteen hundred dollars; county attorney, twelve hundred dollars; county superintendent of common schools, one thousand dollars; county commissioners, four dollars per day; county surveyor, five dollars per day; county assessor, four dollars per day; county coroner, such fees as are allowed by law. [L. '13, p. 355, § 2.]

§ 4049. Of Seventeenth Class.

County auditor, fifteen hundred dollars; county clerk, thirteen hundred and fifty dollars; county treasurer, fourteen hundred dollars; county sheriff, fourteen hundred dollars; county attorney, eleven hundred dollars; county superintendent of common schools, one thousand dollars; county commissioners, four dollars per day; county surveyor, five dollars per day; county assessor, four dollars per day; county coroner, such fees as are allowed by law. [L. '13, p. 355, § 3.]

§ 4065.

One-half of the naturalization fees paid to a salaried county clerk, under 34 U. S. Stat. 596, and authorized by the act to be retained by the clerk for his own use, belong to the county, and must be accounted for by the clerk, under constitution, article 11, sections 5 and 8, requiring the legislature to regulate their compensation, provide for strict accountability by them for all fees collected, and fix their compensation by salaries, and this section, providing a salary which shall be full compensation for all services, section 4066, requiring salaried officers to collect and pay into the county treasury all fees now or hereafter allowed by law, paid, or chargeable, and section 4073, to the same effect and prohibiting the retention to his own use or profit of any sum paid him in his office or by virtue of his office, by virtue of the laws of this state or of the United States: *Franklin County v. Barnes*, 68 Wash. 488, 123 Pac. 779.

The United States statute, 34 U. S. Stat. 596, authorizing clerks of state courts to retain one-half of the naturalization fees paid to them, does not conflict with the state constitution and laws providing a salary for county officers which shall be in full compensation for their services, and providing that all such fees received shall be the prop-

erty of the county and paid into the county treasury; since the fees are paid for acts done in official capacity, and the federal act evinces no purpose to interfere with the disposition of the clerk's fees as between him and the state: *Franklin County v. Barnes*, 68 Wash. 488, 123 Pac. 779.

§ 4073.

See notes to § 4065.

§ 4081.

In a prosecution of a salaried county auditor for the embezzlement of fees which came into his hands by virtue of his office, and which he failed to pay to the county treasurer, it is not necessary to show that any demand was made upon him for the payment of the fees: *State v. Leonard*, 53 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

An information charging that the defendant is a county auditor who receives a salary and that he collected fees and refused to account for and embezzled the same, charges an offense under this section: *State v. Leonard*, 56 Wash. 83, 21 Ann. Cas. 69, 105 Pac. 163.

As to sufficiency of indictment for embezzlement with respect to allegation of fiduciary relation, see note in Ann. Cas. 1912C, 903.

TITLE XXVII.
DIKES AND DRAINS.

CHAPTER I.
DIKING DISTRICTS.

**§ 4107. Assessment of Benefited Lands Formerly Omitted—Procedure—
Appeals.**

If at any time it shall appear to the board of diking commissioners that any lands within or without said district as originally established are being benefited by the diking system of said district and that said lands are not being assessed for the benefits received, or that any lands within said district are being assessed out of or not in proportion to the benefits which said lands are receiving from the maintenance of the diking system of said district, and said board of diking commissioners shall determine that certain lands, either within or without the boundaries of the district as originally established, should be assessed for the purpose of raising funds for the future maintenance of the diking system of the district, or that the assessments on land already assessed should be equalized by diminishing or increasing the same so that said lands shall be assessed in proportion to the benefits received, said commissioners shall file a petition in the superior court in the original cause, setting forth the facts, describing the lands not previously assessed and the lands the assessments on which should be equalized, stating the estimated amount of benefits per acre being received by each tract of land respectively, giving the name of the owner or reputed owner of each such tract of land, and praying that such original cause be opened for further proceedings for the purpose of subjecting new lands to assessment or equalizing the assessments upon lands already assessed, or both.

Upon the filing of such petition, summons shall issue thereon and be served on the owners of all lands affected, in the same manner as summons is issued and served in original proceedings, as near as may be, and if such new lands lie within the boundaries of any other diking district, said summons shall also be served upon the commissioners of such other diking district.

In case any of the new lands sought to be assessed in said proceeding lie within the boundaries of any other diking district, and the diking commissioners of such other district believe that the maintenance of the dike or dikes of such other district is benefiting lands within the district instituting the proceedings, said diking commissioners of such other districts shall intervene in such proceedings by petition, setting forth the facts, describing the lands in the district instituting the proceeding which they believe are being benefited by the maintenance of the diking system of their district, and praying that the benefits to such lands may be determined and such lands subjected to assessment for the further maintenance of the diking system of their district, to the end that all questions of benefits to lands in the respective districts may be settled and determined in one proceeding, and such petitioners in intervention shall cause summons to be issued upon such petition in intervention and served upon the commissioners of the diking district instituting the

proceeding and upon the owners of all lands sought to be affected by such petition in intervention.

In case the owner of any such new lands sought to be assessed in said proceedings shall be maintaining a private dike against salt or fresh water for the benefit of said lands, and shall believe that the maintenance of such private dike is benefiting any lands within or without the district instituting the proceedings, or in case any such new lands sought to be assessed are included within the boundaries of some other diking district and are being assessed for the maintenance of the dikes of such other district, and the owner of such lands believes that the maintenance of the dike or dikes of such other district is benefiting lands included within the district instituting said proceedings, such owner or owners may by answer and cross-petition set forth the facts and pray that at the hearing upon said petition and cross-petition the benefits accruing from the maintenance of the respective dikes may be considered, to the end that a fair and equitable adjustment of the benefits being received by any lands from the maintenance of the various dikes benefiting the same, may be determined for the purpose of fixing the assessments for the future maintenance of such dikes, and may interplead in said proceeding such other diking district in which his lands sought to be assessed in said proceeding are being assessed for the maintenance of the dike or dikes of such other district.

No answer to any petition or petition in intervention shall be required, unless the party served with summons desires to offset benefits or to ask other affirmative relief, and no default judgment shall be taken for failure to answer any petition or petition in intervention, but the petitioners or petitioners in intervention shall be required to establish the facts alleged by competent evidence.

Upon the issues being made up, or upon the lapse of time within which the parties served are required to appear by any summons, the court shall impanel a jury to hear and determine the matters in issue, and the jury shall determine and assess the benefits, if any, which the respective tracts of land are receiving or will receive from the maintenance of the dike or dikes to be maintained, taking into consideration any and all matters relating to the benefits, if any, received or to be received from any dike, structure or improvement, and to credit, or charge, as the case may be, to each tract so situated as to affect any other tract or tracts, or having improvements or structures thereon or easements granted in connection therewith affecting any other tract or tracts included in such proceedings, and shall specify in their verdict the respective amount of benefits per acre, if any, assessed to each particular tract of land, by legal subdivisions. Upon the return of the verdict of the jury, the court shall enter its judgment in accordance therewith, as supplemental to the original decree, or in case a petition in intervention be filed by the diking commissioners of some other district than that instituting the proceeding, such judgment to be supplemental to all such original decrees, and thereafter, all assessments and levies for the future maintenance of any dike or dikes described in said judgment shall be based upon the respective benefits determined and assessed against the respective tracts of land as specified in said judgment. Every person or corporation feeling himself or itself aggrieved by any such judgment may appeal to the supreme court within

thirty days after the entry thereof, and such appeal shall bring before the supreme court the propriety and justness of the verdicts of the jury in respect to the parties to the appeal. No bonds shall be allowed on such appeals. Nothing in this section contained shall be construed as affecting the right of diking districts to consolidation in any manner provided by law. [L. '13, p. 267, § 1.]

Under this section, errors going to the validity of the organization of the district or regularity of the proceedings leading up to the judgment of condemnation cannot be

considered on appeal from the final judgment: Calispel Diking District v. McLeish, 63 Wash. 33, 115 Pac. 508.

§ 4121. Maintenance, Cost of to be Certified to County Auditor.

The board of commissioners of any diking district organized under the provisions of this act shall, on or before the first day of November, of each year, make an estimate of the cost of maintenance of the diking system in such district, which estimate shall include the cost of making any necessary repairs that it might become necessary to make in the maintenance of such system. Such estimate shall be for the succeeding year, and the amount so estimated shall be certified by the board of ——— commissioners to the auditor of the county in which such district is located, on or before said date, and the amount thereof shall be levied against and apportioned to the land in such district benefited by said improvement, in proportion to the maximum benefit originally assessed, and such amount shall be added to the general taxes against said lands and collected therewith: Provided, however, That in case of emergency not in contemplation at the time of making such annual estimate the diking commissioners may incur additional obligations and issue valid warrants therefor in excess of such estimate, and all such warrants so issued shall be valid and legal obligations of such district; and all warrants heretofore issued for such purposes under the provisions of this act, are hereby declared to be valid and legal obligations of the district so issuing the same. [L. '13, p. 271, § 2.]

§ 4126-1. Bonds—Extraordinary Demands on Funds.

Whenever by reason of any extraordinary occurrence or other casualty there occur such changes in conditions as to warrant, in the opinion of the commissioners of any diking district, an estimate for making repairs and improvements, including the yearly maintenance expense in an amount equal to twenty-five per cent of the estimated cost of the original improvements, as provided for in Remington & Ballinger's Annotated Codes and Statutes of Washington, section 4103, the funds therefor may be provided by the issuance of bonds of said diking district, payable in not to exceed ten years, and to pay the same, such commissioners shall make a levy extending over such period of time and in such amount as shall be necessary to take care of such bonds and interest, and such levy when made shall state the year for which it is made and the amount thereof, and thereafter, the county auditor shall each year extend such levy without any further orders from said commissioners: Provided, however, That if for any cause whatsoever, said levy shall not be sufficient to take care of said bonds and interest or pay said fixed estimate a further levy shall be made for that purpose. Said bonds shall be sold at not less than par and shall bear interest not to exceed seven per cent per annum,

and the proceeds thereof shall be used in such repairs, improvements or maintenance or warrants issued in payment therefor and for no other purpose: Provided, however, That such bonds shall only be issued when they are presented to and filed with such commissioners and shall become a part of their record, a petition of property owners owning at least sixty per cent of all the acreage in such district requesting the issuance of such bonds. [L. '13, p. 512, § 1.]

§ 4136-1. Consolidation of Diking District—Petition—Election.

Any two or more contiguous diking districts heretofore organized or which may hereafter be organized under the diking laws of the state of Washington, desiring to consolidate into one district, may, upon petition signed by the owners of real property representing a majority of the acreage therein to the commissioners of their respective districts, effect such consolidation by the commissioners of said districts so desiring to consolidate giving thirty days' notice of an election for such purpose to be held in each of said districts, setting forth in said notice the date of said election, and the object of the same, said notice to be given and posted in the same manner as notice of the annual election of commissioners, as provided in the general diking law, and the further publication of the same for at least three successive issues in a weekly newspaper published in the county in which such districts are located, and of general circulation in said districts: Provided, That where there is no newspaper so published and circulated, the publication of the notice of said election may be dispensed with. [L. '13, p. 106, § 1.]

§ 4136-2. Ballots.

At such election held pursuant to said notice, a printed ballot shall be furnished by the commissioners of said districts, having printed thereon: "For consolidation of Diking District No. — and No. — (here insert numbers), to be known as 'Consolidated Diking District No. — (here insert number), of — (here insert name of county) County, Washington.'" And "Against consolidation of Diking District No. — and No. — (here insert numbers)" in such form as to enable the voters to express their choice as to the proposition submitted. [L. '13, p. 106, § 2.]

§ 4136-3. Election—Canvass—Order.

The manner of conducting said election and the hours between the opening and closing of the polls and the officers of said election shall be the same as provided in the general diking law for the annual election of officers of diking districts, and in case a canvass of the votes cast at said election shall show a majority of the votes cast in each of the districts seeking to consolidate to be in favor of consolidation, an order shall at once be entered upon the minutes of each of said districts by the commissioners thereof, showing the result of said vote cast at said election, and setting forth therein the name of such consolidated district, and a copy of the minutes so entered duly certified by the commissioners of each of said districts shall be filed, one each with the auditor and treasurer of the county within which said districts are located, and one with the clerk of the superior court of such county, to be entered and filed by the clerk of such court in the original proceedings establishing said districts, and a certified copy of such entry shall be transmitted to the

secretary of state by the clerk of said court, and thereafter the territory embraced in said districts so consolidated shall be known and designated as "Consolidated Diking District No. — (here insert number) of — (here insert name of county) County, Washington," as provided in said order, and thereafter the said district shall have the same powers and duties as other diking districts organized under the diking laws of the state of Washington. [L. '13, p. 107, § 3.]

§ 4136-4. Commissioners—Term of Office.

The diking commissioners of the districts constituting such consolidated district shall be the board of commissioners of such consolidated district and discharge the duties of such officers until the next general election for the election of diking commissioners, and until a board of commissioners for said consolidated district are elected and qualified, and thereafter the officers of said consolidated district shall be elected, qualified and perform the same duties as in case of other diking districts. [L. '13, p. 107, § 4.]

§ 4136-5. Indebtedness—Future Obligations.

In case of such consolidation all indebtedness and outstanding obligations, of the districts so consolidated, and all assessments levied and moneys collected and to be collected thereunder, shall remain unaffected by said proceedings for the consolidation of the same, and the payment of such indebtedness and obligations and the expenditure of moneys collected or to be collected under such previous assessments shall be made in the same manner, based upon the same assessments, and against and for the benefit of the same lands liable therefor prior to such consolidation, but the duties relating thereto shall be discharged by the commissioners of such consolidated district: Provided, however, That all assessments made for the future repair, improvement or maintenance of the diking system of said consolidated district shall be apportioned to and assessed against the land included in such consolidated district, in the same manner as though the same had been originally incorporated in one district, and in accordance with the general provisions of the diking laws relating thereto. [L. '13, p. 108, § 5.]

§ 4138. Districts, How Formed.

For the purpose of the formation of such drainage districts a petition shall be presented to the board of county commissioners of the county in which said proposed drainage district is located, which petition shall set forth the object for the creation of said district, the number of acres to be benefited by the proposed drainage system, shall designate the boundaries thereof, shall contain the names of all the freeholders residing within said proposed district so far as known, a brief description of the proposed system of drainage, the designation of a good and sufficient outlet for the drainage of said district, which point of outlet may be within or without the boundaries of said district; the route over which said drainage system is to be constructed, together with the proposed spurs and branches, if any there may be, and the termini thereof, and shall set forth the further fact that the establishment of said district and the proposed system of drainage will be conducive to the public health, convenience and welfare, and increase the public revenue, and that the establishment of said district and system of drainage will be of

special benefit to the property included therein. Said petition shall be signed by the owners of at least a majority of the acreage in the proposed district and shall pray that the same be organized under the provisions of this chapter. At the time of the filing of said petition said petitioners shall file a bond with said county commissioners running to the state of Washington, in the penal sum of five hundred (\$500) dollars, executed in behalf of petitioners by one or more sureties to be approved by the board of county commissioners, conditioned that they will pay all costs in case said district, for any reason, shall not be established. [L. '13, p. 260, § 1.]

CHAPTER II.

DRAINAGE DISTRICTS.

§ 4139. Petitions to be Published—Boundaries, How Located.

Such petition shall be presented at a regular or special meeting of the board of county commissioners of said county, and shall be published for at least two weeks in two successive issues of some weekly newspaper printed and published in said county, and in case no such newspaper be printed or published in such county, then in some such newspaper of general circulation therein, before the time at which the same is to be presented, together with a notice stating the time of the meeting at which the same shall be presented. When such petition is presented for hearing the board of county commissioners shall hear the same, or may adjourn said hearing from time to time, not exceeding one month in all; and any person or corporation may appear before said board of county commissioners and make objections to the establishment of said district, or the proposed boundary lines thereof, and upon final hearing said board of county commissioners shall make such changes in the proposed boundaries as they may deem to be proper, and shall establish and define such boundaries, and shall ascertain and determine the number of acres of land that will be benefited by said proposed drainage system, the number of freeholders residing within said boundaries of the said proposed district, and shall find whether the proposed drainage system will be conducive to the public health, welfare and convenience, increase the public revenue, and be of special benefit to the majority of the lands included within said boundaries of the said proposed district so established by said board of county commissioners: Provided, That no changes shall be made by said board of county commissioners in said boundary lines so as to include any territory outside of the boundaries described in said petition: Provided, further, That any person or persons owning land within the proposed boundaries, and who did not sign said petition, or any person, persons or corporations owning land not included within the proposed boundaries, may file a petition with the board of county commissioners asking that the proposed boundaries be extended so as to include other lands described therein; setting forth in said petition the reasons therefor: Provided, however, That no person, persons or corporations not owning lands included within the proposed boundaries, as originally petitioned for, shall have the right to file such petition unless they ask therein to have their own lands included within the proposed boundaries: Provided, further, That any corporation owning land included within the boundaries described in the original petition, may also petition the board of county com-

missioners for an extension of the proposed boundaries: Provided, further, That the boundaries of any drainage district heretofore or hereafter established may be extended by the board of county commissioners so as to include other lands in said county upon petition signed by the owners of a majority of the acreage of said land within the proposed extension; which said petition for extension shall set forth and contain with reference to the extension such matters and things and data so far as applicable, as is provided for in the petition required for presentation to the board of county commissioners for the purpose of the formation of the original drainage district: Provided, further, That all necessary expense incident to making such extension, together with a proportionate share of the first cost of any drainage system existing in the original district at the time of making such extensions, shall be levied against and apportioned to the lands included in such extension, as in this chapter provided. In such case the board of county commissioners shall give the like notice as provided for in this section of the hearing of the original petition, and the final hearing thereof may, in such case, be continued from time to time for a period not exceeding sixty days, and if upon final hearing the board of county commissioners deem it advisable, and to the best interest of all concerned, they may grant the prayer of such petitioner or petitioners in whole or in part. And said board of county commissioners of such county shall enter an order on the records of their office setting forth all facts found by them upon the final hearing of said petition, and which may be adduced by them from the evidence heard on the final hearing thereof: And provided, further, That any drainage system constructed in the original drainage district may be extended into the said extension by the board of drainage commissioners of said drainage district, in the same manner, and by the same method of procedure as is provided by law for the construction of said drainage system within the said original drainage district. [L. '13, p. 261, § 2.]

§ 4144. Commissioners, Duties of.

Said board of drainage commissioners hereinbefore provided for, shall have exclusive charge of the construction and maintenance of all drainage systems which may be constructed by said district and shall be the executive officers thereof, with full power to bind said district by their acts in the performance of their duties as provided by law. In case of vacancy or vacancies occurring in said board by the death, failure to elect, failure to qualify, resignation or removal of one or more of the members thereof from said district such vacancy or vacancies shall be filled at once from the freeholders and qualified electors of said district by the judge of the superior court of said county, and said appointee shall serve the unexpired term or until the next general election: Provided, That in counties where there may be more than one superior judge, the judge eldest in age shall make such appointment. [L. '13, p. 264, § 3.]

§ 4145. Drainage—Method of Procedure.

Whenever it is desired to prosecute the construction of a system of drainage by said drainage district, said district, by and through its board of commissioners, shall file a petition in the superior court of the county in which said district is located, setting forth therein the route and termini of said

system, with a complete description thereof, together with specifications for its construction, with all necessary plats and plans thereof, with drafts of any artificial appliances or equipment necessary in aid thereof, together with the estimated cost of such proposed improvement, showing therein the names of the land owners whose lands are to be benefited by such proposed improvement; the number of acres owned by each land owner, and the maximum amount of benefits per acre to be derived by each land owner set forth therein from the construction of said proposed improvement, and that the same will be conducive to the public health, convenience and welfare, and increase the value of all of said property for purposes of public revenue. Said petition shall further set forth the names of the land owners through whose land the right of way is desired for said improvement; the amount of land necessary to be taken therefor, and an estimate of the value of said lands so sought to be taken for such right of way, and the damages sustained by any person or corporation interested therein, if any, by reason of such appropriation, irrespective of any benefits to be derived by such land owners by reason of the construction of said improvement. Such estimate shall be made, respectively, to each person through whose land said right of way is sought to be appropriated. Said petition shall set forth as defendants therein all the persons or corporations to be benefited by said improvement, and all persons or corporations through whose land the right of way is sought to be appropriated, and all persons or corporations having any interest therein, as mortgagee or otherwise, appearing of record, and shall set forth that said proposed system of drainage is necessary to drain all of said lands described in said petition, and that all lands sought to be appropriated for said right of way are necessary to be used as a right of way in the construction and maintenance of said improvement; and when the proposed improvement will protect or benefit the whole or any part of any public or corporate road or railroad, so that the traveled track or roadbed thereof will be improved by its construction, such fact shall be set forth in said petition, and such public or private corporations owning said road or railroad shall be made parties defendant therein, and the maximum amount of benefits to be derived from said proposed improvement shall be estimated in said petition against said road or railroad: Provided, however, That all maps, plats, field-notes, surveys, plans, specifications, or other data heretofore made, ascertained or prepared under laws heretofore enacted on the subject of this chapter, may be used under the provisions of this chapter. [L. '13, p. 264, § 4.]

§ 4147.

A land owner who makes no objections to proceedings to establish a drainage district until after decree is made is estopped to object to anything except the constitutionality of the law: *Northern Pac. R. Co. v. Pierce County*, 51 Wash. 12, 23 L. R. A., N. S., 286, 97 Pac. 1099.

§ 4149.

The right of a county to make an assessment on property benefited by a drain being barred by the lapse of ten years, a proceeding by holders of void warrants to compel

the county by mandamus to make a reassessment is barred by the lapse of the same time: *State ex rel. Seymour v. Slater*, 53 Wash. 608, 102 Pac. 651.

In such a case, the fact that the commissioners, upon request made, had not refused to proceed, would not affect the running of the statute, as the property owners could successfully make the defense: *State ex rel. Seymour v. Slater*, 53 Wash. 608, 102 Pac. 651.

As to estoppel on land owner, after decree in proceedings to establish drainage district, to contest assessment, see note in 60 L. R. A. 247.

§ 4181-1. Annexation of Territory to Drainage District.

Any land which is in need of drainage, adjoining any drainage district organized under the provisions of sections 4137 to 4181 of Remington & Ballinger's Annotated Codes and Statutes of Washington, may be annexed to and included in such drainage district under the provisions of this act. [L. '13, p. 104, § 1.]

§ 4181-2. Petition for Annexation—Election.

Upon the presentation to the board of commissioners of such drainage district, of a petition signed by the owners of a majority of the acreage or area, of lands described in the said petition, and also a petition signed by at least ten freeholders of the said district, which petitions shall ask for the annexation to the said district of the lands described therein, and that the same may be made a part of said district, it shall be the duty of the said board of commissioners to call an election in the said district, and also in the said territory which it is proposed to annex thereto, for the purpose of submitting to the electors thereof the question of such annexation; notice of which election shall be given by the said board of commissioners, in both said district, and in the said territory to be annexed, the same as the notice required in the regular annual election of officers in said district. [L. '13, p. 104, § 2.]

§ 4181-3. Election Officers.

The said board of commissioners shall appoint an election board of three electors for the election to be held in the said district and another election board of three electors in the said territory to be annexed, for the election to be held therein. [L. '13, p. 105, § 3.]

§ 4181-4. Election Returns—Certificate of Result.

Return of such election shall be by the officers thereof made to the board of commissioners of said district forthwith, and such board shall as soon as practicable make canvass of the said returns, and if a majority of the votes cast at each of the said elections shall be in favor of the annexation of said territory, the said board of commissioners shall forthwith certify to the county auditor and also to the county assessor of the county wherein such district and such territory are located, the fact of such election, the result thereof, and a particular description of the territory annexed by such election, which certificate shall be filed and become a part of the records of the said auditor and the said assessor; and thereafter the said territory shall be taken to be and shall be annexed to, and be a part of the said district, and shall be liable to assessment for extensions and improvement of drains, and for the cost and expense of maintenance and repairs the same as other property in the said district, and for the purposes of such assessment, the maximum benefits derived to such annexed territory shall be conclusively presumed to be equal to but not greater than those of abutting property within the district as the same existed before the said annexation. [L. '13, p. 105, § 4.]

CHAPTER IV.
PRIVATE DITCHES.

§§ 4226-4250.

Repealed. See § 4226-39.

§ 4226-1. Private Drainage Systems.

Whenever one or more persons whose land will be benefited thereby shall desire to have a drainage system established and constructed or any part of an existing drainage system other than those organized under the provisions of sections 4137 to 4181 straightened, widened, altered, deepened or otherwise improved, and shall not desire to incorporate as a drainage district under the provisions of sections 4137 to 4181 and the acts amendatory and supplemental thereto, or there shall not be a sufficient number to be benefited by such system to form a drainage district as in said chapter and the acts amendatory and supplemental thereto provided, proceedings for the construction or improvement of such system shall be as provided for in this act. [L. '13, p. 611, § 1.]

§ 4226-2. Definitions.

“Drainage system” as used in this act shall be held to include a ditch, drain or watercourse and any side, lateral, spur or branch ditch, drain or watercourse necessary to secure the object of the improvement. Two or more ditches, drains or watercourses with their laterals, spurs, and branches with separate outlets may be included in one system and constructed as a part thereof when such separate systems will draw wholly or in part from the same body of soil water. But no system shall be established or constructed unless sufficient outlet or outlets are provided, which outlet or outlets may be either within or without the boundaries of the improvement district hereinafter provided for. Any natural watercourse may be improved in accordance with the provisions of this act.

“Damages” as used in this act shall be held to include the value of property taken and injury to property not taken, or either, as the case may be. “Property benefited” and “property damaged” as used in this act shall be held to include land, platted or unplatted, whether subject to or exempt from general taxation and roads other than public roads. “Public roads” as used in this act shall be held to include state and county roads, streets, alleys and other public places; and “other roads” as used in this act shall be held to include railroads, street railroads, interurban railroads, logging roads, tramways and private roads, and the rights of way, roadbeds and tracks thereof.

“Public utilities” as used in this act shall be held to include irrigation, power and other canals, flumes, conduits and ditches, telegraph, telephone and electric transmission and pole lines, and oil, gas and other pipe lines. “County engineer” as used in this act shall be held to include any engineer specially employed by the board of county commissioners or the board of supervisors to report upon and prepare plans for or to superintend the construction of a drainage system under the provisions of this act. “Prosecuting attorney” as used in this act shall be held to include any attorney

especially employed by the board of county commissioners in connection with the carrying out of the provisions of this act to advise or carry on proceedings in court with reference to a drainage system initiated and constructed under the provisions of this act. [L. '13, p. 612, § 2.]

§ 4226-3. Petition for System.

Application for any such improvement shall be made by petition to the board of county commissioners of the county or counties in which such system of drainage or proposed system or any part thereof may be, signed by one or more of the owners of property which will be benefited thereby. The petition shall be filed with the clerk of the board of county commissioners, and shall set forth the necessity for the improvement, and shall describe with reasonable certainty the route and termini thereof; and there shall be filed therewith a bond payable to the county, with good and sufficient surety, to be approved by the board of county commissioners, in a sum of not less than two hundred dollars, conditioned for the payment of all expenses which may have been incurred in the proceedings, in case the prayer of the petition be not granted or the petition be dismissed for any cause. If at any time it shall appear to the board of county commissioners that the bond filed with the petition is not sufficient in amount to cover the expenses which will be necessarily incurred in the proceedings, the board may order an additional bond in such an amount as it shall direct to be given. [L. '13, p. 613, § 3.]

§ 4226-4. View and Report.

Upon the filing of the petition and the approval of the bond, the clerk of the board shall deliver a copy of said petition to the county engineer, who shall at once proceed to view the line of the proposed improvement and the property to be affected thereby and determine whether the improvement is in his opinion necessary or will be conducive to public health, convenience or welfare and whether in his opinion the line or lines described constitute the best route, what, if any, branches mentioned in the petition are in his judgment unnecessary, and what, if any, additional branches should be added thereto or changes made therein, and shall report to and file his findings in writing with the board of county commissioners. [L. '13, p. 613, § 4.]

§ 4226-5. Adverse Report.

If the report of the county engineer shall be against the improvement, the board of county commissioners shall dismiss the petition at the cost of the petitioners, and shall cause an itemized bill of all the costs to be made up by the clerk for its examination and approval, including the per diem of the county engineer, and all other costs necessarily incurred except the fees of the clerk and the compensation of the county commissioners, and if such costs are not paid by the petitioners on demand they shall be recovered in an action on the bond. [L. '13, p. 614, § 5.]

§ 4226-6. Favorable Report—Survey—Plat.

If the report of the county engineer shall be in favor of said improvement, the board of county commissioners shall give the improvement district a number, being its serial number in the order of time of its formation among the improvement districts of the county formed under this act, beginning

with the next number following the last serial number of any drainage district organized and existing in said county, if any and thereafter such district shall be designated as Drainage Improvement District Number — of — County, and the board shall cause to be entered on its journal an order directing the county engineer to go upon the lines described in the petition, or as changed by him in his report, and survey, and take levels on the same and set a stake at every hundred feet, numbering down stream, and note the intersection of property lines and boundaries, township, city and county lines, and road crossings, and make a report, profile and plat of the same; also to make an estimate of the cost of construction of such drainage system itemized so as to be reasonably specific as to the various parts thereof: Provided, That such estimate of the cost shall be held to be preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such drainage system. The clerk of the board shall prepare and keep a special index in which he shall note all proceedings had and all papers filed in connection with such drainage improvement district. [L. '13, p. 614, § 6.]

§ 4226-7. Estimate of Property Damaged.

The board shall also by order entered on the journal, direct the county engineer to make and return a schedule and estimate of all property that will be damaged, or both damaged and benefited by the proposed improvement, and to estimate and report the total number of acres that will be benefited by the proposed improvement and to specify the manner in which the proposed improvement is to be made and the number, kind, location and dimensions of all waterways, ditches, outlets, floodgates, bridges and crossings. Schedules of property to be damaged or damaged and benefited shall be arranged in parallel columns, with appropriate headings, and shall show the description of the property, and if land, give the legal subdivision, section, township and range, and number of acres; and if platted, the name of the plat and lot and block number; the name of the owner or owners or reputed owner or owners; the estimated gross damages that will be sustained by reason of the proposed improvement; the estimated gross benefits that will accrue; and the right hand column of the schedule shall be sufficiently wide for the signature of the owner, and shall bear the heading: "I, the undersigned owner of the property opposite which I have signed my name, accept and agree to the estimated amount of benefits and damages that will accrue to my property by reason of the proposed improvement." [L. '13, p. 615, § 7.]

§ 4226-8. Plat to Show Details.

The plat provided for in section 4226-6, shall be drawn upon a scale sufficiently large to show all the meanderings of the proposed improvement, and shall distinctly show the boundaries of each lot or tract of land and the location of each public or other road and sewer system to be benefited thereby, and so far as known, the name of the owner of each lot or tract of land and the authorities or corporation having in charge or owning or controlling each public or other road and sewer system affected, the distance in feet through each tract or parcel of land crossed by the proposed improvement, together with such other matters as the county engineer shall deem material, and the profile shall show the surface, and grade lines and the

gradient fixed. The county engineer shall make and file with his report an itemized bill of costs incurred in the proper discharge of his duties under this act and the preceding sections, and shall report the same to the clerk of the board of county commissioners within ten days after the completion of the survey. [L. '13, p. 615, § 8.]

§ 4226-9. Hearing on Report of Engineer—Notice.

Upon the filing of the report of the county engineer, the board of county commissioners shall immediately fix a date for a hearing on such report, and the clerk of the board shall give notice thereof by publication in three successive weekly issues of the official newspaper of the county, and also, if so directed by the board, in one other weekly newspaper to be designated by the board, published in or near the proposed improvement district and of general circulation therein. Said notice shall fix the time and place for said hearing and shall specify the territory to be included in the proposed improvement district, both by boundaries and also by sections or fractions thereof. Such notice shall also designate with reasonable certainty the route and termini of the proposed improvement, and shall state that the plat, report and schedule on file in the office of the board of county commissioners show the property to be taken or damaged, and the amount of damages proposed to be allowed therefor. The last publication of such notice shall be not less than seven or not more than fourteen days before the date of said hearing. Said hearing, and also the hearing hereinafter provided, for fixing the apportionment of the cost of said improvement, may either or both of them be held at a place other than the county seat, and more convenient to the lands affected, if the board of county commissioners shall so order. The county engineer shall attend and have at such hearing his plats, plans, reports and schedules in relation to the proposed improvement, and the clerk of the board of county commissioners shall also attend and have at such hearing all petitions, claims, objections and other papers and documents relating to said improvement on file in his office. [L. '13, p. 616, § 9.]

§ 4226-10. Hearing—Evidence—Amended Report.

On the date set for said hearing the board of county commissioners shall meet at the place designated in the notice, and if it appear that due notice of such hearing has been given, shall proceed with the hearing on the report of the county engineer, and any objections thereto, and may adjourn said hearing from time to time. At said hearing, the board shall hear all pertinent evidence, including any evidence offered concerning the probable cost of the system and the probable benefits to accrue therefrom, and may change, add to or modify the plans for such drainage system and the boundaries of the improvement district, and change the estimate of damages and benefits in any case, and may review, change and modify any of the findings and estimates of the county engineer, and may, in its discretion, employ another engineer to make separate findings on any or all of the matters hereinbefore required to be included in the report of the county engineer, and may adjourn said hearing and await such report; or may discontinue proceedings in regard to the proposed improvement, at the cost of the petitioners therefor, if the board shall determine that the construction of the pro-

posed improvement is not warranted by the benefits to be derived therefrom. In case any change in the plans of the proposed improvement is made at said hearing, and such change will cause additional damages to any property, or will damage any property not damaged under the original plans, the county engineer shall prepare and file a schedule, showing the estimated damages and benefits under such changed plans, and notice of the filing of such schedule shall be served upon the owners of the properties affected, and settlements made as hereinafter provided. [L. '13, p. 617, § 10.]

§ 4226-11. Deeds to be Executed—Consideration.

In case any owner of property to be damaged by the proposed improvement shall agree to accept the damages estimated by the engineer, or as fixed by the board of county commissioners, the board shall direct and the clerk of the board shall prepare a deed to be approved by the county engineer and the prosecuting attorney, conveying to the county for the benefit of the proposed district the property to be taken, and the right to damage property not taken. If the damages agreed upon are equalled or exceeded by the agreed estimated benefits, the grantors in the deed shall execute and deliver the same without consideration other than the right to have the damages offset against the benefits in the apportionment of the cost of the improvement as hereinafter provided. If the damages agreed upon are damages to property not benefited, or if such damages exceed the agreed benefits, the grantors in the deed shall execute and deliver the same upon the receipt of a warrant drawn by the county auditor under the direction of the board of county commissioners upon the current expense fund of the county, for the amount of damages or the amount of excess of damages over benefits, as the case may be. No such deed shall be accepted, either with or without consideration, until the title conveyed thereby has been approved by the prosecuting attorney. [L. '13, p. 618, § 11.]

§ 4226-12. Agent to Secure Deeds.

If at the conclusion of the hearing provided for in section 4226-10 it shall appear to the board of county commissioners that the owner of any property to be damaged by the proposed improvements has not accepted and agreed to the damages estimated by the engineer or fixed by the board, the board may, in its discretion, appoint an agent to secure acceptances and deeds from such owners and shall, within a reasonable time, direct the prosecuting attorney of the county to institute proceedings in the superior court of the county in which the property affected is located, for the determination of the damages to be sustained and the condemnation of any property the title to which or the right to damage which has not been acquired, and shall direct the clerk of the board to furnish the attorney with a certified copy of such proceedings of the board as he shall require. [L. '13, p. 618, § 12.]

§ 4226-13. Eminent Domain by County.

For the purpose of taking or damaging property for the purposes of this act, counties shall have and exercise the power of eminent domain in behalf of the proposed improvement district, and the mode of procedure

therefor shall be as provided by law for the condemnation of lands by counties for public highways. [L. '13, p. 619, § 13.]

§ 4226-14. Benefits Offset.

The jury in such condemnation proceedings shall find and return a verdict for the amount of damages sustained: Provided, That the jury, in determining the amount of damages, shall take into consideration the benefits, if any, that will accrue to the property damaged by reason of the proposed improvement, and shall make special findings in the verdict of the gross amount of damages to be sustained and the gross amount of benefits that will accrue. If it shall appear by the verdict of the jury that the gross damages exceed the gross benefits, judgment shall be entered against the county, and in favor of the owner or owners of the property damaged, in the amount of the excess damages over the benefits, and for costs of the proceedings, and upon payment of the judgment into the registry of the court for the owner or owners, a decree of appropriation shall be entered, vesting the title to the property appropriated in the county for the benefit of the improvement district. If it shall appear by the verdict that the gross benefits as found by the jury equal or exceed the gross damages, judgment shall be entered against the county and in favor of the owner or owners for the costs only, and upon payment of the judgment for costs a decree of appropriation shall be entered, vesting the title to the property appropriated in the county for the benefit of the improvement district. The verdict and findings of the jury as to damages and benefits shall be binding upon the board appointed to apportion the cost of the improvement upon the property benefited as hereinafter provided. [L. '13, p. 619, § 14.]

§ 4226-15. Warrant for Damages.

Upon the settlement of the claims for damages as provided in section 4226-11, or upon the entry of judgment as provided in section 4226-14, the county auditor shall, under the direction of the board of county commissioners, draw his warrant upon the county treasurer for the payment of the amount of damages agreed to or the amount of the judgment, as the case may be, to be paid out of the current expense fund of the county. [L. '13, p. 620, § 15.]

§ 4226-16. Construction of System.

When the board of county commissioners shall have finally determined and fixed the route and plans for the proposed drainage system and the boundaries of the improvement district, and when it shall appear that the damages for property to be taken or damaged have been settled in the manner hereinabove provided, or when it shall appear that such damages have been settled as to a particular portion of the proposed improvement, and that construction of such portion of such proposed improvement is feasible, the board of county commissioners shall proceed with the construction of the improvement or of such portion thereof, as the case may be. [L. '13, p. 620, § 16.]

§ 4226-17. Cost of Improvement—Property Benefited—Payments—Bonds.

The cost of the improvement shall be paid by assessment upon the property benefited. The assessments shall bear interest until paid at such rate,

not to exceed eight per cent per annum, as the board of county commissioners shall determine. At the hearing provided for in section 4226-10 the board of county commissioners shall determine in what manner and within how many years said assessment shall be paid, and shall also at said meeting determine whether the evidences of indebtedness for the cost of said improvement shall be warrants or bonds. If warrants, it shall fix not to exceed five yearly installments for the payment of said assessments, and if bonds, it shall fix either ten or fifteen years for the payment thereof. Such assessments may be graduated so that the heavier installments shall fall in the later years. In case warrants are to be issued, no yearly installment shall be less than one-tenth nor more than three-tenths of the entire assessment; and in case bonds are to be issued for ten years, the installments shall be as follows:

For the 1st year.....	5%
For the 2d year.....	5%
For the 3d year.....	5%
For the 4th year....	10%
For the 5th year.....	10%
For the 6th year.....	10%
For the 7th year.....	10%
For the 8th year.....	10%
For the 9th year.....	15%
For the 10th year.....	15%

and in case bonds are to be issued for fifteen years the installments shall be as follows:

For the 1st and 2d years, interest only.	
For the 3d year.....	3%
For the 4th year.....	4%
For the 5th year.....	5%
For the 6th year.....	5%
For the 7th year.....	6%
For the 8th year.....	7%
For each succeeding year.....	10%

Such bonds shall be interest-bearing coupon bonds, and of such denominations of not less than \$100 nor more than \$500 as the county commissioners shall by resolution prescribe, and shall recite that they are secured to be paid by assessments upon the property of Drainage Improvement District No. —, of — County, and that they are not a general obligation of such county. They shall be payable in their serial order on the call of the treasurer, whenever at any coupon date there shall be sufficient money in the fund of the district against which they are issued over and above that necessary for the payment of interest on all outstanding bonds, to pay the principal of one or more bonds. The treasurer shall give notice of such call by publication in the county official newspaper, in two successive weekly issues thereof, the second of which shall be not less than seven nor more than fourteen days before the annual interest date, stating that bonds Nos. — (giving their serial number or numbers) will be paid on the date the next interest coupons on said bonds shall become due, and interest upon such bonds shall there-

upon cease upon such date. Each warrant and bond shall bear the date of its issuance, and recite that it is payable on or before the — day of —, 19—, which shall be — months after the last installment of the assessment shall become due, and shall be signed by a majority of the board of county commissioners and attested by the county auditor under his seal, and each coupon shall have printed thereon a fac-simile of the signatures of such officers. The county treasurer shall register said warrants and bonds in a book kept for that purpose and shall certify on each thereof under his seal that it has been so registered and that the signatures thereon are the genuine signatures of said county commissioners and the county auditor, and that the seal attached is the seal of the county auditor. Such warrants and bonds shall not be issued in any amount in excess of the cost and expense of the improvement. [L. '13, p. 620, § 17.]

§ 4226-18. Sale of Bonds or Warrants.

The board of county commissioners may, under such regulations and on such notice as they may determine, sell the warrants and bonds or any part thereof, issued under the provisions of this act, and pay the proceeds thereof into a fund to be used for the purpose of paying the cost and expenses of the improvement. Any warrants or bonds issued under the provisions of this act or such portions thereof as shall remain unsold or undisposed of may be issued to the contractor constructing the improvement or any part thereof in payment therefor, and in case the improvement or any part thereof shall be constructed by the board of supervisors as in this act provided, may be issued in payment for work, labor and material performed and furnished therefor. [L. '13, p. 622, § 18.]

§ 4226-19. Election—Notice.

Upon the determination by the board of county commissioners to proceed with the work of construction, said board shall order an election to be held in some place within the district to be designated by the board, and shall appoint an election board to consist of one inspector and two judges, who shall qualify in like manner and receive like compensation as election officers at general elections. Notice of said election shall be given by the clerk of the board of county commissioners by publication in two consecutive weekly issues of a newspaper to be designated by the board and of general circulation in the district, the last of which publications shall be not less than seven or more than fourteen days prior to the date of said election, and such notice shall also be posted by the sheriff of the county not less than fourteen days prior to the date of said election, in three of the most public places in the district. All electors of the county owning land in the district shall be entitled to vote at said election and at the annual elections hereinafter provided for. [L. '13, p. 622, § 19.]

§ 4226-20. Two Supervisors Elected—Terms of Office.

At the election provided for in the preceding section, two qualified electors of the county owning land in the district shall be elected, who, with the county engineer, shall constitute the first board of supervisors of said district. The board of supervisors shall have charge of the construction

and maintenance of the drainage system of the district, subject to the limitations hereinafter set forth, and may employ a superintendent of construction and maintenance. who may be one of the two elected supervisors. The supervisor receiving the highest number of votes shall hold office until one year after the first annual election of the district and until his successor is elected and qualified, and the other supervisor shall hold office until his successor is elected at the first annual election and shall have qualified. The elected supervisor shall qualify by taking the usual oath of office of county and precinct officers, and by giving a bond in an amount to be fixed and with surety to be approved by the board of county commissioners. On the second Tuesday of December in the year following the election hereinabove provided for and annually thereafter, there shall be elected one supervisor of such district, who shall hold office for the term of two years and until his successor is elected and qualified. Such annual election shall be held upon the same notice and under the same regulations and in the same manner as the first election hereinbefore provided for: Provided, That any drainage improvement districts established under this act, or heretofore established under sections 4226 to 4250, not including any city or town and not less than two thousand acres in extent including all additions thereto, notice of annual elections of supervisors shall be given by posting only. [L. '13, p. 623, § 20.]

§ 4226-21. Elections in Districts Heretofore Organized.

In all drainage districts heretofore organized and now existing under the provisions of sections 4226 to 4250, in which an improvement or extension of the existing drainage system is initiated under the provisions of this act during the year 1913, an election of supervisors shall be held in the manner provided for the first election in drainage improvement districts organized under the provisions of this act, and in such districts in which no improvements are initiated during the year 1913, the first election shall be held on the second Tuesday in December, 1913. The supervisors of such districts now in office shall, unless sooner removed as provided by the act of 1901, hold office until their successors elected under this act shall have qualified. [L. '13, p. 624, § 21.]

§ 4226-22. Board to Construct Ditch.

The said board of supervisors shall, immediately upon their election and qualification, begin the construction of such drainage system at the outlet or outlets thereof, and at such other points as may be deemed advisable from time to time, and shall proceed with the construction thereof in accordance with the plans adopted therefor: Provided, That in the construction of said drainage system the board of supervisors with the approval of the board of county commissioners may change the original plans, cross-sections, gradients, depth and other features of the system, and may construct lining, bulkheading or riprapping wherever the same may be found necessary or advisable in the course of actual construction; but no essential deviation from the route or alteration of the plans or mode of construction of the system shall be made that will increase the cost of the entire system by more than one-fifth, and no deviation of route requiring additional or different right of way shall be made until title thereto has been first obtained: Provided

further, That the board of county commissioners may in its discretion let the construction of said drainage system or any portion thereof by contract, in the manner provided for letting contracts for other public works: And provided further, That the board of county commissioners may, upon such terms as may be agreed upon by the United States acting in pursuance of the National Reclamation Act approved June 17, 1902 (32 Statutes at Large 388), and the acts amendatory thereof and supplemental thereto, or in pursuance to any other act of Congress appropriate to the purpose, contract for the construction of the drainage system or any part thereof, by the United States, or in co-operation with the United States therein. In such case, no bond shall be required, and the work shall be done under the supervision and control of the proper officers of the United States.

Unless the work of construction is let by contract, as hereinbefore provided, or for such part of such work as is not covered by contract, the board of supervisors shall employ such number of men as shall be necessary to successfully carry on the work of such construction, and shall give preference in such employment to persons owning land to be benefited by the improvement. [L. '13, p. 624, § 22.]

§ 4226-23. Compensation—Claims, How Paid.

The compensation of the board of supervisors, superintendent of construction, the board of appraisers hereinafter provided for, and any special engineer, attorney or agent employed by the board of county commissioners in connection with the improvement, the maximum wages to be paid, and the maximum price of materials to be used, shall be fixed by the board of county commissioners. Each county commissioner shall receive pay at the rate of four dollars per day for the number of days he is engaged in the performance of any duty under this act, which sum shall be additional to his salary in case he receive an annual salary; and none of the statutory provisions limiting the number of days that a county commissioner shall draw pay for or limiting the number of sessions for attendance upon which he shall be entitled to mileage shall apply to any proceedings under this act. All officers and members of boards performing duties under this act shall receive in addition to their fees or salaries their actual necessary expenses incurred in the performance of their duties hereunder. All costs of construction or maintenance done under the direction of the board of supervisors shall be paid upon vouchers or payrolls verified by two of the said supervisors. All costs of construction and all other expenses, fees and charges on account of such improvement shall be paid by warrants upon the county treasurer upon the proper fund, and shall draw interest at such rate not to exceed eight per cent per annum as the board of county commissioners shall fix, until paid or called by the county treasurer as other warrants of the county are called. [L. '13, p. 625, § 23.]

§ 4226-24. Notice to Cross Public Utility.

Whenever in the progress of the construction of the drainage system it shall become necessary to construct a portion of such system across any public or other road or public utility, the board of supervisors, or in case the work is being done by contract the board of county commissioners, shall serve

notice in writing upon the authorities, corporation or person having charge of, or controlling or owning such road or public utility, as the case may be, of the present necessity of such crossing, giving the location, kind, dimensions and requirement thereof, for the purpose of the drainage system, and stating a reasonable time, to be fixed by the county engineer, within which plans for such crossing must be filed for approval in case the authorities, corporation or person controlling or owning such road or public utility desire to construct such crossing. As soon as convenient, within the time fixed in the notice, the authorities, corporation or person shall, if they desire to construct such crossing, prepare and submit to the county engineer for approval duplicate detailed plans and specifications for such crossing. Upon submission of such plans, the county engineer shall examine and may modify the same to meet the requirements of the drainage system, and when such plans or modified plans are satisfactory to the county engineer he shall approve the same and return one thereof to the authorities, corporation or person submitting the same, and file the duplicate in his office, and shall notify such authorities, corporation or person of the time within which said crossing must be constructed. Upon the return of such approved plans, the authorities, corporation or person controlling such road or public utility shall, within the time fixed by the county engineer, construct such crossing in accordance with the approved plans, and shall thereafter maintain the same. In case such authorities, corporation or person controlling or owning such road or public utility shall fail to file plans for such crossing within the time prescribed in the notice, the board of supervisors or of county commissioners, as the case may be, shall proceed with the construction of such crossing in such manner as will cause no unnecessary injury to or interference with such road or public utility. The cost of construction and maintenance of only such crossings or such portion of such cost as would not have been necessary but for the construction of the drainage system shall be a proper charge against the improvement district, and only so much of such cost as the board of county commissioners shall deem reasonable shall be allowed as a charge against the district in the case of crossings constructed by others than the authorities of the district. The amount of costs of construction by private corporations and persons allowed as a charge against the district by the board of county commissioners shall be credited on the assessments against the property on which the crossing is constructed, and any excess over such assessments shall be paid out of the funds of the district. The cost of construction and maintenance of crossings of public roads shall be paid by the county, city or town maintaining such public road. [L. '13, p. 626, § 24.]

§ 4226-25. Cost of Improvement—Apportionment.

When the improvement is fully completed and accepted by the county engineer, the clerk of the board shall compile and file with the board of county commissioners an itemized statement of the total cost of the improvement, including engineering and election expenses, the cost of publishing and posting notices, damages and costs allowed or awarded for property taken or damaged, including compensation of attorneys, the cost of construction, including the cost of crossings constructed by the district and the cost of crossings constructed by others and allowed by the board of county com-

missioners, and including the sums paid or to be paid to the United States, and including all other costs and expenses, including fees, per diem and necessary expenses of nonsalaried officers incurred in connection with the improvement, together with interest on such costs and expenses from the time when incurred at the rate of eight per cent per annum. There shall also be included in said statement, in case the county engineer is a salaried officer, a statement of the services performed by him in connection with said improvement at a per diem of five dollars per day and his necessary expenses, and a reasonable sum to be fixed by the board of county commissioners on account of the services rendered by the prosecuting attorney. Upon the filing of such statement of costs and expenses the board of county commissioners shall revise and correct the same if necessary and add thereto a reasonable sum, not to exceed ten per cent of the total thereof, to cover possible errors in the statement or the apportionment hereinafter provided for, and the cost of such apportionment and other subsequent expenses, and shall appoint a board of appraisers consisting of the county engineer ex officio, and two other competent persons, to apportion the grand total as contained in said statement as hereinafter provided. Each member of said board of appraisers shall take, subscribe and file with the board of county commissioners an oath to faithfully and impartially perform his duties to the best of his ability in making said apportionment, and said board of appraisers shall proceed to carefully examine the drainage system and the public and private property within the district and fairly, justly and equitably apportion the grand total cost of the improvement against the property and the county or counties, cities and towns within the district, in proportion to the benefits accruing thereto. The members of said board of appraisers shall be paid out of the funds of the district such compensation for their services as the board of county commissioners shall fix. [L. '13, p. 628, § 25.]

§ 4226-26. Who are Beneficiaries—Sewage Systems Benefited.

Whenever any drainage system constructed under the provisions of this act will drain the whole or any part of any public road or will so affect such road that the same or the roadbed or track thereof will be benefited or protected thereby, or where any such drainage system will furnish an outlet for or facilitate the construction or maintenance of any sewer system in any city or town, there shall be apportioned against the county in which any such state or county road outside of any incorporated city or town is located or against the city or town in which any such public road is located, or against any such other road or part thereof so drained or affected, or against the city or town for which an outlet for sewage will be furnished or wherein the construction or maintenance of a sewer system will be facilitated, the proper amount of the total sum to be apportioned, and nothing in this section contained shall be so construed as to prevent the apportionment of the proper amount of the total sum to any property other than roads lying within any such county, city or town, in proportion to the benefits accruing thereto. [L. '13, p. 629, § 26.]

§ 4226-27. Irrigation System Benefited.

In the plans for and in the construction of a drainage system in an irrigated region, under the provisions of this act, provision may be made

for the prevention of, or affording an outlet for drains to prevent, injury to land from seepage of or saturation by irrigation water, and for the carrying off of necessary waste water from irrigation, and benefits resulting from such provision shall be considered in making the apportionment of the cost of such system. [L. '13, p. 629, § 27.]

§ 4226-28. State Lands.

There shall be apportioned against all state school, granted, and other lands, in the district the proper amount of the total sum to be apportioned in proportion to the benefits accruing thereto. [L. '13, p. 630, § 28.]

§ 4226-29. Apportionment Certified to Municipality.

Upon the completion of the apportionment the board of appraisers shall prepare upon suitable blanks, to be prescribed by the bureau of inspection and supervision of public officers, sign and file with the clerk of the board of county commissioners a schedule giving the name of each county, city and town and the description of each piece of property found to be benefited by the improvement in the following order: First, counties, cities and towns and the respective amounts apportioned thereto for benefits accruing to public roads and sewer systems therein; second, other roads (a) railroads, (b) street railroads, (c) interurban railroads, (d) logging roads, and (e) tramways, giving the location of the particular portion or portions of each road benefited and the respective amounts apportioned thereto; third, unplatted lands giving a description of each tract arranged in the numerical order of the townships, ranges and sections, and giving the legal subdivisions and such other subdivisions and metes and bounds descriptions as may be necessary to show a different rate of apportionment, or different ownership, and giving the respective amounts apportioned to each tract; fourth, platted lands arranged by cities and towns and platted acreage in alphabetical order, giving under each the names of the plats in alphabetical order and the numbers of blocks and lots, and such other subdivisions and metes and bounds descriptions as may be necessary to show a different rate of apportionment, or different ownership, and giving the respective amounts apportioned to each plat, block, lot, or other description, as the case may be. [L. '13, p. 630, § 29.]

§ 4226-30. Notice of Hearing on Apportionment—Hearing—Assessment-roll—Liens.

Upon the filing of the schedule of apportionment the board of county commissioners shall fix the time and place for a hearing thereon, which time shall be not less than thirty nor more than forty days from the date of filing, and notice of such hearing shall be given in the manner provided for giving notice of hearing in section 4226-9, which notice shall fix the time and place of said hearing and shall state that the schedule of the board of appraisers showing the amount of the cost of the improvement apportioned to each county, city, town and piece of property benefited by the improvement is on file in the office of the board of county commissioners and open to public inspection. At or prior to such hearing any persons interested may file with the clerk of the board written objections to any item or items of said apportionment. At such hearing, which may be adjourned from time to time

until finally completed, the board of county commissioners shall carefully examine and consider said schedule of apportionments and any objections filed or made thereto, and may add thereto any property benefited by the improvement against which no apportionment has been made, or strike therefrom any property not benefited, and change, modify or reapportion any item thereof, and shall cause the clerk of the board to enter thereon all such additions, cancellations, changes, modifications and reapportionments, all credits for damages allowed or awarded to the owner of any piece of property benefited, but not paid, as provided in section 4226-14; also, a credit in favor of the county on any apportionment against the county, of all sums paid on account of said improvement, as provided in section 4226-15; and all sums allowed the county on account of services rendered by the county engineer or prosecuting attorney, as provided in section 4226-25; and all credits allowed to property owners constructing crossings as provided in section 4226-24. When the board of county commissioners shall have finally determined that the apportionment as filed or as changed and modified by the board is a fair, just and equitable apportionment, and that the proper credits have been entered thereon, the members of the board approving the same shall sign the schedule and cause the clerk of the board to attest their signatures under his seal, and shall enter an order on the journal approving the final apportionment and all proceedings leading thereto and in connection therewith. Thereupon, the county auditor shall prepare an assessment-roll which shall contain, first, a map of the district showing each separate description of property assessed; second, an index of the schedule of apportionments; third, an index of the record of the proceedings had in connection with the improvement; fourth, a copy of the resolution of the board of county commissioners fixing the method of payment of assessments; fifth, the warrant of the auditor authorizing the county treasurer to collect assessments; and sixth, the approved schedule of apportionments of assessments; and shall charge the county treasurer with the total amount of the assessment and turn the roll over to the treasurer, for collection in accordance with the resolution of the board of county commissioners fixing the method of payment of assessments. The assessments contained in said assessment-roll shall be liens upon the property assessed, and all such liens shall relate back to and take effect as of the date when the board of county commissioners determined to proceed with the construction of the improvement as provided in section 4226-16. [L. '13, p. 630, § 30.]

§ 4226-31. Funds—Order of Payments.

There shall be established in the county treasury of any county in which any drainage improvement district is organized under the provisions of this act, a separate fund for the construction and a separate fund for the maintenance of the improvement in such district. All moneys collected on assessments for the construction or maintenance of any such improvement shall be paid into the proper fund and shall be applied first to the payment of any interest due, and second to the payment of any outstanding warrants or bonds in the order of their issuance. The respective installments of assessments for construction or maintenance of drainage improvements made under the provisions of this act, shall be collected in the same manner and

shall become delinquent at the same time as general taxes, and shall bear interest after delinquency at the rate of ten per cent per annum, and the lien thereof shall be enforced by foreclosure and sale of the property assessed, as in the case of general taxes. If any item of assessment shall be uncollectable by reason of any irregularity in any of the proceedings, a new hearing, as provided in section 4226-30, and a reassessment of the property mentioned in such item, in proportion to the benefit received thereby, shall be had and made. If any item of assessment shall be uncollectable by reason of the fact that the property assessed does not sell for enough to pay the assessment against it, or by reason of the fact the property assessed was not subject to assessment, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency. [L. '13, p. 632, § 31.]

§ 4226-32. Estimate of Annual Expenditures—Levy—Hearing.

On or before the first day of October in each year the board of supervisors of each drainage improvement district shall make and file with the board of county commissioners of the county containing such district, a statement and estimate in writing of the amount required for maintenance of the drainage system of said district for the ensuing fiscal year, and the board of county commissioners shall, on or before the first day of November next ensuing, levy an assessment for the amount of said estimate, or such amount as it shall deem advisable, upon the property within the district and against the county, cities and towns chargeable therewith in the same proportion as the assessment to pay the original cost of construction of said drainage system was levied: Provided, however, That, upon petition filed by two or more assessed property owners of a district the county commissioners may, in their discretion, hold a hearing at the county seat for the purpose of reapportioning the maintenance charges in such district, to be held at the time of the equalization of the real property assessment in the even numbered calendar years. Preliminary to such hearing the county commissioners shall appoint a board of three appraisers, of whom the county engineer shall be one, who shall qualify and proceed as the board of appraisers appointed to apportion the original cost of the system, and shall report to and file with the board of county commissioners their recommendations in such matter not less than twenty days prior to the date of such hearing. Notice of the filing of such report and that such hearing will be held shall be given by publication in the official county newspaper and in such other newspaper published in or near such district as the county commissioners may in their discretion direct in two successive publications, the last of which shall not be less than seven or more than fourteen days prior to the date of said hearing. And at such hearing the commissioners may make such change in the basis of the apportionment of the levies for the maintenance of such drainage system as may seem just and equitable. In maintaining the drainage system of their district the board of supervisors may, with the approval of the board of county commissioners, make expenditures in excess of the annual maintenance fund herein provided for, which excess amount shall in such event be included

in the maintenance levy for the succeeding year: Provided, That when, owing to floods or other causes an unusually high maintenance levy or expenditure in excess of the current levy shall be necessary the board of county commissioners may provide that such levy or the levy to meet such excess expenditure be spread over a term of years and warrants or bonds issued to meet the same as herein provided for the original construction cost of a drainage system. [L. '13, p. 633, § 32.]

§ 4226-33. Cost to Municipal Corporation.

The amount of the costs of construction or maintenance of any drainage system assessed against any city, town or county may be met by levies to be paid in similar installments and extending over a like period of time as the assessments against property benefited are spread, or such amounts may be met by the issue and sale of the bonds of such city, town or county in the manner in which bonds to meet general indebtedness of such city, town or county are issued. The proper authorities of such city, town or county shall make the necessary levies to meet such amounts thus apportioned thereto as a general levy on all property therein. [L. '13, p. 634, § 33.]

§ 4226-34. Abandonment of System—Assessment.

Upon a petition and bond being filed by one or more land owners, either within or without the boundaries of a drainage improvement district, and like proceedings being had as in the case of the original establishment and construction of a drainage system, the county commissioners may declare any drainage system or any part thereof, abandoned and may strike from the district lands no longer benefited or served thereby, or they may cause the route of any established drainage system to be changed, in whole or in part, or the whole or any part thereof to be widened or deepened, or provided with lining or bulkheading, or other betterment to be made therein, or a new outlet or outlets, or one or more branches or extensions to be constructed, either within or without the boundaries of the original district. But the striking of any lands from a district shall not in any way affect any assessment theretofore levied against such lands. When such improvements shall have been completed the costs thereof shall be apportioned and assessed against the lands benefited thereby in the manner hereinbefore provided for such apportionment and assessment in the case of original proceedings in regard to a drainage system and drainage improvement district. New lands assessed for any such improvement shall become a part of such drainage improvement district. The construction and maintenance of such new improvement, unless let by contract by the board of county commissioners, shall be under the direction of the board of supervisors of the district in which they are made or to which said improvement is added. [L. '13, p. 635, § 34.]

§ 4226-35. New Territory—Share of Original Cost.

When any extension or new branch of any existing drainage system is thus constructed there may be included in the apportionment and assessment of the costs thereof against the property, county, cities and towns benefited thereby, a proper and equitable share of the value of the existing drainage

system which serves as an outlet for such extension or new branch. In arriving at which amount the board which makes the apportionments in such case shall consider the amount, if any, which the property thus to be assessed has already paid toward the construction of such drainage system, the present value of said drainage system, to wit: the cost of duplicating the same and all other matters that may be pertinent. The amount of the value of the existing drainage system thus apportioned to the property assessed for such new construction shall be rebated pro rata upon the assessments, if any, outstanding against the lands of the district on account of the construction of such drainage system: Provided, That if the original assessment for the cost of construction is already paid, or for such proportion thereof as is already paid, to wit, in the case of lands whereon all the installments for costs have been paid before coming due, then and in that event the amount of the value of such existing drainage system thus reapportioned to the property benefited by such new construction or such proper proportion thereof, shall be paid into the maintenance fund of said district; and such amount shall be a credit in favor of the respective property or all of the property, as the case may be, in such original district. [L. '13, p. 635, § 35.]

§ 4226-36. Prosecuting Attorney to Prepare Blanks.

It shall be the duty of the prosecuting attorney of each county to prepare suitable blanks for the use of the board of county commissioners under this act, not otherwise provided for, and to advise the board of county commissioners and other officers of the county and the boards provided for by this act in regard to the proceedings and in the performance of their duties under this act, and perform such other duties as in this act provided and required. [L. '13, p. 636, § 36.]

§ 4226-37. Drainage System to be Kept Efficient.

The board of supervisors of each drainage improvement district shall make reasonable rules and regulations whereby any owner of land in the district may make connection for drainage purposes, with the drainage system thereof. They shall also keep the drainage systems in their districts clear and free of all obstructions, and upon complaint of any person they shall immediately remove any obstruction which interferes with the flow of the water through said system. [L. '13, p. 636, § 37.]

§ 4226-38. Districts in Two or More Counties.

When a drainage system is proposed which will require a location in more than one county application therefor shall be made to the board of county commissioners in each of said counties, and the county engineers shall make preliminary reports for their respective counties. The line of such drainage system shall be examined by the county engineers of the counties wherein said ditch will lie, jointly. The hearings provided for by sections 4226-9 and 4226-30 shall be had by the boards of the counties wherein such drainage system shall lie, in joint session, at such place as the said boards jointly shall order. The county engineer of the county wherein the greatest length of the drainage system will lie shall have charge of the engineering work and be ex officio a member of the boards in this act pro-

vided for: Provided, That in case a contract is let to private parties for the construction work, or in the event that the construction work necessary is proposed to be done by or with the co-operation of the United States, as in section 4226-22 provided, a contract for such purpose for the portions in the respective counties shall be executed by the boards of county commissioners of each of the counties, wherein the drainage system will extend, respectively. [L. '13, p. 637, § 38.]

§ 4226-39. Repeal.

Sections 4226 to 4250 and 4256 to 4267 are hereby repealed, saving and excepting, however, that the provisions of said act shall continue in force and effect and shall be applicable to and shall govern all proceedings, rights and powers, in the case of ditches already contracted for, or under construction under said act, and in the case of the maintenance of the same for the current year 1913; and the method of supervision, construction, payment for the work, apportionment of costs, and assessment and collection thereof, delinquency and foreclosing thereof and penalties therefor, and all other proceedings in regard to the same, shall be as in said sections 4226-4250, 4256-4267: Provided, however, That with the consent of the holders of warrants heretofore issued or hereafter issued for work already begun or contracted for under said act, or with the consent of the contractor engaged in constructing any ditch or drainage system under said act, the provisions of this act in regard to the funding of such warrants with bonds, or the payment for work with bonds and the issuance and sale thereof, and all provisions in regard to such issuing of bonds, shall be applicable to such outstanding warrants or work already begun or contracts let for work. And in such event and to the extent of the costs so acquiesced in by warrant holders or contractors, all the provisions of this act in regard to the method of payment, form, issuing and sale, of bonds and warrants, extension of the assessment over a term of years, collecting, delinquency, interest and foreclosure of the assessments, and all other proceedings in regard thereto shall be as in this act provided. In such event the county commissioners shall prescribe the method and time of payment of the assessments and whether bonds shall be issued and perform any other proper act in regard to the same, at a special meeting called for that purpose, or at the hearing on the apportionment of costs provided for in section 4226-30, hereof.

Provided, also, That in case any of the provisions of this act shall be applied to any proceedings in regard to any ditch begun under said sections 4226-4250, 4256-4267 and the same shall be held not to be legally applicable thereto by a court of competent jurisdiction, then appropriate and proper proceedings for the performance of said acts or duties shall be had and done in regard thereto, as in said sections provided. And from the time any such drainage district organized and existing under the provisions of said sections shall be brought under the provisions of this act, said district shall be known and designated in all proceedings and records relating thereto, as Drainage Improvement District No. — of — County, retaining its original serial number.

Nothing in this act contained shall be construed as in anywise modifying or repealing any of the provisions of sections 4137 to 4181, or the acts

amendatory thereof or supplemental thereto, or affecting any proceeding heretofore or that may hereafter be had under the provisions of said act. [L. '13, p. 637, § 39.]

§ 4226-40. Application of Act.

Except as specified in the foregoing section, all of the provisions of this act, instead of said sections 4226 to 4250 and 4256 to 4267, shall be applicable to and shall govern and be the law in all respects, in regard to all ditches and drainage systems now existing, initiated or applied for under said sections, and all powers hereby vested in or granted to all boards and officers under this act shall be vested in such boards and officers that shall hereafter have charge of the work, or administering of the affairs of such ditches and drainage systems, and the districts in which they lie. [L. '13, p. 639, § 40.]

§ 4226-41. Validity.

An adjudication that any section, paragraph, or portion of this act, or any provision thereof, or proceeding provided for therein, is unconstitutional or invalid shall not affect or determine the constitutionality, or validity, of this act as a whole or of any other portion or provisions thereof, and all provisions of this act not adjudicated to be unconstitutional shall be and remain in full force and effect and shall be operative until specifically adjudicated to be unconstitutional or invalid. [L. '13, p. 639, § 41.]

§§ 4256-4267.

Repealed. See section 4226-39, *supra*.

§ 4266. Ditch Through Two Counties—Procedure.

No corporation organized under this chapter shall, by any implication or construction, be deemed to possess the power of issuing bills, notes or other evidence of debt for circulation as money. Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise: Provided, That the stockholders of every bank incorporated under this act or the territory of Washington shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; and all such banking corporations shall file, on the first Monday in June, each year, with the state auditor, a report sworn to by its president, vice-president, or cashier, of the resources and liabilities, stating the amount of deposits, the aggregate of loans, and the amount upon each class of securities, the names and residence of the shareholders and number of their shares, the directors or officers for the time being, and any other matters affecting the safety of their deposits or the interest of their creditors; and such banking corporations shall have power to exercise, by its board of trustees, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving

deposits, buying and selling, exchange, coin and bullion, by loaning money on real estate or personal security; to accept and execute all trusts, fiduciary or otherwise, as may be committed to such bank or corporation, by any person, persons, or corporation, or by the order or direction of any court; and may do any other business pertaining to banking. [L. '11, p. 379, § 1.]

This section is repealed by § 4226—39, saving and excepting as therein stated.

§ 4267—1. Abandoned Ditches.

Where a ditch or drain shall have been in part constructed in compliance with the provisions of Remington & Ballinger's Annotated Codes and Statutes of Washington, sections 4226—4250, 4256—4267, and the work of constructing said ditch or drain shall have ceased before the completion thereof or for any reason, the county commissioners shall declare said ditch or drain abandoned. [L. '11, p. 439, § 1.]

§ 4267—2. Apportionment of Cost.

When any such drainage proceedings shall have been abandoned by the county commissioners they shall, unless a petition shall have been filed within ninety days after such abandonment, as hereinafter provided, order the county engineer to apportion the costs of improvement, so far as constructed, against the lands benefited and like proceedings shall be had for the apportionment and collection of the costs and expenses of constructing said ditch or drain so far as the same shall have been constructed as are provided for the apportionment and collection of costs and expenses when such ditch or drain shall have been completed in accordance with the provisions of the said act. [L. '11, p. 439, § 2.]

§ 4267—3. Petition—Contents.

When any ditch or drain shall have been in part constructed pursuant to the provisions of the said act, and the same shall have been abandoned as provided herein, a petition may be filed as provided in section 4138, and like proceedings shall be had thereon as are provided by sections 4137 to 4179. Said petition shall include only such lots or tracts of land and public or corporate roads or railroads as were included in the schedule filed by the county surveyor in the original proceedings pursuant to sections 4226—4250, 4256—4267: Provided, That the boundaries of such proposed drainage district may be extended by the board of county commissioners in like manner as is provided for the extending of boundaries in section 4139. [L. '11, p. 439, § 3.]

§ 4267—4. Rights and Powers Conferred.

When a petition for the establishment and organization of a drainage district shall have been filed as provided herein the same shall be governed by all the provisions of sections 4137—4179, so far as the same are applicable and all rights and powers conferred upon drainage districts established and organized in compliance with said act shall be and are hereby conferred upon drainage districts organized and established in accordance herewith. [L. '11, p. 440, § 4.]

§ 4267-5. Construction.

When any drainage district shall be established and organized as provided in this act it shall be lawful for such drainage district to use so much of the original ditch or drain as shall have been constructed and to construct such additional ditches or drains as shall be petitioned for and ordered by the board in the course of said proceedings. Upon the completion of said original ditch or drain, the cost of such new ditches or drains, if any, as shall be constructed and expense thereof, together with all costs and expenses lawfully incurred in the partial construction of said original ditch or drain, shall be apportioned against the land in the district established and an assessment made for the payment of the entire sum in accordance with the provisions of sections 4137-4179. [L. '11, p. 440, § 5.]

§ 4267-6. Concurrent Act.

Nothing in this act shall be construed so as to amend, change or repeal any of the existing laws relating to dikes and drains but concurrent therewith. [L. '11, p. 440, § 6.]

TITLE XXVIII. EDUCATION.

CHAPTER I.

SCHOOL SYSTEM AND STATE OFFICERS.

§ 4317.

A franchise requiring a street railway to carry "school children" at half fare applies only to those commonly referred to as school children, and not to students in universities or colleges or schools where a particular branch of learning is pursued, especially in view of our statutory distinctions between "school children" and "students" as found in sections 4317, 4333, 4366, 4406, 4714: State ex rel. Seattle v. Seattle Elec. Co., 71 Wash. 213, 128 Pac. 220.

A franchise ordinance requiring a street-car company to carry school children at half fare having been construed by the street-car company and the city to apply only to chil-

dren attending public and private schools, the city cannot later contend that it should be construed to cover students at universities and colleges: State ex. rel. Seattle v. Seattle Elec. Co., 71 Wash. 213, 128 Pac. 220.

As to the meaning of the word "school," see note in Ann. Cas. 1912B, 1353.

As to such meaning within the statute prohibiting the sale of liquors within a certain distance from a school, see note in 16 Ann. Cas. 924. See, also, note in 22 L. R. A., N. S., 194.

As to the duty of public to furnish free transportation to school children, see note in 37 L. R. A., N. S., 1110.

CHAPTER V-A.

STATE SCHOOL FOR GIRLS.

§ 4386-1. School for Girls.

That there be established an institution which shall be known as the State School for Girls. [L. '13, p. 513, § 1.]

§ 4386-2. Commission to Construct Buildings.

The governor shall appoint four electors of the state of Washington, two of whom shall be women, who, together with the members of the state board of control, shall select a site for such school, to consist of not more than one hundred sixty acres of fertile land, and at a cost not to exceed the sum of one hundred fifty dollars (\$150) per acre, said site to be within a radius of not less than one mile and not more than ten miles of the State Training School at Chehalis. As soon as the site has been selected, the state board of control shall at once proceed to the erection and equipment of such buildings as may be necessary, the number, kind and character of which shall be determined by the state board of control acting as a joint commission with the four electors above mentioned. In the construction and arrangement of buildings, the cottage plan shall be followed as far as practicable, each cottage to provide for a group of not to exceed thirty girls: Provided, That the above-named electors shall serve without compensation other than necessary expenses. [L. '13, p. 513, § 2.]

§ 4386-3. Management—Superintendent.

The government, control and business management of such school shall be vested in the state board of control. The board shall, with the approval of the governor, appoint a suitable superintendent of said school and shall

designate the number of subordinate officers and employees to be employed, and fix their respective salaries, and have power, with the like approval, to make and enforce all such rules and regulations for the administration, government and discipline of the school as they may deem just and proper, not inconsistent with this act. The superintendent and all subordinate officers of the school shall be women: Provided, however, If a married woman be appointed superintendent or to any subordinate position, the husband of such appointee may, with the consent of the board, reside at the institution, and may be assigned such duties or employment as the board may prescribe. [L. '13, p. 514, § 3.]

§ 4386-4. Bond of Superintendent.

Before entering upon the discharge of her duties, the superintendent shall give a surety bond payable to the state of Washington in such sum as the board of control shall prescribe, to be approved by the said board, conditioned for the faithful performance of her duties, and that she will faithfully account for all moneys, property and effects of the institution or the inmates intrusted to her care. [L. '13, p. 514, § 4.]

§ 4386-5. Duties of Superintendent.

The superintendent, subject to the direction and approval of the board of control shall: (1) Have general supervision and control of the grounds and buildings of the institution, the subordinate officers and employees, and the inmates thereof, and all matters relating to their government and discipline; (2) make such rules, regulations and orders, not inconsistent with law or with the rules, regulations or directions of the board of control, as may seem to her proper or necessary for the government of such institution and for the employment, discipline and education of the inmates; (3) exercise such other powers, and perform such other duties as the board of control may prescribe; and (4) have power to engage and remove all employees, subject to the approval of the board of control. [L. '13, p. 515, § 5.]

§ 4386-6. Commitment of Girls.

Any girl more than ten and under eighteen years of age, who has been found delinquent under the juvenile delinquency law of this state, may be committed by the court to the state school for girls, there to remain until twenty-one years of age, unless sooner paroled or discharged as provided in sections 4386-8 and 4386-9, and such commitment shall not be subject to modification or revocation. [L. '13, p. 515, § 6.]

§ 4386-7. Court Record of Girl—Age.

The superior court shall cause a memorandum to be made and kept of the name, age, birthplace, occupation, last place of residence, and previous record of such girl, and the names and places of residence of the parents, next of kin or guardian of such girl, a copy of which shall be furnished to the superintendent at the time of the commitment to the school. The court shall find and determine the age of the girl, which shall be stated in the order for commitment. Such finding shall be conclusive evidence as to such age in any action to recover damages for detention and shall be presumptive evidence in any other inquiry, action or proceeding. [L. '13, p. 515, § 7.]

§ 4386-8. Parole—Behavior Credits.

The board of control, acting with the superintendent, shall, under a system of marks, or otherwise, fix upon a uniform plan by which girls may be paroled or discharged from the school, which system shall be subject to revision from time to time. Each girl shall be credited for personal demeanor, diligence in labor or study and for the results accomplished, and charged for derelictions, negligence or offense. The standing of each girl shall be made known to her as often as once a month. [L. '13, p. 516, § 8.]

§ 4386-9. Conditional Parole.

Every girl shall be entitled to a trial on parole before reaching the age of twenty years, such parole to continue for at least one year unless violated. The superintendent and resident physician, with the approval of the board of control, shall determine whether such parole has been violated. Any girl committed to the school who shall escape therefrom, or who shall violate a parole, may be apprehended and returned to the school by any officer or citizen on written order or request of the superintendent. Any person who shall go upon the school grounds except on lawful business, or by consent of the superintendent, or who shall entice any girl away from the school, or who shall in any way interfere with its management or discipline, shall be guilty of a misdemeanor. [L. '13, p. 516, § 9.]

§ 4386-10. Health of Inmates.

No girl shall be received in the State School for Girls who is not of sound mind, or who is subject to epileptic or other fits, or is not possessed of that degree of bodily health which should render her a fit subject for the discipline of the school. It shall be the duty of the court committing her to cause such girl to be examined by a reputable physician to be appointed by the court, who will certify to the above facts, which certificate shall be forwarded to the school with the commitment. Any girl who may have been committed to the school, not complying with the above requirements, may be returned by the superintendent to the court making the commitment, or to the officer or institution last having her in charge. The board of control shall arrange for the transportation of all girls to and from the school. [L. '13, p. 516, § 10.]

§ 4386-11. Instruction—Part of School System.

It shall be the duty of the superintendent, subject to the approval of the board of control, to employ teachers, and as far as practicable, to instruct the girls in all of the branches usually taught in the grades of the common schools of the state, also in such trades and vocational occupations as may be found desirable. The educational work of the school shall be a part of the educational system of the state, and as such shall be under the supervision of the state board of education. Only those certified by the state superintendent of public instruction shall be employed as teachers. [L. '13, p. 517, § 11.]

§ 4386-12. Hiring Out—Apprenticeships.

The superintendent shall have power to place any girl under the age of eighteen years at any employment for account of the institution or the girl employed, and receive and hold the whole or any part of her wages for the

benefit of the girl less the amount necessary for her board and keep, and may also, with the consent of any girl over fourteen years of age, and the approval of the state board of control indorsed thereon, execute indentures of apprenticeship, which shall be binding on all parties thereto. In case any girl so apprenticed shall prove untrustworthy or unsatisfactory, the superintendent may permit her to be returned to the school, and the indenture may thereupon be canceled. If such girl shall have an unsuitable employer, the superintendent may, with the approval of the board of control, take her back to the school, and cancel the indenture of apprenticeship. All indentures so made shall be filed and kept in the school. A system may also be established, providing for compensation to girls for services rendered, and payments may be made from time to time, not to exceed in the aggregate to any one girl the sum of twenty-five dollars for each year of service. [L. '13, p. 517, § 12.]

§ 4386-13. Transfer of Girls from State Training School.

As soon as the school buildings have been erected and equipped all girls then in the Washington State Training School at Chehalis, shall be transferred to the State School for Girls, all who may then be on parole shall be transferred to the supervision of said school. Both shall thereafter be subject to all the laws, rules, and regulations governing the school last mentioned. [L. '13, p. 517, § 13.]

CHAPTER VI.

STATE SCHOOL FOR THE DEAF AND THE BLIND.

§ 4387-1. Separation of School for Deaf and Blind.

Upon the taking effect of this act, the State School for the Deaf and Blind at Vancouver shall be divided into two institutions, one for the blind to be known as the State School for the Blind, and one for the deaf to be known as the State School for the Deaf, each of said institutions to be located at Vancouver. The state board of control shall appoint a superintendent for each institution. All provisions of law relating to the State School for the Deaf and Blind shall, so far as the same are applicable, govern the management of the State School for the Deaf and the State School for the Blind hereby created. [L. '13, p. 6, § 1.]

CHAPTER VII.

STATE INSTITUTION FOR FEEBLE-MINDED.

§ 4399-2. Who may be Admitted.

The State Institution for Feeble-minded shall be free to residents of the state of Washington under the age of twenty-one years who are feeble-minded, idiotic or epileptic, or who are physically defective to such extent as to prevent them from being educated in the common schools; Provided, That they are not afflicted with contagious diseases. Admission may be applied for as follows: By the father or mother, if father and mother are living together. If the father and mother are not living together, then by the one parent or by the child.

Third. By the guardian duly appointed.

Fourth. By the superintendent or other officer having charge of any institution or asylum where children are cared for.

Fifth. By county superintendents of schools and boards of county commissioners.

Sixth. By juvenile courts under an order of commitment.

Under items three, four, five and six consent of parents is not required. [L. '13, p. 598, § 2.]

§ 4399-3. Application for Admission.

The form of application for admission into said State Institution for Feeble-minded and the necessary checks against improper admission shall be such as the board of control may prescribe and each application shall be accompanied by answers under oath to such interrogatories as the said board shall prescribe, and county superintendents of schools are hereby authorized to administer oaths in such cases. [L. '13, p. 598, § 3.]

§ 4399-4. Approval of Application.

County superintendents of schools shall cause to be filled out the prescribed blank applications for admission for such children in their respective districts, who by reason of mental or physical defects are incapable of receiving instruction in the common schools of this state, or whose habits are such as to render them unfit for companionship with normal children, except such as in the judgment of the county superintendent are receiving proper care and education and are being safely kept at home. All applications for admission of defectives under twenty-one years of age except those committed by the juvenile court, shall be made through the county superintendent of schools, who shall keep a record of such and certify to the board of county commissioners all applications that are accepted by the superintendent of the State School and Colony. [L. '13, p. 598, § 4.]

§ 4399-5. School Clerks to Report Defectives.

It shall be the duty of the clerks of all school districts in the state of Washington, at the time for making the annual reports, to report to the school superintendent of their respective counties, the names and addresses of all feeble-minded youths residing within their respective districts, who are under the age of twenty-one years. And each county school superintendent shall make a full report of such defective youth to the county commissioners of their respective counties at their regular August meeting of each year, transmitting a copy of said report to the state board of control and the superintendent of the State Institution for Feeble-minded. [L. '13, p. 599, § 5.]

§ 4399-6. Parents to Send Defective Children.

Upon notification by the superintendent of the State Institution for Feeble-minded, of acceptance of application for admission, it shall be the duty of the parents or the guardian of such defective youth to send them to said institution and the county superintendent of schools shall take all action necessary to enforce this section of this act. [L. '13, p. 599, § 6.]

§ 4399-7. County to Pay Expense, When.

If it appears to the satisfaction of the county commissioners that the parents of any such defective youth who have been accepted for admission are unable to pay the expense of sending them to the said institution, it shall be the duty of the commissioners to send them at the expense of the county. [L. '13, p. 599, § 7.]

§ 4399-8. Patients Held After Majority.

Inmates arriving at the age of twenty-one years while in the institution, and who, in the judgment of the superintendent, are unfit to be discharged, shall be reported to the superior court of competent jurisdiction, which court, after due examination and finding the case a proper subject for institutional care, may issue an order of commitment to said State School and Colony. [L. '13, p. 599, § 8.]

§ 4399-9. Feeble-minded Adults.

Adults under fifty years of age who may be determined to be feeble-minded, and who are of such inoffensive habits as to make them proper subjects for classification, education and discipline in an institution for feeble-minded, may be admitted free upon pursuing the same course of legal commitment as governs admission to the hospitals for insane; but no insane persons, or those who are proper subjects for county poor farms, hospitals or asylums, or cases of senile dementia, shall be admitted to the State School and Colony. [L. '13, p. 600, § 9.]

§ 4399-10. Period of Detention.

The superintendent of the State School and Colony shall detain inmates admitted to the institution until satisfied that they are in normal condition and safe and competent to be at large, or that they can receive proper care and education at the home of relatives, or in some other home or institutions. In such cases, or for other good and sufficient reasons, he may grant discharges; or, in his discretion, permit inmates to visit their homes for stated periods, upon request of parents or guardians approved by the county superintendent of schools. [L. '13, p. 600, § 10.]

§ 4399-11. Tuition Fee.

Any parent or guardian who may wish to enter a child in said institution and pay all expenses of care and maintenance, may do so under terms, rules and regulations prescribed by the board of control. [L. '13, p. 600, § 11.]

§ 4399-12. Support Charged to Estate.

When not otherwise provided, the superintendent shall provide the inmates with suitable clothing, the actual cost of which shall be a charge against the parents, guardian or estate of such inmates and in the event that such parent, guardian or estate is unable or is insufficient to provide or pay for such clothing, the same shall be provided by the state. The board of county commissioners, county superintendent of schools, or other authorized officers, in recommending an applicant for admission to said institution, shall state whether or not such person has an estate of sufficient value, or a parent of sufficient financial ability to defray the expense in whole or in part for such

clothing. The expense of personal clothing provided by the state shall be a charge against the parents or estate of inmates if such parents or estate are financially able to pay the same; after proper investigation, the state may proceed against the party or parties or estate and collect the same through the courts as other accounts are collected. [L. '13, p. 600, § 12.]

§ 4399-13. Fireproof Buildings—Sexes Separated.

The future construction of the buildings of the State School and Colony shall be fireproof as far as possible. They shall be in two groups for each sex; one for the educational and industrial department and one for the custodial or colony department, with such subdivisions as will best classify and separate the many diverse forms of the infirmity to be cared for. [L. '13, p. 601, § 13.]

§ 4399-14. School Training—Agricultural Training.

A school department shall be maintained from September 1st to June 1st each year, for the benefit of those who can be educated along lines best suited to individual capabilities. The processes of agricultural training shall receive consideration and the employment of the inmates in the care and raising of stock, in dairying and in the cultivation of fruits, vegetables, etc., shall be made tributary as far as possible to the maintenance of the institution. Manual training shall also be carried on along such lines as will be of greatest benefit to both the inmates and the institution. [L. '13, p. 601, § 14.]

§ 4399-15. Penalty for Violation of Act.

Any parent, guardian or proper officer who shall, without proper cause, fail to carry into effect the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon the complaint of any officer or citizen of the county or state, before any justice of the peace or superior court, shall be fined in any sum not less than fifty nor more than two hundred dollars (\$200), in the discretion of the court. [L. '13, p. 601, § 15.]

CHAPTER IX.

SCHOOL DISTRICTS—CLASSIFICATION AND POWER.

§ 4426-1. Insurance Fund in First Class District.

School districts of the first class shall, when in the judgment of the board of directors it be deemed expedient, have power to create and maintain a permanent insurance fund for said districts, to be used to meet losses by fire, if any, of said school districts. [L. '11, p. 378, § 1.]

§ 4426-2. Estimate.

The board of directors shall annually, at the same time and in the same manner as provided for reporting to the board of county commissioners an estimate of the amount of funds required for the support of the schools, report the additional amount of funds determined upon for creating or adding to the permanent insurance fund of the district, and the board of county commissioners are hereby authorized and required to levy and collect such

additional amount of funds, the same as other school taxes. [L. '11, p. 378, § 2.]

§ 4426-3. Investment.

The county treasurer, when authorized to do so by the board of directors of any school district, may invest any accumulated permanent insurance fund of said district in school, county, or state warrants of the state of Washington, and all profits accruing from such investment, and the funds so invested, shall revert to the permanent insurance fund of said district, and the county treasurer shall be the custodian of all warrants purchased by and with said permanent insurance fund until the same are redeemed, and the county treasurer shall submit a statement of such fund and warrants as a part of his monthly report to each district. [L. '11, p. 378, § 3.]

CHAPTER XI.

CONSOLIDATED AND JOINT DISTRICTS.

§ 4440.

This section requires only five signatures from the entire territory, and not the signatures of five heads of families from each district: *State ex rel. Harris v. Ward*, 69 Wash. 342, 124 Pac. 913.

In the absence of statutory authority, the county school superintendent has no power to dissolve a consolidated school district, whether the consolidation was legal or illegal: *Consolidated School District No. 105 v. Jones*, 69 Wash. 537, 125 Pac. 767.

As to power of legislature to delegate taxing power to school district, see note in 8 Ann. Cas. 535.

§ 4446.

Where two school districts are each indebted in excess of two per cent of their taxable property as shown by the last assessment, and are consolidated and the consolidated district issues bonds in excess of three per cent of its taxable property, the issue is void, as being in excess of the constitutional limitation of five per cent of the taxable property in the consolidated district, as each district, under this section, is subject to taxation as a separate entity for the purpose of paying its prior indebtedness: *State ex rel. Zylstra v. Clausen*, 66 Wash. 324, 119 Pac. 797.

CHAPTER XII.

UNION HIGH SCHOOL DISTRICTS.

§ 4469. Withdrawal from Union District.

When five or more years have elapsed from the date upon which two or more school districts united for the purpose of forming a union high school district, such union may be dissolved, if at a special election called by the board of directors of such union high school district for that purpose a majority of three-fifths of the votes cast at said election are in favor of dissolution. The liabilities and assets of the union high school district so dissolved shall be justly apportioned by the county superintendent among the various districts composing the union high school district. [L. '13, p. 643, § 1.]

CHAPTER XV.

DISTRICT OFFICERS—GENERAL POWERS.

§ 4488.

Under Laws of 1893, page 266, section 3, the contract of a school district with a school

teacher to teach school for a period of eight months is void, when the limit of indebtedness contracted in any one year payable out

of the general fund had been reached and exceeded in the aggregate the amount apportioned for the district, as provided in said section: *Wolfe v. School District No. 2*, 58 Wash. 212, 137 Am. St. Rep. 1057, 27 L. R. A., N. S., 891, 108 Pac. 442.

The maintaining of a school for a period

of eight months is not such a necessity as to render valid a teacher's contract therefor when the indebtedness incurred exceeded the limit authorized by law: *Wolfe v. School District No. 2*, 38 Wash. 212, 137 Am. St. Rep. 1057, 27 L. R. A., N. S., 891, 108 Pac. 442.

CHAPTER XVI.

DIRECTORS OF DISTRICTS OF THE FIRST CLASS.

§ 4509.

The provision in the school law for compulsory vaccination is within and germane to the title "An act to establish a general and uniform system of public schools," since the title need not be a complete index of the act, and may cover but one general subject, and the clause but defined the class of persons permitted to attend school and includes the means of offering the object sought: *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214.

In a law for the compulsory vaccination of all pupils attending the public schools, an exception will be presumed in favor of individuals whose health is such as to render the

operation dangerous or injurious: *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214.

A law requiring "successful vaccination" of school children is not too indefinite for enforcement because of its failure to define the terms used; and permitting attendance after the usual reaction, or after three operations without reaction, is not a violation of the statute, but a recognition of an intended exception: *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214.

As to compulsory vaccination laws, see note in 103 Am. St. Rep. 864.

As to vaccination as condition of attendance of school, see note in 25 L. R. A. 152.

CHAPTER XVIII-A.

EXTENDING USE OF SCHOOL BUILDINGS.

§ 4539-1. Use for Public Purpose.

That school boards in each district of the second class and third class may provide for the free, comfortable and convenient use of the school property to promote and facilitate frequent meetings and association of the people in discussion, study, improvement, recreation and other community purposes, and may require, assemble and house material for the dissemination of information of use and interest to the farm, the home and the community, and facilities for experiment and study, especially in matters pertaining to the growing of crops, the improvement and handling of livestock, the marketing of farm products, the planning and construction of farm buildings, the subjects of household economies, home industries, good roads, and community vocations and industries; and may call meetings for the consideration and discussion of any such matters, employ a special supervisor, or leader, if need be, and provide suitable dwellings and accommodations for teachers, supervisors and necessary assistants. [L. '13, p. 395, § 1.]

§ 4539-2. Buildings for Public Purposes.

That each school district of the second or third class, by itself or in combination with any other district or districts, shall have power, when in the judgment of the school board it shall be deemed expedient, to reconstruct, remodel, or build schoolhouses, and to erect, purchase, lease or otherwise acquire other improvements and real and personal property, and establish a communal assembly place and appurtenances, and supply the same with suitable and convenient furnishings and facilities for the uses mentioned in section 4539-1. [L. '13, p. 396, § 2.]

§ 4539-3. Commission to Pass upon Plans.

That plans of any district or combination of districts for the carrying out of the powers granted by this act shall be submitted to and approved by the board of supervisors composed of seven members, as follows: the state superintendent of public instruction; the head of the Extension Department of Washington State College; the head of the Extension Department of the University of Washington; the county superintendent of schools of the county in which such facilities are proposed to be located; these four to choose a fifth member from such county, and a sixth and a seventh member, one of whom shall be a woman, from the district or districts concerned. [L. '13, p. 396, § 3.]

§ 4539-4. Expenditures—Limitations.

No real or personal property or improvements shall be purchased, leased, exchanged, acquired or sold, nor any schoolhouses built, remodeled or removed, nor any indebtedness incurred or money expended for any of the purposes of this act except in the manner provided by law for the purchase, lease, exchange, acquisition and sale of school property, the building, remodeling and removing of schoolhouses and the incurring of indebtedness and expenditure of money for school purposes. [L. '13, p. 396, § 4.]

CHAPTER XXI.

SCHOOL DISTRICT FINANCES.

§ 4557-1. School Warrants to be Registered.

He shall cause all school warrants of the districts issued by him to be registered in the treasurer's office and retain the vouchers on file in his office. [L. '11, p. 377, § 1.]

§ 4557-2. Register of Warrants in Auditor's Office.

He shall register in his own office, and present to the treasurer for registration in the office of the county treasurer, all warrants of the first and second class districts received from secretaries or clerks thereof before delivery of the same to claimants. [L. '11, p. 377, § 1.]

§ 4557-3. Check and Entry.

He shall check the redeemed warrants of each school district after each monthly settlement with the treasurer, enter the date redeemed in his school register, and certify as to the correctness of the treasurer's reports to such school districts. [L. '11, p. 377, § 1.]

§ 4557-4. Annual Report.

He shall make an annual report to the county superintendent of schools on or before the fifteenth day of July in such form as may be prescribed by the superintendent of public instruction. [L. '11, p. 377, § 1.]

§ 4558. County Treasurer as Treasurer of School Districts—Duties.

The county treasurer of each county of this state shall be ex-officio treasurer of the several school districts of their respective counties, and it shall be the duty of each county treasurer:

First. To receive and hold all moneys belonging to such school districts, and to pay them out only on warrants legally issued.

Second. To certify to the county superintendent of common schools and the auditor of his county, quarterly of each year at the time of the state apportionment, the amount of all school funds in his possession subject to apportionment on the last day of the preceding month, which certificate shall specify the source or sources from which said moneys were derived.

Third. To make annually, on or before the fifteenth day of July, a report to the county superintendent and auditor of his county, which report shall show the amount of school funds on hand at the beginning of the school year last past belonging to each school district; the amount of funds placed to the credit of each school district during the school year ending June 30th, last past, and the sources from which said funds were derived; the amount of warrants registered during the year, the amount of funds disbursed upon warrants of each school district during the year; the amount of funds remaining in his possession at the close of the school year subject to be paid out upon warrants, and the fund to which said moneys belong; also the amount of all unpaid warrants or bonds appearing upon his register at the close of the school year.

Fourth. He shall register all school warrants presented to him by the county auditor in a book to be known as the "Treasurer's School District Warrant Register," which register shall show the date issued, number of warrant, to whom issued, amount and purpose, date registered, date advertised, interest if any accruing on said warrant, total as redeemed, date redeemed and to whom paid. If the district has money in the fund on which the warrant is drawn no indorsement on the warrant is necessary, but if there be no money to the credit of the fund on which the warrant is registered he shall indorse on said warrant the following: "This warrant bears interest at — per cent per annum from — until called for payment. — County Treasurer, By — Deputy." All warrants shall be paid in the order of their presentation to the county treasurer; and it is hereby made the duty of the county treasurer to advertise, at least quarterly, all warrants which he is prepared to pay, in the same manner in which he is required to advertise county warrants, and after the date fixed in said notice, warrants shall cease to draw interest.

Fifth. He shall prepare and submit to the secretary of each district of the first class, and to the clerk of each district of the second and third class in his county a written report of the state of the finances of such district on the first day of each month, which report shall be submitted not later than the seventh day of said month, certified to by the county auditor, which report shall contain the balance on hand the first of the preceding month, the funds paid in, warrants paid with interest thereon, if any, the number of warrants issued and not paid, and the balance on hand.

Sixth. After each monthly settlement with the county commissioners the treasurer of each county shall submit a statement of all canceled warrants of districts of the first or second class to the secretary or clerk of such district, which statement shall be verified to the county auditor. The canceled warrants of each district shall be preserved separately and shall at all times be open to inspection by the secretary or clerk or by any authorized accountant of such district.

Seventh. He shall remit all moneys derived from the sale of school registers, and school clerks' record books to the state treasurer, as other moneys are required to be remitted, and the state treasurer shall place such moneys to the credit of the general fund of the state. [L. '11, p. 386, § 1.]

CHAPTER XXIII. APPORTIONMENTS.

§ 4562. Apportionments Quarterly.

The superintendent of public instruction shall apportion to the several counties of the state on or before the 20th day of July, October, January, April, May and June of each year such current state school funds as have been certified by the state auditor to be in the hands of the state and county treasurers. [L. '11, p. 613, § 1.]

§ 4567. Private Schools must Report Attendance.

It shall be the duty of the principal or head of every private school on or before the 30th day of June of each year to make a sworn report to the clerk of the district in which any pupil attending such private school resides of the actual days' attendance in said private school of each such pupil attending said private school during the preceding school year. The report shall include such pupils only as are between six and twenty-one years of age and whose parents or guardians actually reside in the school district where the said pupil resides and each district in making up the attendance of said district for the purpose of apportionment shall be entitled to the days' attendance so reported. [L. '13, p. 518, § 1.]

CHAPTER XXVIII. BONDS.

§ 4608.

In a school bond election, a ballot so printed on a narrow slip of paper that it may be torn in the middle, leaving the voter to deposit one-half with the words "Bonds, Yes" or "Bonds, No," is sufficiently regular

in form, under the statute requiring the ballots to contain the words "Bonds, Yes," or "Bonds No," where the voter could so fold the portion voted as to preserve the secrecy of the vote: *Kinder v. School District No. 126*, 68 Wash. 410, 123 Pac. 610.

§ 4610. Sale of Bonds—Duty of County Treasurer.

At the time named in said notice it shall be the duty of said board of directors to meet with the county treasurer at his office, and with him open said bids, and sell said bonds or any portion thereof to the person or persons making the most advantageous offer: Provided, The bonds shall never be sold below par, and the board of directors may reject any and all bids, and at any time within two years of the election at which authority was granted to issue and sell said bonds, the board of directors may proceed to readvertise the sale of such bonds or any portion thereof as often as may be necessary, until the whole thereof shall be sold; and such board may also require all persons bidding for such bonds, except the state of Washington, to deposit one per centum of the par value of the bonds bid for on depositing with the treasurer their bids, and if the bidder fails to take and pay for the bonds for which he bid in case of their sale to him, the amount so deposited shall

be forfeited to the school district; otherwise to be returned to such bidder, and a resale of such bonds so refused to be taken may be made as if the bid for the same had been rejected. Upon the sale of the bonds, the board of directors shall, within ten days, or as soon thereafter as practicable, deliver the bonds, properly executed, to the county treasurer, taking his receipt therefor. The county treasurer shall, upon payment of the price agreed upon, deliver the same to the person or persons to whom sold, and place the moneys arising from such sale to the credit of the general school fund of the district: Provided, That where the bonds have been sold for the purchase of schoolhouse site or sites, building one or more schoolhouses and providing same with all necessary furniture, apparatus or equipment, or for any or all of these purposes, he shall place the money derived from such sale to the credit of the building fund of the district, and such fund is hereby created. Fees for advertising shall be deducted from the proceeds: Provided, That if the board of directors and the person or persons to whom the bonds are sold agree that the delivery of said bonds shall be in installments, the county treasurer shall hold said bonds, and deliver to purchasers only on written order of the board of directors to deliver at specified time the bonds designated by number and series. [L. '11, p. 390, § 1.]

§ 4613. Bond Interest Levy—Sinking and Redemption Fund.

The county commissioners must ascertain and levy annually, in addition to the school district tax, the tax necessary to pay the interest upon such bonds as it becomes due, and at the expiration of one-half of the time for which said bonds are to run, and annually thereafter, until full payment of said bonds is made, they shall levy, in addition to the tax required to pay the interest, such amount for sinking fund to meet the payments of said bonds at maturity, to be determined by dividing the amount of bonds outstanding by the remaining number of years to run, and the fund arising from such levy shall be kept as the bond redemption fund of said district, and each of said tax levies shall be a lien upon the property of said district, and must be collected in the same manner as the taxes for other school purposes: Provided, That the county treasurer, when authorized to do so by the board of directors of any school district may invest any accumulated or other sinking fund of said district in school, county or state warrants of the state of Washington, and all profits accruing from such investment, and the funds so invested, shall revert to the sinking or other fund of said district, and the county treasurer shall be custodian of all warrants purchased by and with the said sinking fund, until the same are redeemed: And provided further, That the county treasurer, when authorized to do so by the board of directors of any school district, may purchase and redeem any of the outstanding bonds of said district, paying for said bonds out of the accumulated sinking fund of the district; all revenues provided for in this section shall constitute a separate fund, to be known as the bond redemption fund. [L. '11, p. 391, § 2.]

§ 4615. Payment of Interest on Bonds.

The county treasurer must pay out of moneys belonging to the credit of the fund of the school district created by section 4613, the interest upon any bonds issued under this chapter by such school district when the same

becomes due, at such place as may be designated in the coupons attached to said bonds, or upon the presentation at his office of said coupons, which must show the amount due and the number and series of the bond to which it belongs, and all coupons so paid must be immediately reported to the school directors. [L. '11, p. 392, § 3.]

§ 4621. Notice of Bond Redemption—Cancellation.

Whenever the amount of any sinking fund created under the provisions of this act shall equal the amount, principal and interest of any bond then due, or subject under the pleasure or option of said school district to be paid or redeemed, it shall be the duty of the county treasurer of the county in which the school district issuing such bonds is located, to publish a notice in the official newspaper of the county, if such a one there be, and if not, then in a newspaper of general circulation, that the said county treasurer will within thirty (30) days from the date of such notice, redeem and pay any such bond then redeemable or payable, giving priority according to the date of issue numerically, and upon the presentation of any such bond or bonds the said treasurer shall pay the same; and in case that any holder of such bond or bonds shall fail or neglect to present the same at the time mentioned in said notice, or in the notice hereinbefore provided for, then the interest upon such bond or bonds shall cease and determine, and the treasurer of such county shall thereafter pay only the amount of such bond and the interest accrued thereon up to the day mentioned in said notice. When any bonds are so redeemed or paid, the county treasurer shall cause the same to be fully canceled, and write across the face of such bonds the words "redeemed," with the date of redemption, and shall file the same with the county auditor as vouchers for the sum so paid. When bonds are held by the state of Washington advertising as contemplated and prescribed in this section shall be deemed unnecessary. [L. '11, p. 393, § 4.]

CHAPTER XXIX.

VALIDATION OF INDEBTEDNESS AND BONDS THEREFOR.

§ 4629½. Indebtedness of District Merging—Election.

In case any school district has heretofore incurred, or shall hereafter incur, indebtedness for strictly school purposes in excess of one and one-half per cent, and less than five per cent of the assessed valuation of property in such district, and has heretofore, or shall hereafter, become merged in a district of the first class, the directors and clerk of the last-named district may, after such merger, cause to be submitted to the voters within the limits of the district which incurred the obligations, the question of validating and ratifying such indebtedness. The vote shall be taken and the question determined in the manner prescribed in sections 4623, 4624 and 4625. The directors of the district of the first class shall make provisions for payment of the indebtedness so validated by certifying the amount thereof to the county commissioners for a special levy, in the manner prescribed in section 4629: Provided, Such district of the first class may pay a part, or all, of such validating indebtedness from any funds available or by issuing bonds therefor, under the following conditions: When such district of the first class has taken over property of any district without an adjustment and apportion-

ment of property and of indebtedness, as provided in sections 4437 and 4438, the directors of the enlarged district shall make such adjustment and apportionment, as of the time of merger, and may pay such validated indebtedness to the extent that the value of the property received shall be found to exceed the total indebtedness of the district annexed. [L. '13, p. 416, § 1.]

CHAPTER XXX.

CERTIFICATION OF TEACHERS.

§ 4634. Evidence of Moral Character.

Before registering any certificate, the county superintendent of the county in which application was made for certificate shall satisfy himself that the applicant is a person of good moral character and personal fitness. In the event of a refusal to register a certificate, the county superintendent shall immediately notify the superintendent of public instruction of his action and shall fully and clearly state his reasons therefor, and the person aggrieved shall have the right of appeal to the superintendent of public instruction, and shall have the further right of appeal to the state board of education. [L. '11, p. 50, § 1.]

§ 4636. Evidence of Successful Experience.

Whenever evidence of successful experience is a prerequisite to the issuance or renewal of a certificate, it shall be deemed sufficient for the applicant to file evidence, satisfactory to the officer authorized to issue or renew the certificate, of having taught the required number of months and of being a successful teacher. The aforesaid documentary evidence of successful teaching shall be kept on file in the office of the superintendent of public instruction. [L. '11, p. 51, § 2.]

§ 4638. One Year's Study Renews Certificate.

Credits of ninety per cent or over on a valid certificate obtained by examination in any other state in which the examination questions are prepared and answer papers graded by the state department of education may be accepted subject for subject in accordance with the rules and regulations prescribed by the state board of education. [L. '11, p. 51, § 3.]

§ 4644. Certificates and Diplomas Described—Qualifications.

The common school certificates and diplomas issued by authority of the state of Washington, the period for which each shall be valid and the qualifications required of applicants for the same shall be as follows:

First. Third Grade Common School Certificates: Applicant shall pass an examination in reading, grammar, penmanship and punctuation, history of the United States, geography, arithmetic, physiology and hygiene, theory and art of teaching, orthography, and Washington State Manual. This certificate shall be valid for one year: Provided, That the holder of a third grade certificate who shall, after the granting of the same, attend any accredited institution of higher education in this state for one year, shall upon application be granted a second grade certificate.

Second. Second Grade Common School Certificates: Applicant shall have credits in the same subjects as for a third grade common school certificate and

shall take an examination in music. This certificate shall be valid for two years, but may be renewed, if, during the life of the certificate, the holder has complied with any one of the following conditions, to wit, 1. An attendance of one semester at an accredited school of higher education, or of six weeks at an accredited summer school when satisfactory work was done in three subjects and certified to by the principal of such school. 2. Upon sixteen months of successful teaching.

Third. First Grade Primary Certificates: Applicant must have taught at least forty-five months in the primary grades, and shall have credits in the same subjects as for a second grade certificate, and must also pass an examination in nature study, drawing, literature, and physical geography; but the state board of education may accept other subjects in lieu of two of the above subjects at the request of the applicant, as provided in section 4637, of this chapter. This certificate shall authorize the holder to teach in the primary grades only and shall be valid for five (5) years, and may be renewed for a like period if application is made not later than ninety (90) days after certificate expires, and if, during the life of the certificate, the holder has complied with any one of the following conditions, to wit: 1. An attendance of one year at an accredited institution of higher learning during the life of the certificate when satisfactory work was done in three subjects and certified to by the principal or president of such school: 2. Successful teaching for not less than twenty-four (24) months during the life of the certificate. Any renewal may be renewed in like manner.

Fourth. First Grade Certificates: Applicant must have taught at least nine (9) months and shall have credits in the same subjects as for a second grade certificate, and also in physics, English literature, algebra and physical geography. The state board of education may accept other subjects in lieu of two of these upon request of the applicant, as hereinbefore provided. Applicant must secure the same number of credits as for a first grade primary certificate. This certificate shall be valid for five (5) years and may be renewed in the same manner and under the same conditions as a first grade primary certificate.

Fifth. Professional Certificates: Applicant shall meet all the requirements for a first grade certificate, but must have taught successfully twenty-four (24) months, at least eight (8) months of which must have been in the state of Washington. He shall also pass an examination in plane geometry, geology, botany, zoology, and civil government: Provided, That the state board of education may accept other subjects in lieu of any or all of these upon the request of the applicant, as hereinbefore provided. This certificate shall be valid for five (5) years and may be renewed in the same manner and under the same conditions as a first grade certificate.

Sixth. Permanent Certificates: Applicant must be the holder of a first grade primary certificate, a first grade certificate, or a professional certificate, or a renewal of any one of them, in full force and effect, and must have taught successfully not less than seventy-two (72) months, nor less than thirty-six (36) months in the state of Washington, nor less than eighteen (18) months subsequent to the granting of the certificate upon which the application is made. Upon filing satisfactory evidence of having met these requirements, together with the written indorsement of the county superintendent, a permanent certi-

ificate shall be issued of the same grade as that held by the applicant, valid during the life of the holder unless revoked for cause.

Seventh. Life Certificates: Applicant must file with the superintendent of public instruction evidence of having taught successfully for forty-five (45) months, not less than twenty-seven (27) months of which shall have been in this state. He must have the credits required for professional certificates and in addition shall pass an examination in the following, to-wit: Psychology, history of education, bookkeeping, composition, general history: Provided, That the state board of education may accept other subjects in lieu thereof upon request of the applicant. This certificate shall be valid during the life of the holder unless revoked for cause. [L. '11, p. 51, § 4.]

§ 4652. Temporary Certificates.

Temporary certificates shall be issued in accordance with the rules and regulations of the state board of education. [L. '11, p. 54, § 5.]

CHAPTER XXXI. GENERAL ELECTIONS.

§ 4657. When and Where Held.

The election of school district directors shall, except as otherwise provided by law, be held on the first Saturday in March of each year, at the district schoolhouse, if there be one, or if there be none, or more than one, then at one or more places to be designated by the board of directors. Special school elections shall be called and conducted in the manner provided for calling and conducting annual elections. In districts in which elections are held in more than one voting place, the clerks of the election shall forward the election returns to the clerk of the board of school directors, who shall canvass the vote on the Saturday following the election, declare the result and issue certificates of election. [L. '13, p. 348, § 1.]

§ 4660.

Under this section, requiring that one of the judges pronounce the name of any person offering to vote, at a school bond election, and "he shall receive the ballot . . . and deposit the same," the judge pronouncing the name shall receive and deposit the elector's ballot: *Kinder v. School District No. 126*, 68 Wash. 410, 123 Pac. 610.

§ 4662.

Election returns showing that only thirty-

seven out of one hundred and three votes were cast against the issuance of school bonds, are not sufficiently impeached by the affidavits of forty-six voters to the effect that they voted against the issue, where the ballots had been destroyed, and it appears that certain of such voters had made contradictory statements and others had made no concealment when voting and it was testified that their ballots were seen to be for bonds, and that the officers publicly counted the ballots correctly after the election: *Kinder v. School District No. 126*, 68 Wash. 410, 123 Pac. 610.

CHAPTER XXXII. SPECIAL MEETINGS.

§ 4664.

This section, providing that a school election for the purchase of school grounds shall be by ballot, is directory only, and the election is not invalidated by the fact that

a standing vote was taken in the absence of evidence that the election did not fairly represent the will of the electors: *State ex rel. School District No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

CHAPTER XXXIII.

ELECTIONS IN DISTRICTS OF THE FIRST CLASS.

§ 4669. Voting Places.

It shall be the duty of the board of directors to provide one or more voting places in each district: Provided, There shall not be more voting places in any district than the number of schoolhouses located in such district. The board shall also appoint two judges and one clerk for each voting precinct. Both judges and clerk shall be qualified electors in the precinct for which they are appointed. Should any judge or clerk be absent at the time for opening the polls, the electors present shall appoint a legal voter to fill such vacancy. [L. '11, p. 503, § 1.]

§ 4673. Voters must Register.

Every person residing in any portion of a school district of the first class, which lies without the limits of any incorporated city, who is not required to register to vote at a general election held therein shall not be entitled to vote at any school election, either general or special, to be held in any such district of the first class unless he or she shall have previously complied with the requirements as to registration as in this act provided. [L. '11, p. 501, § 1.]

§ 4678. Registration Required Annually—Qualifications for.

Registration shall not be required more than once in each year. All persons who are duly qualified electors under the provisions of this act, who reside in any portion of a school district of the first class outside of the limits of any incorporated city and who are not required to register to vote at a general election shall be entitled to registration on application to the secretary of the board of directors of the district in which they reside: Provided, Such elector shall have been a resident of the state for one year, of the county ninety days, and of the voting precinct thirty days prior to the next general or special election to be held in such district. No person shall vote at any such election except in the precinct where he or she has resided for the length of time above specified. [L. '11, p. 501, § 2.]

§ 4679. Registration Book for Each Precinct.

Wherever the whole or any portion of such district of the first class shall lie without the limits of any incorporated city the board of directors of such district shall subdivide such outlying territory into voting precincts so that each precinct shall contain, as near as may be, five hundred inhabitants, and after the boundaries of such precincts shall have been established, said territory shall not be redistricted oftener than once in three years, and not then unless one or more of the precincts thereof shall have attained a population of more than five hundred inhabitants. There shall be provided by the board of directors in each district and kept by the secretary of such board a book of registration for each voting precinct in such district established by the board of directors as above provided. [L. '11, p. 502, § 3.]

§ 4683. Change of Residence of Registered Voter.

If any elector shall during the year for which he or she may be registered change his or her place of residence from the precinct in which he or she is registered to any other precinct in said district, outside the corporate

limits of such city, he or she shall apply to the secretary of the board to have said removal noted. The secretary shall run a red ink line across the name in the precinct book in which said applicant shall be registered, and likewise note said removal in the column headed, "Remarks," in said book and thereupon the secretary shall enter the name and register the elector in the registration book of the precinct to which he or she has removed. [L. '11, p. 502, § 4.]

CHAPTER XXXVI. COMPULSORY EDUCATION.

§ 4714.

The act, Laws of 1907, page 569, providing for compulsory attendance upon the public schools does not conflict with or impliedly repeal the prior act, Laws of 1905, page 262, section 3, subdivision 9, providing that successful vaccination shall be required as a condition precedent to school membership; and the two acts together require compulsory vaccination: State ex rel. McFadden v. Shorrock, 55 Wash. 208, 104 Pac. 214.

The legislature has power to require all minors to attend the public schools and all pupils to be vaccinated: State ex rel. McFadden v. Shorrock, 55 Wash. 208, 104 Pac. 214.

An information for violation of the school law providing for compulsory attendance of children of school age in the public school of the district for the full term, or in a private school for the same term, is not defective in that it charges the neglect to

cause the children to attend the public school or an "approved" private school, where the gist of the offense was in the failure to attend any school, public or private, and the information clearly charges such offense: State v. Counort, 69 Wash. 361, 41 L. R. A., N. S., 95, 124 Pac. 910.

It is no defense to a prosecution for violating the school law requiring parents to cause their children of school age to attend the public school of the district or a private school that the parent is experienced and qualified as a teacher and gave private instruction to his own children at his home, such home instruction not being attendance at a private school within the meaning of the law where he did not maintain a private school at his home as determined by the purpose, intent and character of the endeavor: State v. Counort, 69 Wash. 361, 41 L. R. A., N. S., 95, 124 Pac. 910.

As to compulsory attendance at public schools, see note in Ann. Cas. 1912A, 373.

CHAPTER XXXIX. KINDERGARTENS.

§ 4738. Election to Authorize Establishment.

The board of directors of any school district of the first and second classes shall have power to establish and maintain free kindergartens in connection with the common schools of said district for the instruction of children between the ages of four and six years, residing in said district, and shall establish such courses of training, study and discipline and such rules and regulations governing such kindergartens as said board may deem best. [L. '11, p. 382, § 1.]

§ 4740. Special Fund for Establishment and Maintenance.

The cost of establishing and maintaining such kindergartens shall be paid from the general fund of the district. [L. '11, p. 382, § 1.]

CHAPTER XL. PROHIBITING SALE OF INTOXICATING LIQUORS.

§ 4744.

This section prohibits sales by druggists within the restricted district, as exceptions cannot be made by construction where the language is plain and unequivocal: State

v. Pomeroy, 68 Wash. 389, 39 L. R. A., N. S., 615, 123 Pac. 514.

As to "schools" as contemplated by laws prohibiting sales of liquors within stated distances from such institutions, see notes in 16 Ann. Cas. 924 and 37 L. R. A., N. S., 1110.

TITLE XXIX.

ELECTIONS.

CHAPTER I.

QUALIFICATIONS OF ELECTORS.

§ 4755.

Constitution, article 6, section 3, providing that persons convicted of infamous crimes shall be excluded from the elective franchise unless restored to their civil rights, cannot be taken as a construction of the existing territorial statute section 4755 to mean that such persons lost their civil rights, when the act only forfeited their right to vote, a political and not a civil right: *State v. Collins*, 69 Wash. 268, 124 Pac. 903.

As to conviction of crime in the aspect of civil death, see notes in 6 Am. St. Rep. 379 and 137 Am. St. Rep. 691.

As to power of state to modify or take away right to vote, see note in 1 L. R. A. 111.

As to suspension of sentence and its effect upon right to vote, see note in 18 L. R. A., N. S., 684.

As to test oaths and disqualification, as voter, for crime, see note in 25 L. R. A. 483.

CHAPTER II.

REGISTRATION OF VOTERS.

§ 4765.

See notes to § 8165-1.

§ 4767.

This section was not impliedly repealed by section 4815, Laws of 1909, page 174, section 4, amending the direct primary law, Laws of 1907, page 464, section 12, so as to require the registration of the elector's party affiliations, as it is not a complete act on that subject and repeals by implication cannot be invoked piecemeal: *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791.

As to the validity of primary election laws, see note in 5 Ann. Cas. 568, and 12 Ann. Cas. 851.

As to "primary elections" as elections within the contemplation of the constitution or statute relating to elections generally, see note in Ann. Cas. 1913A, 702. See, also, notes in 16 Ann. Cas. 251 and 18 L. R. A. 412.

§ 4768.

One who procures a voter to register and incorrectly state his place of residence is not guilty of false registration when the voter did not register in the wrong precinct, under this section, in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting the criminal offense: *State v. Cohen*, 67 Wash. 618, 122 Pac. 9.

As to the force of the word "knowingly" as used in describing illegal registering,

see note in Ann. Cas. 1912A, 436. See, also, note in Ann. Cas. 1913B, 17.

The registration oath, required by this section, that the elector had not lost his civil rights by having been convicted of an infamous crime, is not shown to be false by an allegation in an information for false swearing that the accused had taken the oath after conviction of a felony, where, by such conviction, he had lost no civil rights, but only the right to vote, which is a political and not a civil right: *State v. Collins*, 69 Wash. 268, 124 Pac. 903.

Where, under the law of this state, jail-breaking was only a misdemeanor at the time the offense was committed in another state, the offense would not be an infamous crime, within the meaning of this section, even if jail-breaking were a felony in such other state; since the laws of such state could not be given extraterritorial force in opposition to the laws of this state: *State v. Collins*, 69 Wash. 268, 124 Pac. 903.

As to the enforcement of penal laws of another state, see notes in 2 L. R. A. 779 and 13 L. R. A. 51.

As to what constitutes conviction for crime such as entails forfeiture of right to vote, see note in 15 Ann. Cas. 103.

A voter is not guilty of false registration in incorrectly stating his place of residence, when he did not register in the wrong precinct, under this section, in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting

the criminal offense: *State v. Ross*, 66 Wash. 138, 119 Pac. 20, 122 Pac. 8.

An information for falsely swearing in a registration oath made pursuant to this section, that the accused had not lost his civil rights by being convicted of an infamous crime, is insufficient where it merely alleges that the accused had been convicted of the infamous crime of jail-breaking in another state without showing that at the time of his escape he was held on an infamous charge; since by section 2342 jail-breaking is a felony only where the prisoner was held on a felony charge,

and a misdemeanor, if held otherwise: *State v. Collins*, 69 Wash. 268, 124 Pac. 903.

The fact that election officers were prejudiced and their appointment influenced by their opinions, and the expense of the election paid by parties interested in the propositions, does not invalidate the election, in the absence of any fraud upon the election itself: *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476.

As to how the conduct of an election may avoid it, see note in 90 Am. St. Rep. 49.

CHAPTER IV.

NOMINATIONS AND PRIMARY ELECTIONS.

§ 4794.

The primary election law requiring first and second choice voting for candidates for a "congressional office," where there are four or more candidates, does not extend to or include United States senators, in view of section 4805, where the word "congressional" is qualified by the word "elective," which is not applicable to United States senators within the meaning of state election laws; and in view of the form of the pledge to be signed by state senators and representatives, and section 4813 prescribing different positions in the election ballot in which shall be placed the names of candidates for "congressional office" and for "preference for United States senators," above the former being the warning "vote for both first and second choice," and above the latter being the warning "vote for one choice only," the sample ballot containing the names of four senatorial candidates: *State ex rel. Duryee v. Howell*, 59 Wash. 634, 110 Pac. 543.

Under this section, defining a convention as an "organized assemblage of the electors or delegates representing a party or a principle," and section 4830, requiring political parties which cast less than ten per cent at the last preceding election to nominate candidates at a convention, county nominees of the Progressive Party, which cast no votes at the last election, are not named at a "convention," and are therefore not entitled to have their names placed on the general election ballot, where it appears that in K. county a party primary election was held in but seven out of the thirty-one voting precincts to elect one delegate in each precinct to a state convention which had been called for September 10th, and one delegate to a county

convention; that no notice of a county convention was given, but that, during a recess at the state convention held in another county, the five delegates elected to the county convention, with twenty-five to forty others present from K. county, meeting as a convention of assembled electors of K. county, nominated Progressive Party candidates for county offices, without any pretense of holding a county convention in obedience to the invitation to elect delegates at the party primary, the proceedings showing that a mass convention only was held; since such a popular or mass convention, held outside of the county without notice is not fairly representative, would open the door to fraud, and is contrary to the spirit of the direct primary law designed to give every opportunity to participate in the selection of party nominees: *State ex rel. Peters v. Superior Court*, 70 Wash. 662, 127 Pac. 310.

§ 4798.

See notes to § 7678.

§ 4802.

Under the primary law requiring a person nominated for an office by two parties to designate the ticket upon which he desires his name to appear, the right to become a candidate of two or more parties is a valuable right, and the central committee of a political party authorized to fill vacancies has no power to declare a vacancy where the lawful nominee of two parties, in declining to be a candidate under both tickets, did not decline the nomination in writing in the manner required by this section: *State ex rel. Peters v. Superior Court*, 70 Wash. 662, 127 Pac. 310.

§ 4805. Application of Act—Special and Other Elections not Included.

Hereafter, all candidates for elective offices in this state, either state, county, municipal, precinct or congressional, shall be nominated at a direct

primary election held in pursuance of this act: Provided, That this act shall not be held to refer to special elections for filling the vacancies of unexpired terms, or to election to offices of any city or town of the fourth class or for any school, dike, irrigation or metropolitan park district or other local improvement elections, or for presidential electors: Provided, further, That the provisions of this act shall not apply to nomination of candidates for municipal elective offices in cities of the first class which have adopted or may hereafter adopt charters under section 10, article 11 of the state constitution, where such charters have provided or may hereafter provide a nonpartisan method or methods of nominating candidates for municipal elective offices; and all such cities shall have the right and power to provide in their charters for any method or methods of nonpartisan nomination of candidates for their elective offices as they may desire. [L. '11, p. 490, § 2.]

See notes to § 4794.

Nomination certificates on recall of city officers, see § 7517-1.

Under this section, which provides that the state primary election law shall not apply to nomination of candidates for municipal elective offices in cities of the first class which have adopted a nonpartisan method of nominating candidates, the city clerk in such cities cannot collect the filing fee required by section 4808 of the state law, the city charter making no provision for the payment of such a fee: State ex rel. Holtzner v. Bothwell, 69 Wash. 217, 124 Pac. 371.

§ 4808.

See notes to § 4805.

§ 4813.

See notes to § 4794.

§ 4815.

This section amending the direct primary law, Laws of 1907, page 464, section 12, so as to require each elector voting at a primary election to declare his party affiliations, and providing that he shall receive the ballot only of the party for which he registered, is void as requiring a condition impossible of performance, the registration law making no provision for registration of party affiliations: State ex rel. Arnold v. Mitchell, 55 Wash. 513, 104 Pac. 791.

Laws of 1909, page 174, section 4, amending the direct primary law, Laws of 1907, page 464, section 12, so as to require the registration of the elector's party affiliations in order to vote at a primary election, is void as an amendment to the registration law, Ballinger's Code, section 1455, in that it does not set forth the section in full as amended and is not a complete act upon the subject of registration: State ex rel. Arnold v. Mitchell, 55 Wash. 513, 104 Pac. 791.

Laws of 1909, page 174, section 4, entitled an act relating to primary elections and amending certain sections of the direct primary law, and which amends Laws of 1907, page 464, section 12, is void as an instrument of the registration law, in so far as it requires the registration of the elector's party affiliations to entitle him to vote at a primary election, in that there is no reference in its title to the subject of registration, as required by constitution, article 19, section 2, and no reference to Laws of 1907, page 464, section 12, amended by the act: State ex rel. Arnold v. Mitchell, 55 Wash. 513, 104 Pac. 791.

§ 4826.

Under this section, relating to the election of precinct, county and state party committeemen, and the holding of party conventions, and providing that a convention shall have no power to nominate any candidates to be voted for at any primary election, a person nominated at a convention is not thereby disqualified from afterward becoming a candidate at the September primaries, since to construe the law to have that effect would render it unconstitutional as violating constitution, article 1, section 4, providing that the right of petition and of the people peaceably to assemble for the common good shall not be abridged: State ex rel. Wells v. Dykeman, 70 Wash. 599, 127 Pac. 218.

As to the conclusiveness of certificates of nomination, see note in 9 Ann. Cas. 916.

As to defects in nomination papers, see note in 16 L. R. A. 754.

§ 4828.

The county auditor, charged with the duty of printing on the election ballots separately the names of judicial candidates who received a majority of all votes cast, has no such interest in the matter as to entitle him to maintain an action to secure a count of the total number of ballots cast, without which such majority can-

didates could not be determined, where the canvassing board failed to determine the question; since his duty as auditor is ministerial and limited to printing such names separately as affirmatively appear from the records of the canvassing board, on file in his office, to have received a majority of all votes cast, such returns being conclusive on him in the absence of a proceeding in behalf of any interested party: *State ex rel. Case v. Superior Court*, 70 Wash. 428, 126 Pac. 937.

§ 4829.

This section authorizes any candidate for nomination at a primary election to contest the nomination of any other candidate for the same office, and provides a tribunal to try the question; and the fixing of the specific procedure is not essential to the validity of the statute, in view of section 69, providing that, when jurisdiction is conferred upon any tribunal, all the means to carry it into effect are also given, and if the proceedings be not specifically fixed, any suitable mode may be adopted: *State ex rel. McAvoy v. Gilliam*, 60 Wash. 420, 111 Pac. 401.

Where a primary election contest was filed within five days as required by this section, the statute prescribing no time for service of citation, the court has jurisdiction, after quashing a citation, to issue another citation: *State ex rel. McAvoy v. Gilliam*, 60 Wash. 420, 111 Pac. 401.

Under the express provisions of the primary election law, any citizen of the county may maintain an action to restrain the county auditor from illegally placing upon the general election ballot the names of candidates as nominees of a political party who had not been legally nominated by such party: *State ex rel. Peters v. Superior Court*, 70 Wash. 662, 127 Pac. 310.

§ 4830.

See notes to § 4794.

§ 4837.

This section of the primary election law only adopts provisions of the statutes with relation to the holding of elections, and not general criminal statutes which are no part of the election laws: *State v. Robinson*, 69 Wash. 172, 124 Pac. 379.

§ 4842. Nomination of Supreme and Superior Court Judges.

Judges of the supreme and superior courts, state senators and representatives shall not be considered state officers within the meaning of the provisions of this act relating to first choice and second choice voting. When there are to be elected at any general election one or more judges of the supreme court, or of the superior court of any county, the candidates for each respective office whose names are to be placed on the general election ticket shall be determined as follows: The number of candidates equaling the number of judicial positions to be filled who receive the highest number of votes at the primary election, and an equal number of candidates for such positions, providing there are such candidates, who receive the next highest number of votes, shall be the candidates for such respective offices and their names shall appear on the general election ballot under the designation of such respective offices: Provided, however, That where any candidate for any such office shall receive a majority of all votes cast at such primary election for such office, the name or names of such candidates receiving such majority shall be printed separately on the general election ballot, under the designation "Vote for —," and the name or names of no opposing candidate or candidates shall be printed on such ballot in opposition to such candidate or candidates, but spaces equaling the number of such majority candidates shall be left following such name or names, in which the voter may insert the name of any person for whom he wishes to cast his ballot. Following the names of such majority candidates, under the designation "Vote for —," the names of the minority candidates who have received the highest number of votes at the primary election equal to twice the number of the remaining places to be filled shall be printed: Provided, further, That the secretary of state, or other proper certifying officer, in certifying to the several county auditors of the state the names of candidates for judicial

offices shall specify the names of those who have received a majority vote at such primary election, together with the names of the minority candidates who are entitled to have their names placed upon the official ballot. The names of all such candidates for such judicial offices shall appear on the general election ballot under the heading: "Nonpartisan Judiciary." Where a vacancy or other cause shall necessitate the election of a judge for a short term, and at the same election one or more judges are to be elected for the full term candidates may announce themselves for either the short or full term, and the ballots shall be arranged accordingly. There shall be a separate ballot for the candidates for nomination for such judicial offices, which shall be the general election ballot hereinbefore referred to, and shall be printed, delivered, voted and counted as hereinbefore provided for the general primary election ballot: Provided, That any voter shall have the privilege of voting this ticket alone. The form of said ballot shall be substantially as follows:

NONPARTISAN JUDICIARY TICKET.

To vote for a person make a cross (X) in the square at the RIGHT of the name of the person for whom you desire to vote.

Judges of Supreme Court.	Vote for...	Judges Superior Court.	Vote for...
John Doe.....		John Doe.....	
John Doe.....		John Doe.....	
John Doe.....		John Doe.....	

[L. '11, p. 489, § 1.]
See notes to § 4893.

CHAPTER VII.
BALLOTS.

§ 4890. Questions for Popular Vote, How Submitted.

Whenever a proposed constitution or constitutional amendment, or other question is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than thirty days before election, certify the same to the clerk of the board of county commissioners of each county in the state, and the clerk of the board of county commissioners of each county shall include the same in the publication provided for in section 4801. Questions to be submitted to the people of a county or municipality shall be advertised as provided for nominees for offices by said section, and in submitting said amendment or question, there shall be printed on the ballot a concise statement, not exceeding seventy-five words, of its essential features in such manner that the voters may clearly identify the proposition in which they are voting. Such statement shall be prepared by the attorney general for the secretary of state, by the prosecuting attorney for the board of county commissioners, and by the legal department of the municipality for the proper officer thereof: Provided, That where the legislature shall have prescribed any particular form, the same shall be used. [L. '13, p. 415, § 1.]

§ 4893.

This section, subdivision 6, providing that no candidate's name shall appear on

the ballot more than once, and that the candidate, if nominated by two or more parties, may designate the party under

whose title he desires to appear, is a reasonable regulation of the elective franchise, and violates no constitutional right of the voter to vote for a candidate of his choice: State ex rel. Shepard v. Superior Court, 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233.

This section, subdivision 6, providing that the names of candidates shall not appear on the ballot more than once, was not impliedly repealed by the amendment of 1909 (section 4842), providing that the

names of judges nominated at a joint convention of several parties shall appear on the tickets of all the parties holding the joint convention; since there is no such conflict between the two acts as to indicate any such legislative intent: State ex rel. Shepard v. Superior Court, 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233.

As to the number of times the name of a candidate may appear on the official ballot, see note in Ann. Cas. 1913B, 177. Also, see note in 37 L. R. A., N. S., 825.

CHAPTER VII-A.

VOTING MACHINES.

§ 4910-1. Use of Voting Machines at Elections.

At all state, county, city, town, township and district elections of any character, primary, general, special or otherwise, hereafter held in the state of Washington, ballots or votes may be cast, registered, recorded and counted by means of voting machines, as hereinafter provided. [L. '13, p. 177, § 1.]

§ 4910-2. State Board of Voting Machine Examiners.

The governor, the secretary of state, and the state treasurer and their successors in office are hereby created and constituted the state board of voting machine examiners. It shall be the duty of said board to examine all makes of voting machines submitted to it and determine whether such machines comply with the requirements of this act, and can safely be used by voters at elections under the provisions of this act. Any person or corporation owning or being interested in a voting machine may submit same to said board for examination, and said board shall thereupon publicly examine and report upon such machine, pursuant to the provisions of this act. For the purpose of assistance in examining such machine the said board may employ not more than three expert machinists at a cost of not more than ten dollars for each day employed. The compensation of said machinists shall be paid by the person or corporation submitting the machine. Within thirty days after completing the examination of any voting machine the board shall make and file with the secretary of state its report on such machine, together with such written or printed description and such drawings and photographs as shall clearly identify such machine and the mechanical operation thereof; and within ten days after receiving such report, the secretary of state shall send a copy thereof to the county commissioners of each county, to the common council of each city, and to the board or governing body of each district or other municipality within the state. Any voting machine that shall receive the approval of a majority of said board may be used for conducting any or all elections subject to the provisions of this act. Any machine that shall not receive said approval shall not be adopted for or used at any election. After a voting machine has been approved by said board, any change, or improvement therein that does not impair its accuracy, efficiency, or capacity, shall not render necessary a re-examination or reapproval thereof. [L. '13, p. 178, § 2.]

§ 4910-3. Definition of Terms Employed in This Act.

The list of offices and candidates, and the statements of questions used on the voting machines shall be deemed an official ballot and the words "ballot labels," as used in this act shall mean the cards, paper, or other material containing the names of offices and candidates, and statements of questions to be voted on. The word "diagram" shall mean an illustration of the official ballot when placed upon the machine, showing the names of the parties, offices and candidates, and statements of the questions in their proper places, together with the voting devices therefor, and shall be considered a sample ballot. The word "question" shall mean a statement of such constitutional amendment or other proposition as shall be submitted to a popular vote at any election. The words "irregular ballot" shall mean the paper or other material on which a vote is cast for persons whose names do not appear on the ballot labels. The words "vote indicators" shall mean those devices with which votes are indicated for parties, candidates, or for or against questions. The words "candidate counters" and "question counters" shall mean the counters on which are registered the votes cast for candidates and on questions respectively. The words "public counter" shall mean a counter or other device, which shall at all times publicly indicate how many times the machine has been voted on at an election. The words "protective counter" or "protective devices" shall mean a counter or device that will register each time the machine is operated, and shall be so constructed, and so connected that it cannot be reset, altered or operated, except by operating the machine. The words "voting machine booth" shall mean the inclosure occupied by the voter when voting. The word "model" shall mean a mechanically operated model of a portion of the face of the machine illustrating the manner of voting. The word "custodian" shall mean the person charged with the duty of testing and preparing the voting machine for the election. The words "statement of canvass" shall mean a statement and return in book form of the votes cast at any election, together with suitable certificates of its correctness. [L. '13, p. 179, § 3.]

§ 4910-4. Requirements of Voting Machines.

No voting machine shall be approved by the state board of voting machine examiners unless it be so constructed as to fulfill the following requirements: It shall secure to the voter secrecy in the act of voting. It shall provide facilities for voting for the candidates of as many political parties or organizations as may make nominations, and for or against as many questions as may be submitted. The voting devices for the candidates shall be arranged in separate parallel party lines, one or more lines for each party and in parallel office rows transverse thereto. It shall permit the voter to vote for any person for any office that he shall have the right to vote for but none other. It shall, except at primary elections, permit the voter to vote for all the candidates of one party or in part for the candidates of one party and in part for the candidates of one or more other parties. It shall, except at primary elections, provide means whereby the voter can by a single operation vote for all the candidates of one party. It shall permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for but no more. It shall prevent the voter from voting for the same person more than once for the same office. It shall permit the voter to vote for or

against any question he may have the right to vote on but none other. It shall correctly register or record all votes cast for any and all persons and for or against any and all questions. It shall be provided with a lock or locks by which all operation of the registering mechanism can be prevented as soon as the polls of the election are closed. It shall be provided with a "protective counter," or "protective device" whereby any operating or tampering with the machine before or after the election will be detected. It shall be provided with a counter which shall show at all times during an election how many persons have voted. It shall be provided with a mechanical model, illustrating the manner of voting on the machine suitable for the instruction of voters. It may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation, and a ballot label therefor containing only the words "presidential electors" preceded by the name of that party and followed by the names of the candidates thereof for the offices of President and Vice President, and a registering device there-which shall register the vote cast for said electors when thus voted for collectively: Provided, however, That means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party and in part for those of one or more other parties or in part or in whole for persons not nominated by any party. [L. '13, p. 180, § 4.]

§ 4910-5. Voting Machines may be Adopted, Procured and Used.

The county commissioners of any county, the common council of any city or town, the township board of any township or the board or governing body of any district or municipality, at any regular meeting or at a special meeting called for the purpose, may adopt, purchase, or otherwise procure, and provide for the use of, any voting machine approved by the state board of voting machine examiners; and thereafter said machine shall be used for voting at all primaries and elections for public offices and on all questions and for receiving, registering and counting the votes thereof in such election district or districts as such county commissioners, council or board shall direct. The county commissioners or council may, not later than forty days before any election, create, unite, combine, or divide one or more election districts or precincts for the purpose of using one or more voting machines therein at such election, and such uniting, combining or dividing shall be done in the manner now prescribed by law for the change of election districts. More than one voting machine may be used in the same election district. The number of voters to be in each of said districts or precincts shall be determined by said commissioners, council or board, but shall not exceed six hundred for each machine. [L. '13, p. 181, § 5.]

§ 4910-6. Payment for Voting Machines.

The county commissioners of any county, the council of any city, the supervisors of any town or township, or the governing board of any district or municipality may, on the adoption and purchase of a voting machine or machines, provide for the payment thereof in such a manner as they may deem for the best interest of the county, city, town or township, district or municipality, and may for that purpose issue bonds, warrants, certificates of indebtedness, notes or other negotiable obligations, which shall be a charge upon such county, city, town, township, district, or municipality, or may pay

for the same in cash out of the general fund or otherwise; and may make such contract for the purchase of such machines with regard to price, manner of purchase and time of payment as to the said officials shall seem proper, and in estimating the amount of taxes for the general fund, if any, such amount shall be added, extending over such time as may be required to fully pay for such machines. Such bonds, certificates, warrants, notes or other obligations may be issued to bear interest not to exceed five per cent per annum. They may be made payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par. [L. '13, p. 182, § 6.]

§ 4910-7. Printed Matter and Supplies.

Within a proper and reasonable time before each election at which voting machines are to be used, the secretary of state shall prepare samples of the printed matter and supplies named in this section, and shall furnish one of each thereof to the board or official in charge of the election of each county, city, township or district in which the machines are to be used; such samples to meet the requirements of the election to be held and to suit the construction of the machine to be used. The board or officials charged with the duty of providing ballots shall provide for each voting machine for each election the following printed matter and supplies: Suitable printed or written directions to the custodian for testing and preparing the voting machines for the election; one certificate on which the custodian can certify that he has properly tested and prepared the voting machine for the election; one certificate on which some person other than the custodian can certify that the voting machine has been examined and found to have been properly prepared for the election; one certificate on which the party representatives can certify that they have witnessed the testing and preparation of the machines; one certificate on which the deliverer of the machines can certify that he has delivered the machines to the polling places in good order; one card stating the penalty for tampering with or injuring a voting machine; two seals for sealing a voting machine; one envelope in which the keys to the voting machine can be sealed and delivered to the election officers, said envelope to have printed or written thereon the designation and location of the election district in which the machine is to be used, the number of the machine, the number shown on the protective counter thereof after the machine has been prepared for the election and the number or other designation on such seal as the machine is sealed with; said envelope to have attached to it a detachable receipt for the delivery of the keys of the voting machine to the inspector of election; one envelope in which the keys to the voting machine can be returned by the inspector of election; one card stating the name and telephone address of the custodian on the day of election; two statements of canvass on which the election officers can report the canvass of the votes as shown on the voting machine together with other necessary information relating to the election, said statements of canvass to take the place of all tally-keepers, statements and returns as provided heretofore; three complete sets of ballot labels; two diagrams; five suitable printed instructions to the inspector of election; three notices to inspectors and judges of election to attend the instruction meetings; three certificates that the inspector and judges of an

election have attended the instruction meeting, have received the necessary instruction, and are qualified to conduct the election with the machine.

The ballot labels shall be printed in black ink on clear white material of such size and arrangement as to suit the construction of the machine: Provided, however, The ballot labels for questions may contain a condensed statement of each question to be voted on, accompanied by the words "Yes" and "No"; the titles of the offices on the ballot labels shall be printed in type as large as the space for such office will reasonably permit, and where more than one candidate can be voted for an office, there shall be printed below the office title the words "vote for any two," or such number as the voter is lawfully entitled to vote for out of the whole number of candidates nominated.

If the election be one at which all the candidates for the office of presidential electors are to be voted for with one device, the county commissioners shall furnish for each machine at least five lists of the names of the presidential electors nominated and at least fifty paper ballots with which the voter can vote thereon for part of the candidates for the office of the presidential electors of one party and part of the candidates therefor of one or more other parties or for persons for that office not nominated by any party. For election districts in which voting machines are to be used no paper ballots shall be furnished for any offices to be voted for on the machine except as hereinafter provided. [L. '13, p. 182, § 7.]

§ 4910-8. Instruction to Voters Before Election.

Before each election at which voting machines are to be used the custodian shall place on public exhibition a suitable number of machines for the proper instruction of voters. Such machines shall be so arranged and so equipped with ballot labels as to best illustrate the method of voting at that election, and so far as practical shall contain the names of the offices to be filled, the names of the candidates to be voted for, together with their proper party designations, and statements of the questions to be voted on. Not more than ten nor less than three days before each election at which voting machines are to be used the board of officials charged with the duty of providing ballots shall publish in newspapers representing at least two political parties a diagram of reduced size showing the face of the voting machine after the official ballot labels are arranged thereon, together with illustrated instructions how to vote and a statement of the locations of such voting machines as shall be on public exhibition; or in lieu of such publication said board or officials may send by mail or otherwise at least three days before the elections a printed copy of same to each registered voter. [L. '13, p. 184, § 8.]

§ 4910-9. Instruction of Election Officials.

The election board of each election district in which a voting machine is used shall consist of one inspector, two judges and two clerks of election. Where more than one machine is to be used in an election district, one additional inspector shall be appointed for each additional machine. In any voting precinct or district where the number of registered voters is less than one hundred the election board may consist of one inspector, one judge and one clerk. Before each election at which voting machines are to be used,

the custodian shall instruct all inspectors and judges of election that are to serve thereat in the use of the machine and their duties in connection therewith; and he shall give to each inspector and judge that has received such instructions and is fully qualified to conduct the election with the machine a certificate to that effect. For the purpose of giving such instructions, the custodian shall call such meeting or meetings of the inspectors and judges as shall be necessary. Each inspector and judge shall attend such meeting or meetings and receive such instructions as shall be necessary for the proper conduct of the election with the machine; and, as compensation for the time spent in receiving such instruction each inspector and judge that shall qualify for and serve in the election shall receive the sum of one dollar, to be paid to him at the same time and in the same manner as compensation is paid to him for his services on election day. No inspector or judge of election shall serve in any election at which a voting machine is used unless he shall have received such instruction and is fully qualified to perform his duties in connection with the machine and has received a certificate to that effect from the custodian of the machines: Provided, however, That this shall not prevent the appointment of an inspector, or judge of election to fill a vacancy in an emergency. [L. '13, p. 185, § 9.]

§ 4910-10. Testing and Preparing Voting Machines for Election.

The county commissioners of a county, the council of a city, or other governing body of any district in which voting machines are to be used shall cause same to be properly prepared therefor; and for that purpose shall employ for such time as is necessary one or more competent persons who shall be known as the voting machine custodians, who shall be sworn to perform their duties honestly and faithfully, and for such purpose shall be considered as officers of election, and shall be paid for the time actually spent in the discharge of their duties in the same manner and amount as other election officers are paid. One custodian shall be employed for each twenty machines; if more than one be employed they shall be selected from the political parties entitled to representation on a board of election officers.

In preparing a voting machine for an election, the custodian shall, according to the printed directions furnished by the county commissioners, council or other governing body, arrange the machine and labels therefor so that it will in every particular meet the requirements for voting and counting at such election, thoroughly test same, and certify thereto to said commissioners, council, or other governing body. A voting machine may be so arranged for an election that the names of candidates nominated independently may be placed in the same party row with those nominated by a political party entitled to the use of a party voting device, provided such placing does not prevent such independently nominated candidates from being voted for individually, and provided it does not prevent or interfere with the operating of the party voting device of such party. It may also be so arranged that candidates nominated independently, or by political organizations which have nominated but one candidate, each shall be placed in the same party row and voted for individually; and in that event the party voting device of such party row shall be locked against movement, and the political designations of such candidates shall be printed upon the ballot labels in connection with their names.

Before preparing the voting machine for any election, the custodian shall give written notice to at least three of the principal political parties stating the time and place where machines will be prepared, at which time one representative of each of such political parties shall be afforded an opportunity to see that the machines are in proper condition for use in the election. Such representatives shall be sworn to faithfully perform their duties and shall be regarded as election officials, but shall not interfere with the custodians or assume any of their duties and shall serve without pay. When a machine has been so examined by such representatives, it shall be sealed with a numbered metal seal, and such representative shall certify to the number of the machine; that the public counter and all the candidate and question counters register "000"; the number registered on the protective counter, and the number or other designating mark on the seal. After being prepared for the election each machine shall be examined by some person other than the custodian preparing it and a certificate thereof filed with the county commissioners. The custodian shall cause all voting machines to be delivered to the polling places in charge of an authorized official who shall certify to their delivery in good order on the certificate furnished therefor. After such delivery the county commissioners or council shall provide proper protection therefor. The county commissioners, council, board, or officials, in charge, shall provide a lantern or proper light for every machine, which light shall be in good order and give sufficient light to enable voters while in the booth to read the ballot labels, and suitable for use by the election officers in examining the counters. [L. '13, p. 186, § 10.]

§ 4910-11. Delivery of Election Supplies and Keys.

The board of officials having charge of the elections, shall cause to be delivered to the inspector or one of the judges of election not later than forty-five minutes before the time for opening the polls the keys for the voting machine, which shall be delivered in a sealed envelope on which shall be written the designation and location of the election district, the number of the voting machine, the number or other designative mark on the seal, and the number registered on the protective counter as reported by the custodian for which a receipt shall be taken on the blank attached thereto, two diagrams, one extra set of ballot labels, one envelope containing seal for sealing the machine after the polls are closed, one envelope for the return of the keys, two statements of canvass, and all other supplies necessary for conducting the election. [L. '13, p. 188, § 11.]

§ 4910-12. Opening the Polls.

The election officers of each election district in which a voting machine is to be used shall meet at the polling place thereof at least forty-five minutes before the time set for opening the polls, and before unlocking the machine for voting shall proceed as follows: They shall see that the voting machine is placed where it can be conveniently attended by the election officers and conveniently operated by the voters, and where, unless its construction requires otherwise, the ballot labels thereon can be plainly seen by the election officers and the public when not being voted on. They shall see that the model is placed where each voter can conveniently operate it and receive instructions thereon as to the manner of voting, before entering the machine booth. They

shall post one diagram inside the polling room and one outside, in places where the voters can conveniently examine them. They shall see that the lantern or other means provided for giving light is in such condition that the voting machine is sufficiently lighted to enable voters to readily read the names on the ballot labels. They shall see that the ballot labels are in the proper places on the machine. They shall see if the number or other designating mark on the seal sealing the machine, also the number registered on the protective counter agree with the number written on the envelope containing the keys; and if same do not agree they shall at once notify the custodian and delay unlocking the machine and opening the polls until he shall have re-examined the machine. If such numbers or marks do so agree the election officers shall then proceed to see if the public counter and all the candidate and question counters register "000." If any of such counters shall be found to register some number other than "000," the judge of election shall at once notify the custodian who shall set such counter at "000." After performing their duties as provided in this section, the election officers shall certify thereto in the appropriate places on the statement of canvass as provided thereon. When the polls are declared open, the inspector or judge of election shall break the seal and unlock the machine for voting. [L. '13, p. 188, § 12.]

§ 4910-13. Conducting the Election.

Before each voter enters the voting machine [booth] each clerk shall insert in his list of voters opposite the voter's name the letter V and the number of his vote. The election officers shall, so far as possible, inform him how to operate the machine and illustrate same upon the model, and call his attention to the diagram. No voter shall remain within the voting machine booth longer than two minutes, and if he shall refuse to leave at the end of that time, he shall be removed by the election officers: Provided, however, That they may grant him a longer time if other voters are not waiting to vote. Whenever a voter who has the right to vote only on certain offices and certain questions shall enter the machine, the election officer shall so adjust same that he can vote on such office and questions, but on no others. If any voter shall, in the presence of the election officers, declare that by reason of physical disability he is unable to register or record his vote upon the machine, two election officers of opposite political parties shall enter the voting machine [booth] with him and indicate and register his vote for such candidates and for or against such questions as he shall designate. If any voter shall, after entering the voting machine [booth], ask for information regarding its operation, the election officers shall give him such necessary information. Any election officer who shall deceive any voter in registering or recording his vote under this section, or who shall register or record such vote in any other way than as designated by such voter, or who shall give information to any person as to what candidates or for or against what questions such voters voted, or who shall seek to suggest or persuade any voter to vote for any party, or for any candidate, or for or against any question shall be guilty of a felony and shall be punished by being fined not less than fifty dollars nor more than five hundred dollars or imprisoned in a state prison for not less than six months or more than one year or by both such fine and imprisonment. Except as herein provided for in cases of physically disabled voters, the operation of voting shall be secret. The election officers shall occasionally examine the face of

the machine and the ballot labels to determine if same have been injured or tampered with. No voter shall be permitted to enter the machine booth or move the operating lever more than once.

In case any voting machine used in any election district shall, during or before the time the polls are opened, become injured so as to render it inoperative in whole or in part, it shall be the duty of the judge immediately to give notice thereof to the officials charged with the care of the machine, and it shall be the duty of said official, if possible, to repair the machine at once, or to substitute another machine for the injured machine; and, at the close of the polls, if a machine has been so substituted the records of both machines shall be taken and the votes shown on their corresponding counters shall be added together in ascertaining the result of the election. If no other machine can be procured for use at such election, and the injured machine cannot be repaired in time for further use at such election the officers of said election may permit the use of unofficial paper ballots by the voters, which ballots may be received by the election officers, and placed by them in a receptacle, to be provided therefor and counted with the votes registered on the voting machine, and the result declared the same as though there had been no accident to the voting machine; any marking of such unofficial ballots by the voters which shall clearly indicate their intentions shall be deemed a proper and sufficient method of marking such ballots; the unofficial ballots thus voted shall be preserved and returned to the county commissioners, city council or other governing body, with a certificate or statement setting forth how and why the same came to be voted. For this purpose the printed diagram of reduced size referred to in section 4910-8, may be used if such can be procured. [L. '13, p. 189, § 13.]

§ 4910-14. Canvassing the Vote.

At the hour for closing the polls, the judge of election shall declare the polls of the election closed and shall not permit any further operation of the machine except provided as follows, namely: That such voters as shall at the hour of closing be within the polling-room and awaiting their turn to vote shall be considered as having begun the act of voting and shall be permitted to cast their votes upon the machine. As soon as such voters have voted, the election officers shall lock and seal the machine, unlock and open the doors of the counter compartment, and canvass the votes registered on the counters therein and the votes recorded on or in the device or devices for voting for persons not nominated and shall make two statements of canvass thereof in the following manner: One election officer shall call the designating number and letter of each candidate's counter in the order given on the statement of canvass, and another election officer under the scrutiny of one of a different political party shall repeat such number and letter as it is read, and announce the vote registered on such counter, which shall thereupon be entered in ink on each of the statements of canvass. The canvass of each office shall be completed before proceeding to the next. The vote on each question shall be canvassed in the same manner. The votes cast on the irregular ballots shall then be canvassed. All votes for persons whose names do not appear on the ballot labels must be cast in the proper places on or in the device for irregular ballots; and all votes for persons whose names do appear upon the ballot labels must be cast on the counters therefor, and any votes not so cast

shall not be counted: Provided, however, That all elections at which presidential electors are voted for with one device, the voter may vote on or in the device for irregular ballots in part for the presidential electors of one party and in part for those of one or more other parties, or in part or in whole for persons not nominated by any party. After completing and writing down the canvass of the votes cast, the election officers shall verify the same by comparing the figures on the statements of canvass with the figures on the counters in the machine and the names recorded on or in the device for voting for persons not nominated, and shall then certify, in the appropriate place on each of these statements of canvass, as to the number of voters that voted at the election as shown by the poll list and by the number registered on the public counter; the number registered on the protective counter and the number of other designating marks on the seal with which the machine has been sealed. After completing and certifying to the statements of canvass, the inspector or a judge shall read therefrom in a distinct voice the name of each candidate, the designating number and letter of his counter as stated thereon, and the vote entered for each; also the vote for and against each question. During the canvassing and announcing of the vote, the counter compartment shall remain open, and opportunity shall be given any person lawfully present to examine the counters to determine the correctness of the vote as announced. The counter compartment shall then be locked and all the keys of the machine shall be delivered in a sealed envelope to the officers or board in charge of the election. One copy of the statement of canvass shall be delivered forthwith in a sealed envelope to the office of the county auditor, city comptroller, city clerk, or other governing body, and if the election be one at which state or county officers are voted for, one copy of the returns shall be delivered in a sealed envelope to the county clerk. [L. '13, p. 191, § 14.]

§ 4910-15. Provisions for Recanvass of Vote.

The registering mechanism of each voting machine used in any election shall remain locked and sealed against operation for a period of thirty days following such election: Provided, however, That whenever it shall appear that there is a discrepancy in the returns of any election district, the county commissioners, council, board or other governing body shall summon the inspector and judges of election thereof, who shall in their presence make a record of the number or other designating mark on the seal, and the number on the protective counter, open the counter compartment, and, without unlocking said machine against voting, shall recanvass the vote cast thereon. Before making such recanvass the county commissioners, council or board, shall give notice in writing to the custodian and to each political party or organization that shall have nominated candidates for the election, of the time and place where said recanvass is to be made; and each of such political parties or organizations may send two representatives to be present at such recanvass. If, upon such recanvass, it should be found that the original canvass of the returns has been correctly made from the machine, and that the discrepancy still remains unaccounted for, the county commissioners, council, board or other governing body, with the assistance of the custodian, shall in the presence of the said inspector and judges of election and the authorized representatives of the several political parties or organizations, unlock the voting

and counting mechanism of said machine and proceed to thoroughly examine and test the machine to determine and reveal the true cause or causes, if any, of the discrepancy in the returns from said machine. Before being tested the counters shall be set at "000," after which each counter shall be operated at least one hundred times. After the completion of said examination and test, the custodian shall then and there prepare a statement in writing giving in detail the result thereof, and said statement shall be witnessed by the persons present and shall be filed with the officer or board in charge of the election. [L. '13, p. 193, § 15.]

§ 4910-16. Penalty for Injuring or Tampering With a Voting Machine.

Any person who shall tamper with or injure or attempt to injure any voting machine to be used or being used in an election, or who shall prevent or attempt to prevent the correct operation of such machine, or any unauthorized person who shall make or have in his possession a key to a voting machine to be used or being used in an election, shall be guilty of a felony and shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars or imprisonment in the state prison for not less than one year or more than five years, or both such fine and imprisonment. [L. '13, p. 194, § 16.]

§ 4910-17. Joint Purchase and Use of Machine.

In purchasing the necessary voting machines to be used at general, primary or other elections, as herein provided, the board of county commissioners of the several counties, and the legislative bodies of the incorporated cities, towns or districts therein, may by agreement entered into by said board of county commissioners and the legislative body of any incorporated city, town or district in such county, provide for the joint purchase and subsequent ownership thereof, and for the care, maintenance and use of the same. [L. '13, p. 194, § 17.]

§ 4910-18. Primary and Election Laws Made Applicable to Use of Voting Machines.

All the provisions of the primary and election laws and of any city charter or ordinance not inconsistent with this act shall apply to all elections in districts or precincts where voting machines are used; and any provisions of law or of any city charter or ordinance which conflict with the use of such machines as herein set forth, shall not apply to the districts or precincts in which voting machines are used; and all acts or parts of acts or city charters or ordinances in conflict with any of the provisions of this act, shall be of no force or effect in election districts or precincts where voting machines are used. [L. '13, p. 194, § 18.]

CHAPTER VIII.

OPENING POLLS AND VOTING.

§ 4911.

Where it does not appear that a fair election has been prevented, an election is not invalidated by reason of the failure of the election officers to observe or com-

ply with the statutory requirements that a certain number of election officers be selected and qualified in a specified manner, that they be present at all times, that they take an oath of office, or that the

polls be opened on time and kept open during the time prescribed by law, since the provisions are directory merely: *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476.

As to the validity of ballot cast at election after time for closing polls, see note in *Ann. Cas.* 1913B, 166.

CHAPTER IX-A.

THE RECALL.

§ 4940-1. Charges—How Formed.

Whenever any legal voter or committee or organization of legal voters of the state or of any political subdivision thereof shall desire to demand the recall and discharge of any elective public officer of the state or of such political subdivision, as the case may be, under the provisions of sections 33 and 34 of article 1 of the constitution, he or they shall prepare a typewritten charge, reciting that such officer, naming him and giving the title of his office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated his oath of office, or has been guilty of any two or more of the acts specified in the constitution as grounds for recall, which charge shall state the act or acts complained of in concise language, without unnecessary repetition, and shall be signed by the person or persons making the same, give their respective postoffice addresses, and be verified under oath that he or they believe the charge or charges to be true. [L. '13, p. 454, § 1.]

§ 4940-2. Charges Where Filed.

In case the officer whose recall is to be demanded be a state officer, the person making the charge shall file the same with the secretary of state. In case the officer whose recall is to be demanded be a county officer, the person or persons making the charge shall file the same with the county auditor. In case the officer whose recall is to be demanded be an officer of an incorporated city or town, the persons making the charge shall file the same with the clerk of said city or town. In case the officer whose recall is to be demanded is an officer of any other political subdivision of the state, the persons making the charge shall file the same with the officer whose duty it is to receive and file petitions for nomination of candidates for the office concerning the incumbent of which the recall is to be demanded. [L. '13, p. 454, § 2.]

§ 4940-3. Ballot Synopsis of Charges.

If the acts complained of in the charge are acts of malfeasance or misfeasance while in office, or a violation of the oath of office, as specified in the constitution, the officer with whom the charge is filed shall formulate a ballot synopsis of such charge of not to exceed two hundred words, which shall set forth the name of the person charged, the title of his office, and a concise statement of the elements of the charge, and shall notify the persons filing the charge of the exact language of such ballot synopsis, and attach a copy thereof to and file the same with the charge, and thereafter such charge shall be designated on all petitions, ballots and other proceedings in relation thereto by such synopsis. [L. '13, p. 455, § 3.]

§ 4940-4. Form of Petition.

Upon being notified of the language of the ballot synopsis of the charge, the persons filing the charge shall cause to be printed on single sheets of white

paper of good quality twelve inches in width by fourteen inches in length and with a margin of one and three-fourths inches at the top for binding, blank petitions for the recall and discharge of such officer. Such petitions shall be substantially in the following form:

WARNING.

Every person who shall sign this petition with any other than his true name, or who shall knowingly sign more than one of these petitions, or who shall sign this petition when he is not a legal voter, or who shall make herein any false statement, shall be fined, or imprisoned, or both.

Petition for the Recall of (here insert the name of the office and of the person whose recall is petitioned for) to the Honorable (here insert the name and title of the officer with whom the charge is filed).

We the undersigned citizens of (the State of Washington or the political subdivision in which the recall is invoked, as the case may be) and legal voters of the respective precincts set opposite our respective names, respectfully direct that a special election be called to determine whether or not (here insert the name of the person charged and the office which he holds) be recalled and discharged from his office, for and on account of (his having committed the act or acts of malfeasance or misfeasance while in office, or having violated his oath of office, as the case may be), in the following particulars: (here insert the synopsis of the charge); and each of us for himself says: I have personally signed this petition; I am a legal voter of the State of Washington in the precinct and city (or town) and county written after my name, and my residence address is correctly stated.

Petitioner's signature	Residence address, Street and num- ber if any	Precinct name or number	Ward number	City or town	County
---------------------------	---	-------------------------------	----------------	--------------------	--------

(Here follow 20 numbered lines divided into columns as below).

1.	.....	.....	.....	.....	.....
2.	.....	.....	.....	.....	.....
3.	.....	.....	.....	.....	.....
etc.					

I, the undersigned, hereby certify that I am the officer of the city (town or precinct) of —, county of —, State of Washington, having the custody of the registration books containing the signatures, addresses and precincts of the registered legal voters of said city (town or precinct); that I have carefully compared the signatures on the foregoing petitions with said registration books, and the signatures on the petitions opposite which I have written my initials are the signatures of legal voters of the State of Washington, and of the political subdivision from which said officer sought to be recalled was elected.

Dated the — day of —, 19—.

(Seal)

_____,
of the city (town or precinct) of _____.
By _____, Deputy.

[L. '13, p. 455, § 4.]

§ 4940-5. Certificate of Precinct Officers.

Blank petitions for circulation in precincts where registration of voters is not required shall bear certificates in lieu of those contained in the foregoing form, which shall be signed by a justice of the peace, road supervisor, member of a school board or a postmaster, to the effect that he resides in the precinct, (naming it) and is acquainted with the legal voters thereof, and that he believes the signatures opposite which he has written his initials are the signatures of legal voters of such precinct. [L. '13, p. 456, § 5.]

§ 4940-6. Size of Petition.

Each such recall petition for circulation and signing shall at the time of signing, certifying and filing with the officer with whom the charge is filed, as hereinafter in this act provided, consist of not more than five sheets with numbered lines for not more than twenty signatures on each sheet, with the prescribed warning, title and form of petition on each sheet, but with the prescribed form of certificate only on the last sheet, and a full, true and correct copy of the charge against such officer referred to therein, printed on sheets of paper of like size and quality as the petition and firmly fastened together. [L. '13, p. 457, § 6.]

§ 4940-7. Petitions Checked—Omission.

Every recall petition, before it is filed with the officer with whom the charge is filed as hereinafter provided, shall be filed with the officer having custody of the registration books containing the signatures, addresses, and precincts of the registered voters of the city, town or precinct, as the case may be, where the persons who have signed such petition claim to be legal voters. Upon the filing of any such petition it shall be the duty of such officer to forthwith compare or cause a deputy to compare the signatures, addresses and precinct numbers on such petition with said registration books. The officer or deputy making the comparison shall place his initials in ink opposite the signatures of those persons who are shown by the registration books to be legal voters, and shall certify upon the last signature sheet of such petition that the signatures so initialed are the signatures of legal voters of the state of Washington and of the political subdivision affected by such recall petition, and shall sign such certificate and attach thereto the seal of the registration officer, if such officer have a seal, and return such petition to the person filing the same upon demand. The omission to fill any blank shall not prevent the initialing or certification of any name, if sufficient information is given to enable the officer, by a comparison of the signatures, to identify the voter. Every such petition bearing the signatures of persons residing in precincts where registration of voters is not required, before it is filed with the secretary of state, shall be submitted to and initialed and certified by a justice of the peace, road supervisor, member of a school board or a postmaster residing in such precinct in the form provided in section 4940-2. It shall be the duty of such justice of the peace, road supervisor or member of a school board to examine, and initial and certify the signatures of legal voters on any such petition upon demand. [L. '13, p. 457, § 7.]

§ 4940-8. Names Necessary—Contributions—Expenditures.

When a person, committee or organization demanding the recall of any public officer shall have secured upon such recall petition the signatures of

a number of legal voters equal to twenty-five per cent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election, in case such officer be a state officer, an officer of a city of the first class, a member of a school board in a city of the first class, or a county officer of a county of the first, second or third class; or the signatures of a number of legal voters equal to thirty-five per cent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election, if the officer whose recall is demanded is an officer of any other political subdivision, city, town, township, precinct or school district than those hereinbefore mentioned, or is a state senator or representative, he or they may submit said petition to the officer with whom the charge is filed for filing in his office. At the time of submitting such petition the person, committee or organization submitting the same shall file with the officer to whom such petition is submitted a full, true and detailed statement, giving the names and postoffice addresses of all persons, corporations and organizations who have contributed or aided in the preparation of the charge and in the preparation, circulation and filing of the petition, with the amount contributed by each, and a full, true and detailed statement of all expenditures, giving the amounts expended, the purpose for which expended and the names and postoffice addresses of the persons and corporations to whom paid, which statement shall be verified by the affidavit of the person or some member of the committee or organization making the charge, and until such statement is filed the officer shall refuse to receive such petition. [L. '13, p. 458, § 8.]

§ 4940-9. Canvassing Petition—Election.

Upon the filing of such petition in his office, the officer with whom the charge was filed shall stamp on each of said petitions the date of filing, and shall notify the persons filing the same and the officer whose recall is demanded by said petition of the date when said petitions will be canvassed, which date shall be not less than five or more than ten days from the date of filing, and shall, at the time set for said canvass, in the presence of at least one person representing the petitioners and in the presence of the person charged, or some one representing him, if either should desire to be present, detach the sheets containing the signatures and certificates from the copies of the charge, and cause them to be firmly attached to one or more copies of the charge in such volumes as will be most convenient for canvassing and filing, and shall proceed to canvass and count the names of certified legal voters on such petitions. If he shall find the same person has signed more than one petition, he shall reject all signatures of such person from the count. If at the conclusion of the canvass and count, it shall be found that such petition bears the requisite number of signatures of certified legal voters, the officer with whom the petition is filed shall fix a date not less than ten or more than fifteen days after the conclusion of the canvass, for calling a special election to determine whether or not the officer charged shall be recalled and discharged from his office, and shall on said date call such special election, to be held not less than thirty nor more than forty days from the date of the call, and give notice thereof in the manner required by law for calling special elections in the state or in the political subdivision,

as the case may be. But if it be found that the petition does not contain the requisite number of signatures of certified legal voters, the officer shall so notify the persons filing the petition, and at the expiration of thirty days from the conclusion of the count shall, unless prevented therefrom by the injunction or mandate of the courts as hereinafter provided, destroy the petitions. [L. '13, p. 459, § 9.]

§ 4940-10. Illegal Signatures.

The officer making the canvass as hereinabove provided shall keep a record of all names appearing on said petitions which are not certified to be legal voters of the state or of the political subdivision, as the case may be, and of all names appearing more than once on said petition, and shall report the same to the prosecuting attorneys of the respective counties where such names appear to have been signed, to the end that prosecutions may be had for violation of this act. [L. '13, p. 460, § 10.]

§ 4940-11. Conduct of Elections—Form of Ballot.

The special election to be called as hereinabove provided shall be carried on and conducted in the same manner as general state, county, municipal or other political subdivision elections, as the case may be, are conducted and carried on, and it shall be the duty of all officers of the state, county, municipality or other political subdivisions to provide for the holding of such election and the necessary places and officers, ballot-boxes, ballots, poll-books and returns as are required by law for holding general elections. The ballots at any such election shall contain a full, true and correct copy of the ballot synopsis of the charge hereinabove provided for, and shall be so arranged that any voter can, by making one cross (X) express his desire to have the officer charged recalled or discharged from his office, or retained therein. Substantially the following form shall be a compliance with the provisions of this section:

RECALL BALLOT.

(Here insert the ballot synopsis of the charge).

FOR the recall of (here insert the name of the officer) ☐

AGAINST the recall of (here insert the name of the officer) ☐

[L. '13, p. 460, § 11.]

§ 4940-12. Returns—Canvass.

The election officers in the various precincts shall count the ballots and make returns thereon to the officer of the county, municipality or other political subdivision, as required by law for making returns of general elections: Provided, That in case the officer whose recall is demanded is the officer to whom, under the law, returns of elections are made, such returns shall be made to the officer with whom the charge is filed, and who called the special election; and in case of an election for the recall of a state officer, the county canvassing boards of the various counties shall canvass and return the result of such election to the officer calling such special election. [L. '13, p. 461, § 12.]

§ 4940-13. Results Published—Office Declared Vacant.

Upon the completion of the returns of any such election to the proper officer, he shall cause to be published in the manner required by law for the publication of the results of general elections, the result of such election, and a majority of all votes cast at such recall election be for the recall of the officer charged, such officer shall thereupon be recalled and discharged from his office, and the office shall thereupon become and be vacant; and such vacancy shall be filled in the manner provided by the constitution and the laws of the state of Washington, or the charter and ordinances of the municipality, as the case may be. [L. '13, p. 461, § 13.]

§ 4940-14. Mandamus—Procedure.

The superior court of the county constituting or containing any political subdivision of the state in which the recall is invoked as in this act provided shall have original jurisdiction to compel the performance of any act required of any officer of such political subdivision under the provisions of this act, in case such officer refuse to perform the same, or to prevent the performance by any such officer of any act in relation to the recall not in compliance with the provisions of this act; and the supreme court shall have like original jurisdiction in relation to state officers and revisory jurisdiction over the decisions of the superior courts: Provided, That any proceeding to compel or prevent the performance of any such act shall be begun within ten days from the time the cause of complaint arises, and shall be considered an emergency matter of public concern and take precedence over other cases, and be speedily heard and determined; and any proceeding to review a decision of any superior court shall be begun and perfected within fifteen days after such decision, and shall be by the supreme court considered an emergency matter of public concern, and speedily heard and determined. [L. '13, p. 461, § 14.]

§ 4940-15. False Signing.

Every person who shall sign any recall petition provided for in this act with any other than his true name, shall be guilty of a felony; and every person who shall knowingly sign more than one of such petitions for the recall of any officer, or who shall sign any such petition when he is not a legal voter, or who shall make on any such petition any false statement as to his place of residence, and every registration officer who shall make any false report or certificate on any such petition shall be guilty of a gross misdemeanor. [L. '13, p. 462, § 15.]

§ 4940-16. Corrupt Practices—Professional Recallers.

Every officer who shall willfully violate any of the provisions of this act, for the violation of which no penalty is herein prescribed, or who shall willfully fail to comply with the provisions of this act; and every person who shall for any consideration, compensation, gratuity, reward or thing of value or promise thereof sign or decline to sign any recall petition, or who shall advertise in any newspaper, magazine or other periodical publication or in any book, pamphlet, circular or letter or by means of any sign, signboard, bill, poster, handbill or card or in any manner whatsoever, that he will either for or without compensation or consideration circulate, or solicit, procure or

obtain signatures upon, or influence or induce or attempt to influence or induce persons to sign or not to sign any recall petition or vote for or against any recall; or who shall for pay or any consideration, compensation, gratuity, reward or thing of value or promise thereof circulate, or solicit, procure or obtain or attempt to procure or obtain signatures upon any recall petition; or who shall pay or offer or promise to pay, or give or offer or promise to give any consideration, compensation, gratuity, reward or thing of value to any person to induce him to sign or not to sign, or to circulate or solicit, procure or attempt to procure or obtain signatures upon any recall petition, or to vote for or against any recall; or who shall by any other corrupt means or practice or by threats or intimidation interfere with or attempt to interfere with the right of any legal voter to sign or not to sign any recall petition or to vote for or against any recall; or who shall receive, accept, handle, distribute, pay out or give away either directly or indirectly any money, consideration, compensation, gratuity, reward or thing of value contributed by or received from any person, firm, association or corporation having his, their or its residence or principal office outside of the state of Washington, or corporation the majority of whose stockholders are nonresidents of the state of Washington, for any service, work or assistance of any kind done or rendered for the purpose of aiding in procuring signatures upon any recall petition or the adoption or rejection of any recall, shall be guilty of a gross misdemeanor. [L. '13, p. 462, § 16.]

CHAPTER X.

CONTESTING ELECTIONS.

§ 4941.

A citizen and elector has the inherent right to maintain an action questioning the eligibility of a candidate for election to a public office: State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 Pac. 954.

As to right of private person to enforce by mandamus public right or duty relating to elections, see note in 11 Ann. Cas. 419.

Where no notice of a special election to fill a vacancy was given, as contemplated by statute, and a candidacy therefor was kept secret, thirteen votes by stickers, out of a total of thirty-two thousand electors voting for other officers at the general election, held at the same time, is not such an expression of the popular will as to amount to an election to such office, or such as would dispense with the necessity of giving notice of the special election for that office: State ex rel. Sampson v. Superior Court, 71 Wash. 484, 128 Pac. 1054.

§ 4942.

Under this section, a contest of a primary election cannot prevail by reason of the fact that in one election precinct the polls were not kept open the full time and several electors were wrongfully excluded, one of whom

would have voted for the contestant, or that one irregular vote was received by the contestee, where, making due allowance for such votes, the contestee still received the highest number of votes, and there was no showing of fraud or intentional wrong or that the irregularities influenced the final result; nor should the votes of the precinct be thrown out because the polls were closed for the noon hour without any guard over the ballot-boxes, in the absence of a showing that any harm resulted: Hill v. Howell, 70 Wash. 603, 127 Pac. 211.

As to effect upon election of irregularity in opening or closing polls, see note in 90 Am. St. Rep. 78.

§ 4945.

This section has no application to an action in equity to enjoin the canvass of returns of an illegal city election for the annexation of territory: Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386.

As to power of court of equity to issue injunction against election, see note in Ann. Cas. 1912A, 723. Also note in 9 Ann. Cas. 123.

§ 4946.

Under this section and section 4949, requiring the judge to fix a date for hear-

ing and to give a notice thereof not less than ten nor more than twenty days from the date of the notice, the proceedings are timely and regular where the canvass was made November 23d, the contest filed November 25th, and the order made December 9th fixing December 22d as the date of hearing: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

§ 4947.

In an election contest, the vote of an elector wrongfully excluded must be counted for the candidate for whom he testifies he would have voted, but can be counted for neither candidate when it is not shown how the elector would have voted: *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211.

In an election contest, votes shown to have been cast for a candidate by electors who could not read or write the English language must be deducted from the number of votes cast for such candidate: *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211.

Electors who can read the English language sufficiently to read the names of the different candidates and mark them without extrinsic aid are qualified electors, although they are unable to read English fluently or understandingly: *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211.

In an election contest, evidence that an unqualified voter had stated to the witness that she had voted for a certain candidate is inadmissible as hearsay: *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211.

§ 4949.

See notes to § 4946.

The statute not requiring the court to give a notice and fix a date for hearing an election contest on the day the contest is filed, a delay from November 23d to December 9th in so doing does not deprive the court of jurisdiction: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

This section, requiring the issuance of a citation to defendant in an election contest to appear on a day fixed by the court,

is not mandatory in the sense of requiring an order on the day the contest is filed or within any specified time thereafter, and a futile attempt to fix a day for the hearing, without the issuance of jurisdictional process, does not affect the jurisdiction of the court to fix another day and cause a citation to issue thereon: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

As to equity jurisdiction of election contests, see note in *Ann. Cas.* 1912C, 691.

Under this section and section 4950, providing that the clerk shall also at the time issue a citation to the defendant to appear at the time and place specified in said notice, and providing the manner of service of the citation, the judge may cause notice to be given by the issuance of the citation: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

This section does not require the fixing of a date within twenty days from the date of filing of the contest: *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

As to notice to contestee in election contests, see note in 12 L. R. A. 705.

§ 4950.

See notes to § 4949.

§ 4956.

Under this section, providing for an appeal to the supreme court from a judgment in an election contest, "as in other cases," the appeal does not supersede the judgment unless a supersedeas bond is given as in other cases; section 4957, declaring that the certificate of election shall be rendered null and void by a judgment canceling the same where no appeal is taken within ten days, merely makes the judgment a finality within that time if no appeal is taken, and does not give the appeal the effect of superseding the judgment without bond: *State ex rel. Davis v. Superior Court*, 62 Wash. 166, 113 Pac. 277.

§ 4957.

See notes to § 4956.

CHAPTER XI.

OFFENSES AGAINST THE SUFFRAGE.

§ 4958. Fraudulent Voting.

If any person shall vote, or attempt to vote more than once at any election, or shall knowingly hand in two or more tickets together, or, having voted in one township, precinct, ward, or county, shall afterward, on the same day, vote, or attempt to vote, in another township, precinct, ward, or county, such person shall be guilty of a gross misdemeanor and shall be incapable of voting at any election or holding any office for two years thereafter. [L. '11, p. 394, § 1.]

§ 4959. Disqualified Persons Voting.

If any person, knowing that he does not possess the legal qualifications of a voter, at any election authorized by law to be held in this state for any office whatever, shall vote at such election, such person shall be guilty of a felony. [L. '11, p. 394, § 1.]

§ 4960. Collusion of Election Officers.

If any inspector or judge of any such election shall knowingly permit any elector to cast a second vote at any such election, or shall knowingly permit any person not a qualified elector to vote at any such election, such inspector or judge of election shall be guilty of a felony and be incapable of holding any office in this state for five years thereafter. [L. '11, p. 394, § 1.]

§ 4961. Officers Attempting to Influence Voter.

If any inspector, judge, or clerk of an election shall attempt to induce, by persuasion, menace, or reward, or promise thereof, any elector to vote for any person, such inspector, judge, or clerk shall be guilty of a gross misdemeanor. [L. '11, p. 394, § 1.]

§ 4962. Tampering With Ballot by Officer.

If any judge, inspector, clerk, or any other officer of an election shall open or mark, by folding or otherwise, any ticket presented by such elector at such election, or attempt to find out the names thereon, or suffer the same to be done by any other person, before such ticket is deposited in the ballot-box, such judge, inspector, or clerk shall be guilty of a gross misdemeanor. [L. '11, p. 394, § 1.]

§ 4963. Intimidating or Bribing Voter.

If any person shall use menace, force, threat or corrupt means at or previous to any election held pursuant to the laws of the state toward any elector to hinder or deter such elector from voting at said election, or shall directly or indirectly offer any bribe or reward of any kind to induce any elector to vote for or against any person, or proposition, or shall authorize any person so to do, such person shall be guilty of a felony. [L. '11, p. 394, § 1.]

§ 4967. Nonfeasance or Malfeasance of Election Officers.

Every person charged with the performance of any duty under the provisions of any law of this state relating to elections, or to any September primary or any other primary election held pursuant to law or the provisions of any charter or ordinance of any town or city of this state, who willfully neglects or refuses to perform such duty, or who, in the performance of such duty, or in his official capacity, knowingly or fraudulently violates any of the provisions of law relating to such duty, shall be guilty of a felony. [L. '11, p. 394, § 1.]

This section, being an early general criminal statute not a part of any election act, is general in its application, and applies to the September primary election for the nomination of candidates, under

the act of 1909, subsequently enacted; hence such officers may be prosecuted for malfeasance under this section: State v. Robinson, 69 Wash. 172, 124 Pac. 379.

CHAPTER XII.

INITIATIVE AND REFERENDUM.

§ 4971-1. Proposals—Name and Address of Submitters.

That whenever any legal voter or committee or organization of legal voters of the state shall desire to propose any measure to be submitted to the legislature, or to the people upon initiative petition, or shall desire to order by petition the referendum of any act, bill or law, or any part thereof, passed by the legislature, he or they shall file in the office of the secretary of state five printed or typewritten copies of the proposed measure or of the act or part thereof on which a referendum is desired, accompanied by the name and postoffice address of the person, committee or organization proposing the same, and the affidavit of such person, or the affidavit of some member of such committee or organization that such person is, or the members of such committee or organization, are legal voters. Measures to be submitted upon initiative petition shall be filed within ten months prior to the election or the session of the legislature at which they are to be submitted. The secretary of state shall give to each such measure a serial number, using a separate series for initiative and referendum measures, respectively, and forthwith transmit to the attorney general a copy of such measure bearing its serial number, and thereafter, such measure shall be known and designated in all petitions, ballots and proceedings as "Initiative Measure No. —," or "Referendum Measure No. —," as the case may be. [L. '13, p. 418, § 1.]

§ 4971-2. Form of Ballot Title.

Within ten days after the receipt of any such measure the attorney general shall formulate therefor and transmit to the secretary of state a ballot title of not to exceed one hundred words, bearing the serial number of such measure, which ballot title may be distinct from the legislative title of such measure, and shall express, and give a true and impartial statement of the purpose of such measure, and shall not be intentionally an argument, or likely to create prejudice, either for or against the measure. Such ballot title formulated by the attorney general shall be the ballot title of such measure unless changed on appeal as hereinafter provided. [L. '13, p. 418, § 2.]

§ 4971-3. Appeal—Court to Fix Title.

Upon the filing of such ballot title in his office, the secretary of state shall forthwith notify the persons proposing the measure by telegraph and by mail of the exact language thereof. In case such persons are dissatisfied with said ballot title they may at any time within ten days from the filing thereof in the office of the secretary of state appeal from the decision of the attorney general to the superior court of Thurston county by petition setting forth the measure, the title formulated by the attorney general and their objections thereto, and praying for amendment thereof. A copy of said petition, together with a notice that an appeal has been taken shall be served upon the secretary of state and upon the attorney general. Upon the filing of such petition on appeal the court shall forthwith, or at such time to which the hearing may be adjourned by consent of the appellants, examine the proposed measure, the title prepared by the attorney general and the objections

thereto and may hear argument thereon, and shall as soon as possible render its decision and certify to and file with the secretary of state such ballot title as it shall determine will meet the requirements of this act. The decision of the superior court shall be final, and the title so certified shall be the established ballot title. Such appeal shall be heard without costs to either party. [L. '13, p. 419, § 3.]

§ 4971-4. Title Mailed to Proposers.

When the ballot title shall have been finally established, the secretary of state shall file the instrument establishing it with the proposed measure and transmit a copy thereof by mail to the persons proposing the measure. Thereafter such ballot title shall be the title of the measure in all petitions, ballots and other proceedings, if any, in relation thereto. Upon the ballot title being established, the persons proposing the measure may prepare and cause to be printed upon single sheets of white paper of good quality twelve inches in width and fourteen inches in length, with a margin of one and three-quarters inches at the top for binding, blank petitions for proposing measures for submission to the legislature or to the people, or for ordering legislative enactments to be referred to the people, as the case may be. [L. '13, p. 419, § 4.]

§ 4971-5. Petitions to Legislature—Form.

Petitions for proposing measures for submission to the legislature at its next regular session, to be filed with the secretary of state not less than ten days before such regular session, shall be substantially in the following form:

WARNING.

Every person who shall sign this petition with any other than his true name, or who shall knowingly sign more than one of these petitions, or who shall sign this petition when he is not a legal voter, or who shall make herein any false statement, shall be punished by fine or imprisonment or both.

INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE.

To the Honorable —, Secretary of State of the State of Washington:

We, the undersigned citizens of the State of Washington and legal voters of the respective precincts set opposite our names, respectfully direct that this petition and that certain proposed measure known as Initiative Measure No. —, and entitled (here set forth the established ballot title of the measure), a full, true and correct copy of which is hereto attached, shall be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we hereby respectfully petition the legislature to enact said proposed measure into law; and each of us for himself says: I have personally signed this petition; I am a legal voter of the State of Washington in the precinct, city (or town), and county written after my name, and my residence address is correctly stated.

Petitioner's signature	Residence address. Street and num- ber, if any	Precinct name or number	Ward number	City or town	County
---------------------------	--	-------------------------------	----------------	--------------------	--------

(Here follow 20 numbered lines divided into columns as below).

1.	.....	.....	.....	.....	.....
2.	.....	.....	.....	.....	.....
3.	.....	.....	.....	.....	.....
etc.					

I, the undersigned, hereby certify that I am the officer of the city (town or precinct) of — county of —, State of Washington, having the custody of the registration books containing the signatures, addresses and precincts of the registered legal voters of said city (town or precinct); that I have carefully compared the signatures on the foregoing petitions with said registration books, and the signatures on the petitions opposite which I have written my initials are the signatures of legal voters of the State of Washington.

Dated, this — day of —, 19—.

(Seal)

_____ of the city (town or precinct) of _____.
By _____, Deputy.

[L. '13, p. 420, § 5.]

§ 4971-6. Petitions to People—Form.

Petitions for proposing measures for submission to the people for their approval or rejection at the next ensuing general election, to be filed with the secretary of state not less than four months before such general election, shall be substantially in the following form:

WARNING.

(Same form as in section 4971-5.)

INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE.

To the Honorable —, Secretary of State of the State of Washington:

We, the undersigned citizens of the State of Washington and legal voters of the respective precincts set opposite our names, respectfully direct that that certain proposed measure known as Initiative Measure No. —, entitled (here insert the established ballot title of the measure), a full, true and correct copy of which is hereto attached shall be submitted to the legal voters of the State of Washington for their approval or rejection at the general election to be held on the — day of —, A. D. 19—; and each of us for himself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the precinct, city (or town), and county written after my name, and my residence address is correctly stated.

(Followed by the same form of blanks and certificate as in section 4971-5.) [L. '13, p. 421, § 6.]

§ 4971-7. Petitions to Refer—Form.

Petitions ordering that bills or parts of bills passed by the legislature be referred to the people at the next ensuing general election, or special election ordered by the legislature, to be filed with the secretary of state within

ninety days after the final adjournment of the session of the legislature at which such bill was passed, shall be substantially in the following form:

WARNING.

(Same form as in section 4971-5.)

PETITION FOR REFERENDUM.

To the Honorable —, Secretary of State of the State of Washington:

We, the undersigned citizens of the State of Washington and legal voters of the respective precincts set opposite our names, respectfully order and direct that Referendum Measure No. —, entitled (here insert the established ballot title of the measure) being a (or part or parts of a) bill passed by the —th legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the — day of —, A. D. 19—; and each of us for himself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the precinct, city (or town), and county written after my name, and my residence address is correctly stated.

(Followed by the same form of blanks and certificate as in section 4971-5.) [L. '13, p. 422, § 7.]

§ 4971-8. Signatures—Certificate.

Blank petitions for circulation in precincts where registration of voters is not required shall bear certificates, in lieu of those contained in the foregoing forms, to be signed by a justice of the peace, road supervisor, member of a school board or a postmaster, to the effect that he resides in the precinct, naming it, and is acquainted with the legal voters thereof and that he believes the signatures opposite which he has written his initials are the signatures of legal voters of such precinct. [L. '13, p. 422, § 8.]

§ 4971-9. Size of Petitions.

Each initiative or referendum petition for circulation and signing shall at the time of signing, certifying and filing with the secretary of state, as hereinafter in this act provided, consist of not more than five sheets with numbered lines for not more than twenty signatures on each sheet, with the prescribed warning, title and form of petition on each sheet, but with the prescribed form of certificate only on the last sheet, and a full, true and correct copy of the proposed measure referred to therein printed on sheets of paper of like size and quality as the petition, firmly fastened together. [L. '13, p. 423, § 9.]

§ 4971-10. Check of Petitions—Certificate.

Every initiative and referendum petition, before it is filed with the secretary of state as hereinafter provided, shall be filed with the officer having custody of the registration books containing the signatures, addresses and precincts of the registered voters of the city, town or precinct, as the case may be, where the persons who have signed such petition claim to be legal voters. Upon the filing of any such petition it shall be the duty of such officer to forthwith compare or cause a deputy to compare the signatures, addresses and

precinct numbers on such petition with said registration books. The officer or deputy making the comparison shall place his initials in ink opposite the signature of those persons who are shown by the registration books to be legal voters, and shall certify upon the last signature sheet of such petition that the signatures so initialed are the signatures of legal voters of the state of Washington, and shall sign such certificate and attach thereto the seal of the registration officer, if such officer have a seal, and return such petition to the person filing the same upon demand. The omission to fill any blank shall not prevent the initialing or certification of any name, if sufficient information is given to enable the officer, by a comparison of the signatures, to identify the voter. Every such petition bearing the signatures of persons residing in precincts where registration of voters is not required, before it is filed with the secretary of state, shall be submitted to and initialed and certified by a justice of the peace, road supervisor, member of a school board or a postmaster residing in such precinct in the form provided in section 4971-8. It shall be the duty of such justice of the peace, road supervisor or member of a school board to examine and initial and certify the signatures of legal voters on any such petition upon demand. [L. '13, p. 423, § 10.]

§ 4971-11. Number of Signatures—Contributors—Expenditures.

When the person, committee or organization proposing any such initiative measure or demanding any such referendum shall have secured upon any such initiative petition the signatures of fifty thousand legal voters or the signatures of legal voters equal in number to or exceeding ten per centum of the whole number of electors who voted for governor at the regular gubernatorial election last preceding, or shall have secured upon any such referendum petition the signatures of thirty thousand legal voters, or the signatures of legal voters equal in number to or exceeding six per centum of the whole number of electors who voted for governor at the regular gubernatorial election last preceding, he or they may submit said petition to the secretary of state for filing in his office. At the time of submitting such petition the person, committee or organization submitting the same shall file with the secretary of state a full, true and detailed statement giving the names and postoffice addresses of all persons, corporations and organizations who have contributed any moneys to aid in the preparation, publication and advertising of the measure and the preparation, circulation and filing of the petition, with the amount contributed by each, and a full, true and detailed statement of all expenditures, giving the amounts expended, the purpose for which expended, and the names and postoffice addresses of the persons and corporations to whom paid, which statement shall be verified by the affidavit of the person or some member of the committee or organization in charge of the measure, and until such statement is filed with the secretary of state shall refuse to receive such petition. [L. '13, p. 424, § 11.]

§ 4971-12. Time for Filing Petition.

The secretary of state upon any such petition being submitted to him for filing shall examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters, and if said petition be an initiative petition proposing a measure to be submitted to the legislature at its next ensuing regular session

and is submitted for filing not less than ten days before such regular session, or if said petition be an initiative petition proposing a measure to be submitted to the people for their approval or rejection at the next ensuing general election and is submitted for filing not less than four months before such general election, or if said petition be a referendum petition ordering and directing that the whole or some part or parts of a bill passed by the legislature be referred to the people for their approval or rejection at the next ensuing general election or a special election ordered by the legislature, and such petition is submitted for filing not more than ninety days after the final adjournment of the session of the legislature which passed the bill, the secretary of state shall accept and file said petition in his office; otherwise, he shall refuse to file the same, but shall stamp on said petitions the word "submitted" and the date of submission, and shall retain said petitions pending appeal. [L. '13, p. 424, § 12.]

§ 4971-13. Appeal from Refusal of Secretary of State to File—Review.

If the secretary of state shall refuse to file any such initiative or referendum petition when submitted to him for filing, the persons submitting the same for filing may, within ten days after such refusal, apply to the superior court of Thurston county for a citation requiring the secretary of state to bring such petitions before the court, and for a writ of mandate to compel him to file the same. Such application shall take precedence over other cases and matters and shall be speedily heard and determined. If the court shall issue citation, and upon final hearing shall determine that the petitions are legal in form and apparently contain the requisite number of signatures and were submitted for filing within the time prescribed in the constitution, it shall issue its mandate requiring the same to be filed in his office by the secretary of state as of the date of submission for filing. The decision of the superior court granting a writ of mandate shall be final and no appeal shall be allowed from the decision of the superior court refusing to grant a writ of mandate, but such decision may be reviewed by the supreme court in a writ of certiorari sued out within five days after the decision of the superior court, and such review shall be considered an emergency matter of public concern, and shall be heard and determined with all convenient speed, and if the supreme court shall decide that the petitions are legal in form and apparently contain the requisite number of signatures of legal voters, and were filed within the time prescribed in the constitution, it shall issue its mandate direct to the secretary of state, requiring that said petitions be filed in his office as of the date of submission. In case no appeal is taken from the refusal of the secretary of state to file said petitions within the time prescribed, or in case an appeal is taken and the secretary of state is not required to file said petitions by the mandate of either the superior or the supreme court, the secretary of state shall destroy said petitions. [L. '13, p. 425, § 13.]

§ 4971-14. Petitions to be Volumed and Filed.

If the secretary of state accept and file any such initiative or referendum petition upon its being submitted for filing or if he be required to file the same by the court he shall forthwith, in the presence of the governor, or, if the governor be absent, in the presence of some other state officer and in the

presence of the persons submitting such petition for filing, if such persons desire to be present, detach the sheets containing the signatures and certificates and cause them all to be firmly attached to one or more printed copies of the proposed initiative or referendum measure in such volumes as will be most convenient for canvassing and filing, and shall number such volumes and file the same and stamp on each thereof the date of filing. [L. '13, p. 426, § 14.]

§ 4971-15. Canvass of Petition.

Upon filing such volumes of an initiative petition proposing a measure for submission to the legislature at its next regular session, the secretary of state shall forthwith in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to canvass and count the names of certified legal voters on such petition. If he find the same name signed to more than one petition he shall reject both names from the count. If, at the conclusion of the canvass and count, it shall appear that such petition bears the requisite number of names of certified legal voters, the secretary of state shall transmit a certified copy of such proposed measure to the legislature at the opening of its session together with a certificate of the facts relating to the filing of such petition and the canvass thereof. [L. '13, p. 426, § 15.]

§ 4971-16. Fraudulent Names.

The secretary of state shall, while making said canvass, keep a record of all names appearing on said petition which are not certified to be legal voters and of all names appearing more than once on said petition, and shall report the same to the prosecuting attorneys of the respective counties where such names were signed to the end that prosecutions may be had for violations of this act. [L. '13, p. 427, § 16.]

§ 4971-17. Appeals—Review.

Any citizen who shall be dissatisfied with the determination of the secretary of state that the petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit said petitions to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be, which application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined. No appeal shall be allowed from the decision of the superior court granting or refusing to grant the writ of mandate or injunction, but such decision may be reviewed by the supreme court on a writ of certiorari sued out within five days after the decision of the superior court, and if the supreme court shall decide that a writ of mandate or injunction, as the case may be, should issue, it shall issue such writ direct to the secretary of state; otherwise, it shall dismiss the proceedings, and the clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court. [L. '13, p. 427, § 17.]

§ 4971-18. Canvass of Names Within Thirty Days.

When the petition filed shall be a referendum petition or an initiative petition for submission of a measure to the people the secretary of state shall canvass and count the names on such petition within thirty days after filing and like proceedings shall and may be had thereon as provided in sections 4971-15, 4971-16, and 4971-17. [L. '13, p. 428, § 18.]

§ 4971-19. Certificate to County Auditor.

If such referendum or such initiative petition for submission to the people shall be found sufficient, the secretary of state shall at the time and in the manner he certifies to the county auditors of the various counties the names of candidates for state and district officers certify to each county auditor the serial numbers and ballot titles of the several initiative and referendum measures to be voted upon at the next ensuing general election or special election ordered by the legislature. [L. '13, p. 428, § 19.]

§ 4971-20. Serial Number for Referendum Bills.

Whenever any bill passed by the legislature shall be by the legislature referred to the people for their approval or rejection at the next ensuing general election or at a special election ordered by the legislature, the secretary of state shall give such bill a serial number, using a separate series, such series being designated "Referendum Bills," and if the legislature shall not have prescribed a ballot title shall obtain from the attorney general a ballot title therefor in the manner provided in this act for obtaining ballot titles for initiative measures, and shall certify the serial number and ballot title of such bill to the county auditors for printing on the ballots for such general or special election in like manner as initiative measures for submission to the people are certified. [L. '13, p. 428, § 20.]

§ 4971-21. Certified by Serial Number.

Whenever any measure proposed by initiative petition for submission to the legislature is rejected by the legislature or the legislature shall take no action thereon before the end of the regular session at which it is submitted, the secretary of state shall certify the serial number and ballot title thereof to the county auditors for printing on the ballots at the next ensuing general election in like manner as initiative measures for submission to the people are certified. [L. '13, p. 428, § 21.]

§ 4971-22. Substitute Measure to Take Same Number.

Whenever any measure proposed by initiative petition for submission to the legislature is rejected by the legislature and the legislature proposes a different measure dealing with the same subject, the secretary of state shall give such different measure the same serial number as that borne by the initiative measure followed by the letter "B," and such measure proposed by the legislature shall be designated as "Alternative Measure No. — B," and the secretary of state shall obtain from the attorney general a ballot title therefor in the manner provided in this act for obtaining ballot titles for initiative measures, and shall certify the alternative serial number and ballot title of such alternative measure to the county auditors for printing on the ballots for the election at which such measures are to be submitted to the people, in like manner as initiative measures for submission to the

people are certified. The ballot title for such alternative measure shall be different from the ballot title of the initiative measure in lieu of which it is proposed, and shall indicate as clearly as possible the essential differences in the measure. [L. '13, p. 429, § 22.]

§ 4971-23. Printing of Numbers and Titles on Ballots.

It shall be the duty of the several county auditors to cause to be printed on the official ballots for the election at which initiative and referendum measures are to be submitted to the people for their approval or rejection the serial numbers and ballot titles, certified by the secretary of state, under separate headings in the order of the serial numbers. Measures proposed for submission to the people by initiative petition shall be under the heading, "Proposed by Initiative Petition"; bills passed by the legislature and ordered referred to the people by referendum petition shall be under the heading, "Passed by the Legislature and Ordered Referred by Petition"; bills passed and referred to the people by the legislature shall be under the heading, "Proposed to the People by the Legislature"; measures proposed to the legislature and rejected or not acted upon shall be under the heading, "Proposed to the Legislature and Referred to the People"; measures proposed to the legislature and alternative measures passed by the legislature in lieu thereof shall be under the heading, "Initiated by Petition and Alternative by Legislature." [L. '13, p. 429, § 23.]

§ 4971-24. Provision for Voting—Ballot.

Except as in the next succeeding section provided, each measure submitted to the people for approval or rejection shall be so printed on the ballot, under the proper heading, that a voter can by making one cross (X) express his approval or rejection of such measure. Substantially the following form shall be a compliance with this section:

PROPOSED BY INITIATIVE PETITION.

Initiative Measure No. 22, entitled (here insert the ballot title of the measure).

FOR Initiative Measure No. 22.....☐
AGAINST Initiative Measure No. 22.....☐

[L. '13, p. 430, § 24.]

§ 4971-25. Alternative—Ballot.

In all cases where initiative measures proposed to the legislature have been rejected by the legislature and alternative measures passed by the legislature in lieu thereof the serial numbers and ballot titles of both such measures shall be so printed on the official ballots that a voter can express separately by making one cross (X) for each, two preferences: first, as between either measure and neither, and secondly, as between one and the other, as provided in the constitution. Substantially the following form shall be a compliance with the constitutional provision:

INITIATED BY PETITION AND ALTERNATIVE BY LEGISLATURE.

Initiative Measure No. 25, entitled (here insert the ballot title of the initiative measure).

Alternative Measure No. 25B, entitled (here insert the ballot title of the alternative measure).

Vote FOR EITHER, or AGAINST BOTH.

FOR EITHER Initiative No. 25 OR Alternative No. 25B.....☐

AGAINST Initiative No. 25 AND Alternative No. 25B.....☐

and vote FOR one.

FOR Initiative Measure No. 25.....☐

FOR Alternative Measure No. 25B.....☐

[L. '13, p. 430, § 25.]

§ 4971-26. Arguments—Number—Selection.

The person, persons, committee or organization filing any initiative or referendum petition proposing a measure, or ordering a referendum for submission to the people, and any other citizen or committee or organization of citizens shall have the right at the time of filing such petition or within ten days after such petition has been accepted and filed, to file with the secretary of state for printing and distribution arguments advocating the proposed measure or referendum, and any citizen or committee or organization of citizens may, within twenty days after such petition has been accepted and filed, file an argument in opposition to such measure or referendum for printing and distribution, provided, that not more than two separate arguments advocating such measure or referendum and not more than three separate arguments in opposition thereto shall be printed by and distributed at the expense of the state. If more than two arguments advocating or more than three arguments in opposition to such measure or referendum are filed, the secretary of state shall forthwith notify the persons filing the arguments advocating or in opposition to such measure or referendum of that fact, and if the persons filing such arguments do not agree among themselves within thirty days after the acceptance and filing of such petition as to which of said arguments shall be printed by the state, the secretary of state shall select for printing, binding and distribution, in addition to the argument advocating such measure filed by the persons proposing the same, one additional argument, and shall select three arguments in opposition to such measure, to be printed by the state. In making such selections the secretary of state shall select the argument advocating and the three arguments in opposition to the measure which he shall consider the strongest, taking into account the arguments proposed and the form in which they are presented. If in the opinion of the secretary of state any argument for or against a measure offered for filing contain any obscene, vulgar, profane, scandalous, libelous, defamatory or treasonable matter or any language tending to provoke crime or a breach of the peace, or any language or matter the circulation of which through the mails is prohibited by any act of Congress, the secretary of state shall refuse to file such argument: Provided, That the person submitting such argument for filing may appeal to a board of censors consisting of the governor, the attorney general and the superintendent of public instruction, and the decision of a majority of such board shall be final. Each such argument either for or against the measure shall not exceed two pages of the pamphlet hereinafter required to be published by

the state and shall contain the serial designation and number of the measure and state the name of the person or organization advancing it. The person or organization filing such argument shall at the time of filing the same deposit with the secretary of state sufficient money, the amount to be estimated by the secretary of state, to cover the increased cost of paper for the printing and binding of such argument. In the case of measures initiated by petition and submitted to the legislature and alternatives passed by the legislature in lieu thereof, the person, committee or organization proposing the measure may likewise within ten days after the filing of the petition, or within ten days after the final passage of the alternative measure, file an argument in support of the initiative measure, and other citizens may file arguments in support thereof within ten days after the final passage of the alternative measure, and the legislature may by resolution file an argument in support of the alternative measure, and other citizens may file arguments in support thereof. But only two arguments in support of each measure, in addition to the argument filed by the proponents of the measure, and by the legislature, shall be printed by and distributed at the expense of the state, and if the persons filing arguments do not agree among themselves as to what arguments shall be printed the secretary of state shall select arguments to be printed. Arguments for and against bills passed and referred to the people by the legislature, including amendments to the constitution proposed by the legislature, shall be filed, selected and printed in the same manner. [L. '13, p. 431, § 26.]

§ 4971-27. Publication of Pamphlet.

At least sixty days prior to any election at which any initiative or referendum measure is to be submitted to the people, the secretary of state shall cause to be printed in pamphlet form a true copy of the serial designation and number, the ballot title, the legislative title, the full text of and the argument for and arguments against each such measure, including amendments to the constitution proposed by the legislature, to be submitted to the people in the foregoing order, and shall cause all of such measures to be printed and bound in a single pamphlet in the following order: first, those "Proposed by Initiative Petition"; second, those "Proposed to the People by the Legislature"; third, those "Proposed to the Legislature and Referred to the People"; fourth, those "Initiated by Petition and Alternative by the Legislature," and fifth, "Amendments to the Constitution Proposed by the Legislature." The pages of such pamphlet shall be not larger than five and three-fourths by eight and three-fourths inches in size, and the outside measurement of the printed matter of each page shall be not less than four and one-half by seven and one-third inches, including running head, and shall be printed in eight-point Roman-faced type, set solid in two columns, each thirteen ems pica to the line, separated by a pica slug, with appropriate headings. Said pamphlet shall be printed on No. 1 print paper weighing thirty-two pounds to the ream of sheets twenty-four by thirty-six inches. The cost of printing and binding such pamphlets shall be paid from the money appropriated for printing for the secretary of state; Provided, The increased cost of printing and binding such arguments shall be paid from the moneys deposited to cover the same and the balance of any such moneys, if any, and the moneys deposited for arguments not printed shall be returned to

the persons depositing it respectively. Such number of pamphlets shall be printed as shall fill the requirements as to distribution hereinafter provided. It shall be the duty of the secretary of state to publish in such pamphlets a table of contents and a brief alphabetical index of subjects. [L. '13, p. 433, § 27.]

§ 4971-28. List of Voters—Filing.

Not more than four nor less than three months before any election at which initiative or referendum measures are to be submitted to the people, the officer having custody of the registration books in each city, town or precinct where registration of voters is required shall prepare and transmit to the secretary of state typewritten lists of the names and addresses of the legal voters of such city, town or precinct, as shown by the registration books, and the county auditors of each county shall prepare and transmit to the secretary of state typewritten lists of the names and postoffice addresses of the legal voters in each precinct in said county where registration of voters is not required, as shown by the poll-books of the last preceding general election. The secretary of state shall notify such officers of the dates of such elections. [L. '13, p. 434, § 28.]

§ 4971-29. Distribution of Pamphlets.

Not less than fifty-five days before any election at which initiative or referendum measures are to be submitted to the people, the secretary of state shall transmit, by mail with postage fully prepaid, to every voter in the state whose address he has, or can with reasonable diligence ascertain, one copy of the pamphlet hereinabove provided for, and shall transmit by the least expensive means copies of such pamphlet as follows: to each county auditor three copies for each voting precinct in the county; to the libraries of each educational, charitable, penal and reformatory institution of the state three copies; to each state officer and member of a state board and to each county officer two copies; to each judge of the supreme and superior courts two copies; to the state library five copies; to each public library in the state two copies; to each member of the legislature two copies; and shall reserve for distribution on request such number of copies as he shall deem necessary. The cost of mailing or shipping said pamphlets shall be paid from the money appropriated for postage for the secretary of state. It shall be the duty of the county auditors of the several counties to transmit the copies of the pamphlets so furnished them to the election officers of the respective precincts, to be kept at the polling place throughout election day for the information of voters. [L. '13, p. 434, § 29.]

§ 4971-30. Election Returns—Canvass of Votes.

The votes on the initiative and referendum measures submitted to the people, as in this act provided, shall be counted, canvassed and returned by the regular precinct election officers, and by the county auditors, in the manner provided by law for canvassing and returning votes for candidates for state offices. It shall be the duty of the secretary of state, in the presence of the governor, within thirty days after any such election to canvass the votes for each measure and certify to the governor the result thereof, and the governor shall forthwith issue his proclamation giving the whole number of votes cast in the state for and against such measure, and declaring such

measures as are approved by the majority of those voting thereupon, provided that the vote cast upon such measure shall equal one-third of the total vote cast at such election, to be the law of the state of Washington from the date of such proclamation. [L. '13, p. 435, § 30.]

§ 4971-31. Penalty.

Every person who shall sign any initiative or referendum petition provided for in this act with any other than his true name shall be guilty of a felony. Every person who shall knowingly sign more than one of such petitions for the same measure or who shall sign any such petition knowing that he is not a legal voter or who shall make on any such petition any false statement as to his place of residence, and every registration officer who shall make any false report or certificate on any such petition shall be guilty of a gross misdemeanor. [L. '13, p. 435, § 31.]

§ 4971-32. Professional Solicitors — Hiring Solicitors — Corruption in General.

Every officer who shall willfully violate any of the provisions of this act, for the violation of which no penalty is herein prescribed, or who shall willfully fail to comply with the provisions of this act; and every person who shall for any consideration, compensation, gratuity, reward or thing of value or promise thereof sign or decline to sign any initiative or referendum petition; or who shall advertise in any newspaper, magazine or other periodical publication or in any book, pamphlet, circular or letter or by means of any sign, signboard, bill, poster, handbill or card or in any manner whatsoever, that he will either for or without compensation or consideration circulate, or solicit, procure or obtain signatures upon, or influence or induce or attempt to influence or induce persons to sign or not to sign any initiative or referendum petition or vote for or against any initiative or referendum measure; or who shall for pay or any consideration, compensation, gratuity, reward or thing of value or promise thereof, circulate, or solicit, procure or obtain or attempt to procure or obtain signatures upon any initiative or referendum petition; or who shall pay or offer or promise to pay, or give or offer or promise to give any consideration, compensation, gratuity, reward or thing of value to any person to induce him to sign or not to sign, or to circulate, or solicit, procure or attempt to procure, or obtain signatures upon any initiative or referendum petition or to vote for or against any initiative or referendum measure; or who shall by any other corrupt means or practice or by threats or intimidation interfere with or attempt to interfere with the right of any legal voter to sign or not to sign any initiative or referendum petition or to vote for or against any initiative or referendum measure; or who shall receive, accept, handle, distribute, pay out or give away either directly or indirectly any money, consideration, compensation, gratuity, reward or thing of value contributed by or received from any person, firm, association or corporation having his, their or its residence or principal office outside of the state of Washington, or corporation the majority of whose stockholders are nonresidents of the state of Washington, for any service, work or assistance of any kind done or rendered for the purpose of aiding in procuring signatures upon any initiative or referendum petition or the adoption or rejection of any initiative or referendum measure, shall be guilty of a gross misdemeanor. [L. '13, p. 436, § 32.]

TITLE XXX.

ELECTRIC LIGHT AND POWER COMPANIES.

§ 4974.

A power and water company may condemn property for the public purposes of municipal lighting and of electric railways, notwithstanding it seeks to avail itself of this section, granting it the right to use for private purposes electricity generated for public purposes if at any time there should be a surplus of power not needed for public purposes, since it may anticipate future as well as present public needs, where it acts in good faith and seeks no excessive or unreasonable appropriation: State ex rel. Lyle Light,

Power & Water Co. v. Superior Court, 70 Wash. 486, 127 Pac. 104.

Sufficient public necessity for condemnation is shown where an electric light and power company, having agreed to furnish power to a town and an electric railway company, and contemplating other contracts for power for public purposes only, sought to condemn to develop ten thousand horse-power, although but a small part of such power was needed for the contracts already secured: State ex rel. Lyle etc. Water Co. v. Superior Court, 70 Wash. 486, 127 Pac. 104.

§ 4976-1. Rules for Construction.

It shall be unlawful from and after the passage of this act for any officer, agent, or employee of the state of Washington, or of any county, city or other political subdivision thereof, or for any other person, firm or corporation, or its officers, agents or employees, to run, place, erect, maintain, or use any electrical apparatus or construction, except as provided in the rules of this act.

Rule 1. No wire or cable carrying a current of less than seven hundred fifty (750) volts of electricity within the corporate limits of any city or town shall be run, placed, erected, maintained or used on any insulator the center of which is less than thirteen (13) inches from the center line of any pole. And no such wire shall be run past any pole to which it is not attached at a distance of less than thirteen (13) inches from the center line thereof. This rule shall not apply to any wire or cable where the same is run from under ground and placed vertically on the pole; nor to any wire or cable where the same is attached to the top of the pole; nor to a pole top fixture as between it and the same pole; nor to any wire or cable between the points where the same is made to leave any pole or fixture thereon for the purpose of entering any building or other structure and the point of attachment to such building or structure; nor to any jumper wire or cable carrying a current or connected with a transformer or other appliance on the same pole; nor to bridle or jumper wires on any pole which are attached to or connected with signal wires on the same pole; nor to any aerial cable as between such cable and any pole upon which it originates or terminates; nor to exclusive telephone or telegraph toll lines; nor to aerial cables containing telephone, telegraph, or signal wires, or wires continuing from same, where the cable is attached to poles on which no wires or cables other than the wires continuing from said cable are maintained, provided, that electric light or power wires or cables are in no case maintained on the same side of the street or highway on which said aerial cable is placed.

Rule 2. No wire or cable used to carry a current of over seven hundred fifty (750) volts of electricity within the incorporate limits of any city or town shall be run, placed, erected, maintained or used on any insulator the center of which is nearer than twenty-four (24) inches to the center line of

any pole. And no such wire or cable shall be run past any pole to which it is not attached at a distance of less than twenty-four (24) inches from the center line thereof: Provided, That this shall not apply to any wire or cable where the same is run from under ground and placed vertically on the pole; nor to any wire or cable where the same is attached to the top of the pole; nor to a pole top fixture, as between it and the same pole; nor to any wire or cable between the points where the same is made to leave any pole or fixture thereon for the purpose of entering any building or other structure, and the point of attachment to said building or structure; nor to any jumper wire or cable carrying a current or connected with transformers or other appliances on the same pole: Provided, further, That where said wire or cable is run vertically, it shall be rigidly supported and where possible run on the ends of the cross-arms.

Rule 3. No wire or cable carrying a current of more than seven hundred fifty (750) volts, and less than seventy-five hundred (7,500) volts of electricity, shall be run, placed, erected, maintained or used within three (3) feet of any wire or cable carrying a current of seven hundred fifty (750) volts or less of electricity; and no wire or cable carrying a current of more than seventy-five hundred (7,500) volts of electricity shall be run, placed, erected, maintained, or used within seven (7) feet of any wire or cable carrying less than seventy-five hundred (7,500) volts.

Provided, That the foregoing provisions of this paragraph shall not apply to any wire or cable within buildings or other structures; nor where the same are run from under ground and placed vertically upon the pole; nor to any service wire or cable where the same is made to leave any pole or fixture thereon for the purpose of entering any building or other structure, and the point of attachment to said building or structure; nor to any jumper wire or cable carrying a current or connected with a transformer or other appliance on the same pole.

Provided, That where run vertically, wires or cables shall be rigidly supported, and where possible run on the ends of the cross-arms.

Provided, further, That as between any two wires or cables mentioned in Rules 1, 2 and 3 of this section, only the wires or cables last in point of time so run, placed, erected or maintained, shall be held to be in violation of the provisions thereof.

Rule 4. No wire or cable used for telephone, telegraph, district messenger, or call bell circuit, fire or burglar alarm, or any other similar system, shall be run, placed, erected, maintained or used on any pole at a distance of less than three (3) feet from any wire or cable carrying a current of over three hundred (300) volts of electricity; and in all cases (except those mentioned in exceptions to Rules 1, 2 and 3) where such wires or cables are run, above or below, or cross over or under electric light or power wires, or a trolley wire, a suitable method of construction, or insulation or protection to prevent contact shall be maintained as between such wire or cable and such electric light, power or trolley wire; and said methods of construction, insulation or protection shall be installed by, or at the expense of the person owning the wire last placed in point of time: Provided, That telephone, telegraph or signal wires or cables operated for private use and not furnishing service to the public, may be placed less than three (3) feet from any line carrying a voltage of less than seven hundred and fifty (750) volts.

Rule 5. Transformers, either single or in bank, that exceed a total capacity of over ten (10) K. W. shall be supported by a double cross-arm, or some fixture equally as strong. No transformer shall be placed, erected, maintained or used on any cross-arm or other appliance on a pole upon which is placed a series electric arc lamp or arc light: Provided, This shall not apply to a span wire supporting a lamp only. All aerial and underground transformers used for low potential distribution shall be subjected to an insulation test in accordance with the standardized rules of the American Institute of Electrical Engineers. In addition to this each transformer shall be tested at rated line voltage prior to each installation and shall have attached to it a tag showing the date on which the test was made, and the name of the person making the test.

Rule 6. No wire or cable carrying more than seventy-five hundred (7,500) volts of electricity shall be run, placed, erected, maintained or used on curves or corners of greater than fifteen (15) degrees without maintaining guards sufficient to hold said wire or cable in case of breakage of pins or insulators to which the same are attached, except where said wire or cable terminates or dead-ends on curves or corners.

No wire or cable, other than ground wires, used to conduct or carry electricity, shall be placed, run, erected, maintained or used vertically on any pole without causing such wire or cable to be at all times sufficiently insulated the full length thereof to insure the protection of anyone coming in contact with said wire or cable.

Rule 7. The neutral point or wire of all transformer secondaries strung or erected for use in low potential distributing systems shall be grounded in all cases where the normal maximum difference of potential between the ground and any point in the secondary circuit will not exceed one hundred and fifty (150) volts. When no neutral point or wire is accessible one side of the secondary circuit shall be grounded in the case of single phase transformers, and any one common point in the case of interconnected polyphase bank or banks of transformers. Where the maximum difference of potential between the ground and any point in the secondary circuit will, when grounded, exceed one hundred fifty (150) volts, grounding shall be permitted. Such grounding shall be done in the manner provided in Rule 33.

Rule 8. In all cases where a wire or cable larger than No. 14 B. W. G. originates or terminates on insulators attached to any pin or other appliance, said wire or cable shall be attached to at least two insulators.

Provided, however, That this section shall not apply to service wires to buildings; nor to wires run vertically on a pole; nor to wires originating or terminating on strain insulators or circuit breakers; nor to telephone, telegraph or signal wires outside the limits of any incorporated city or town.

Rule 9. All poles along which shall be run vertically any wire or cable used to conduct or carry a current of over two hundred fifty (250) volts shall be provided with steps, and no steps shall be placed on any pole nearer the ground than seven (7) feet.

Rule 10. Fixtures placed or erected for the support of wires on the roofs of buildings shall be of sufficient strength to withstand all strains to which they may be subjected, due to the breaking of all wires on one side thereof, and, except where insulated wires or cables are held close to fire walls by straps or rings, shall be of such height and so placed that all of the wires

supported by such fixtures shall be at least seven (7) feet above any point of roofs less than one-quarter pitch over which they pass or may be attached, and no roof fixtures or wire shall be so placed that they will interfere with the free passage of persons upon, over, to or from the roofs.

Rule 11. No guy wire or cable shall be placed, run, erected, maintained or used within the incorporate limits of any city or town on any pole or appliance to which is attached any wire or cable used to conduct electricity without causing said guy wire or cable to be efficiently insulated with circuit breakers at all times at a distance of not less than eight feet nor more than ten feet measured along the line of said guy wire or cable from each end thereof: Provided, No circuit breaker shall be required at the lower end of the guy wire or cable where the same is attached to a ground anchor, nor shall any circuit breaker be required where said guy wire or cable runs direct from a grounded messenger wire to a grounded anchor rod.

Rule 12. In all span wires used for the purpose of supporting trolley wires or series arc lamps there shall be at least two circuit breakers, one of which shall at all times be maintained no less than four (4) feet nor more than six (6) feet distance from the trolley wire or series arc lamp, and in cases where the same is supported by a building or metallic pole, the other circuit breaker shall be maintained at the building or at the pole: Provided, That in span wires which support two or more trolley wires no circuit breaker shall be required in the span wire between any two of the trolley wires: Provided, further, That in span wires supporting trolley wires attached to wooden poles only the circuit breaker adjacent to the trolley wire shall be required.

Rule 13. At all points where in case of a breakdown of trolley span wires, the trolley wire would be liable to drop within seven (7) feet of the ground, there shall be double span wires and hangers placed at such points.

Rule 14. All wires or appliances carrying a current of less than seventy-five hundred (7,500) volts, inside of any building or vault, for the distribution of electrical energy, shall be sufficiently insulated, or so guarded, located, or arranged as to protect any person from injury. All wires or appliances carrying a current of over seventy-five hundred (7,500) volts, shall be insulated, or so located or arranged, as to protect any person from injury; or shall be protected by a grounded metallic guard screen or other device equally as efficient, so arranged that no person may come within three times the arcing distance of the given voltage of such conductor or appliance as rated by the American Institute of Electrical Engineers for discharges between needle points; or by a guard-rail or other device so arranged that no person may come within three feet of the same.

Rule 15. The secondary circuit of current transformers, the casings of all potential regulators and arc light transformers, all metal frames of all switchboards, metal oil tanks used on oil switches except where the tank is part of the conducting system, all motor and generator frames, the entire frame of the crane and the tracks of all traveling cranes and hoisting devices, shall be thoroughly grounded, as provided in Rule 33.

Rule 16. All generators and motors having a potential of more than three hundred (300) volts shall be provided with a suitable insulated platform or mat so arranged as to permit the attendant to stand upon such platform or mat when working upon the live parts of such generators or motors.

Rule 17. Suitable insulated platforms or mats shall be provided for the use of all men while working on any live part of switchboards on which any wire or appliance carries a potential in excess of three hundred (300) volts.

Rule 18. Every generator, motor, transformer, switch or other similar piece of apparatus and device used in the generation, transmission or distribution of electrical energy in stations or substations, shall be either provided with a name plate giving the capacity in volts and amperes, or have this information stamped thereon in such a manner as to be clearly legible.

Rule 19. In all cases there shall be two switches used at the station or substation in each feeder for the transmission of electrical energy at constant potential of seven hundred fifty (750) volts or over; one shall be an oil switch so situated as to insure the safety of the person operating the same; the other shall be a disconnecting switch: Provided, That oil switches shall not be required in direct current feeders.

Rule 20. When lines of seven hundred fifty (750) volts or over are cut out at the station or substation to allow employees to work upon them, they shall be short-circuited and grounded at the station, and shall in addition, if the line wires are bare, be short-circuited, and where possible grounded at the place where the work is being done.

Rule 21. All switches installed with overload protection devices, and all automatic overload circuit breakers must have the trip coils so adjusted as to afford complete protection against overloads and short circuits, and the same must be so arranged that no pole can be opened manually without opening all the poles, and the trip coils shall be instantly operative upon closing.

Rule 22. All feeders for electric railways must, before leaving the plant or substation, be protected by an approved circuit breaker which will cut off the circuit in case of an accidental ground or short circuit.

Rule 23. There shall be provided in all distributing stations a ground detecting device.

Rule 24. There shall be provided in all stations, plants, and buildings herein specified warning cards printed on red cardboard not less than two and one-fourth by four and one-half inches in size, which shall be attached to all switches opened for the purpose of linemen or other employees working on the wires. The person opening any line switch shall enter upon said card the name of the person ordering the switch opened, the time opened, the time line was reported clear and by whom, and shall sign his own name.

Rule 25. No manhole containing any wire carrying a current of over three hundred (300) volts shall be less than six (6) feet from floor to inside of roof; if circular in shape it shall not be less than six feet in diameter; if square it shall be six feet from wall to wall: Provided, however, That this paragraph shall not apply to any manhole in which it shall not be required that any person enter to perform work: Provided, further, That the foregoing provisions of this paragraph shall not apply where satisfactory proof shall be submitted to the proper authorities that it is impracticable or physically impossible to comply with this law within the space or location designated by the proper authorities.

Rule 26. All manholes containing any wires or appliances carrying electrical current shall be kept in a sanitary condition, free from stagnant water

or seepage or other drainage which is offensive or dangerous to health, either by sewer connection or otherwise, while any person is working in the same.

Rule 27. No manhole shall have an opening to the outer air of less than twenty-six (26) inches in diameter, and the cover of same shall be provided with vent hole or holes equivalent to three square inches in area.

Rule 28. No manhole shall have an opening which is, at the surface of the ground, within a distance of three (3) feet at any point from any rail of any railway or street-car track: Provided, That this shall not apply where satisfactory proof shall be submitted to the proper authorities that it is impracticable or physically impossible to comply with the provisions of this paragraph: Provided, That in complying with the provisions of this rule only the construction last in point of time performed, placed or erected shall be held to be in violation thereof.

Rule 29. Whenever persons are working in any manhole whose opening to the outer air is less than three (3) feet from the rail of any railway or street-car track, a watchman or attendant shall be stationed on the surface at the entrance of such manhole at all times while work is being performed therein.

Rule 30. There shall be provided proper cutout switches on all primary and secondary wires in all manholes where the wires are connected with transformers or other electrical devices therein.

Rule 31. All persons employed in manholes shall be furnished with insulated platforms so as to protect the workmen while at work in the manholes: Provided, That this paragraph shall not apply to manholes containing only telephone, telegraph or signal wires or cables.

Rule 32. No work shall be permitted to be done on any live wire, cable or appliance carrying more than seven hundred fifty (750) volts of electricity by less than two competent and experienced persons, who, at all times while performing such work shall be in the same room, chamber, manhole or other place in which, or on the same pole on which, such work is being done: Provided, That in districts where only one competent and experienced person is regularly employed, and a second competent and experienced person cannot be obtained without delay at prevailing rate of pay in said district, such work shall be permitted to be done by one competent and experienced person and a helper who need not be on the same pole on which said work is being done.

No work shall be permitted to be done in any manhole or subway on any live wire, cable or appliance carrying more than three hundred volts of electricity by less than two competent and experienced persons, who at all times while performing such work shall be in the same manhole or subway in which such work is being done.

Rule 33. The grounding provided for in these rules shall be done in the following manner: by connecting a wire or wires not less than No. 6 B. & S. gauge to a water-pipe of a metallic system outside of the meter, if there is one, or to a copper plate one-sixteenth inch thick and not less than three feet by six feet area buried in coke below the permanent moisture level, or to other device equally as efficient. The ground wire or wires of a direct current system of three or more wires shall not be smaller than the neutral

wire at the central station, and not smaller than a No. 6 B. & S. gauge elsewhere: Provided, That the maximum cross-section area of any ground wire or wires at the central station need not exceed one million circular mils. The ground wires shall be carried in as nearly a straight line as possible, and kinks, coils and short bends shall be avoided: Provided, That the provisions of this rule shall not apply as to size to ground wires run from instrument transformers or meters. [L. '13, p. 397, § 1.]

§ 4976-2. Copy of Act to be Posted.

A copy of this act printed in a legible manner shall be kept posted in a conspicuous place in all electric plants, stations and storerooms. [L. '13, p. 407, § 2.]

§ 4976-3. Time to Comply.

All wires, cables, poles, electric fixtures or appliances of every kind or nature being used or operated at the time of the passage of this act shall be changed, and made to conform with the provisions of this act on or before five (5) years from the date of its passage.

Provided, however, That the public service commission of Washington shall have power, upon notice and hearing, to order and require the erection of all guards, protective devices, and methods of protection which in the judgment of the commission are necessary and should be constructed previous to the expiration of the time fixed in this section: Provided, however, That it shall be lawful to place additions, wires, cables, electrical fixtures or appliances upon existing poles or cross-arms so long as the new construction shall be made to conform to the provisions of this act.

Provided, further, That nothing in this act shall apply to manholes already constructed, except the provisions for guards, sanitary conditions, drainage and safety appliances specified in Rules 20, 24, 26, 29, 30, 31 and 32. [L. '13, p. 407, § 3.]

§ 4976-4. Change of Rules—Violations.

It shall be the duty of the public service commission of Washington to enforce all the provisions and rules of this act and it is hereby empowered upon hearing to amend, alter and change any and all rules herein contained, or any part thereof, and to supplement the same by additional rules and requirements, after first giving reasonable public notice and a reasonable opportunity to be heard to all affected thereby: Provided, That no rule amending, altering or changing any rule supplementary to the rules herein contained shall provide a less measure of safety than that provided by the rule amended, altered or changed.

A violation of any rule herein contained or of any rule or requirement made by the commission which it is hereby permitted to make shall be deemed a violation of this act. [L. '13, p. 408, § 4.]

§ 4976-5. Rules of Public Service Commission—Effect.

Every public service company, county, city, or other political subdivision of the state of Washington, and all officers, agents and employees of any public service company, county, city, or other political subdivision of the state of Washington, shall obey, observe and comply with every order, rule, direc-

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tion or requirement made by the commission under authority of this act, so long as the same shall be and remain in force. Any public service company, county, city, or other political subdivision of the state of Washington, which shall violate or fail to comply with any provision of this act, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, pursuant to this act, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this act shall be a separate and distinct offense, and in case of a continued violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense. [L. '13, p. 408, § 5.]

§ 4976-6. Penalty.

Every officer, agent or employee of any public service company, the state of Washington, or any county, city, or other political subdivision of the state of Washington, who shall violate or fail to comply with, or who procures, aids or abets any violation by any public service company, the state of Washington, or any county, city or other political subdivision of the state of Washington, of any provision of this act, or who shall fail to obey, observe or comply with any order of the commission, pursuant to this act, or any provision of any order of the commission, or who procures, aids or abets any such public service company, the state of Washington, or any county, city, or other political subdivision of the state of Washington, in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor. [L. '13, p. 409, § 6.]

TITLE XXXI.

FENCES.

§ 4977.

At common law a tenant was not bound to fence against the cattle of his neighbor, who was answerable for any trespass committed: *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461.

The fence law requires an owner of inclosed lands to fence only against stock lawfully at large, and not against stock in an adjoining inclosed field; and where the owner of stock in his own inclosure does not avail himself of the statutory provisions for the maintenance of a division fence, the common-law rule applies, and he is liable for trespass by reason of the failure of the division fence to restrain

his stock: *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461.

The intent of the fence act of 1863, construed with reference to conditions then existing, was to require fencing stock at large on the public domain, and not to change the common-law rule as to fences dividing inclosed fields when not erected pursuant to the statute governing division fences: *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461.

As to the effect of statute prohibiting recovery for damages done by the trespassing cattle on unfenced land, see note in 9 Ann. Cas. 1095; and see note in 54 Am. St. Rep. 513.

TITLE XXXIII.

FINANCE.

CHAPTER VI.

STATE EDUCATIONAL FUNDS.

§ 5049-1. Higher Educational Institutions Defined.

The terms "State Institutions of Higher Education" as used in this act shall include the University of Washington, the Washington State College, the State Normal School at Cheney, the State Normal School at Ellensburg, and the State Normal School at Bellingham. [L. '11, p. 340, § 1.]

§ 5049-2. Funds Created.

There is hereby created a fund to be known as the "University Fund"; a fund to be known as the "Washington State College Fund"; a fund to be known as the "Cheney Normal School Fund"; a fund to be known as the "Ellensburg Normal School Fund"; and a fund to be known as the "Bellingham Normal School Fund." [L. '11, p. 340, § 2.]

§ 5049-3. Payment.

All moneys arising from the tax herein directed to be levied for the said several institutions of higher education shall be paid into the respective funds hereby created. [L. '11, p. 340, § 3.]

§ 5049-4. Tax Levy.

The state board of equalization shall, beginning with the fiscal year 1912 and annually thereafter, at the time of levying taxes for state purposes, levy upon all property subject to taxation a tax of forty-seven and one-half one-hundredths ($47\frac{1}{2}$ -100) of one mill for the State University Fund; thirty-two and one-half one-hundredths ($32\frac{1}{2}$ -100) of one mill for the Washington State College Fund; nine one-hundredths (9-100) of one mill for the Cheney Normal School Fund; seven one-hundredths (7-100) of one mill for the Ellensburg Normal School Fund; and nine one-hundredths (9-100) of one mill for the Bellingham Normal School Fund. After January 1, 1916, it shall be the duty of the governor upon request of the president of any of the institutions of higher learning to appoint a commissioner of five members to investigate reasons for changing the levy herein provided for, and to report to him in time for action, if any is necessary, by the legislature of 1917. [L. '11, p. 340, § 4.]

§ 5049-5. Use of Funds.

All sums of money produced by said tax shall be placed in said several funds and hereby set apart for the use of the several institutions herein provided for, for the purpose of maintenance, repairs and construction of buildings, and equipment thereof. [L. '11, p. 341, § 5.]

CHAPTER IX.

STATE DEPOSITARIES.

§ 5071-1. Daily Deposits by Commission of Public Lands.

It shall be the duty of the commissioner of public lands of this state, and he is hereby required to deposit daily all moneys and fees collected or received by him as such commissioner under the existing land laws of the state, including all moneys and fees received by him which remain in his custody and control for a greater or less time awaiting disposition under the provisions of the land laws of the state or the action of the board of land commissioners, as provided by law; and all moneys and fees from all sources received by him in the discharge of his official duties or acting for or in behalf of the state board of land commissioners: Provided, however, That all moneys collected or received by the commissioner of public lands, belonging to the state at the time, or to any department or institution thereof, in payment of principal and interest under outstanding contracts and leases where no question is raised as to the right of the state to receive payment, shall be paid to the state treasurer daily in the manner provided by existing laws. [L. '11, p. 299, § 1.]

§ 5071-2. Board of Finance Designate Depositaries.

The deposit of all moneys other than the moneys paid to the state treasurer as by law required, provided for in section 5071-1, shall be made in state depositaries only and in no other institution. The depositary or depositaries shall be designated and selected by the state board of finance in the manner provided by existing laws for the designation of state depositaries, and after such selection and designation by the state board of finance notice thereof shall be given to the commissioner of public lands, and the commissioner shall thereupon make daily deposits of the moneys in his official custody and control as provided in section 5071-1, and such deposit shall be made in the depositary designated by the state board of finance and in no other institution. [L. '11, p. 300, § 2.]

§ 5071-3. Bond—Approval.

Every state depositary selected by the state board of finance as provided in this act for the purposes herein, and for the receipt and deposit of all moneys in the custody, possession and control of the commissioner of public lands, other than the moneys transmitted daily to the state treasurer, shall file with the state treasurer a good and sufficient bond or collateral securities, or bonds of the United States, or bonds or warrants of the state of Washington, or of any county or school district in this state, to be approved by the state board of finance, as a security and pledge for the payment on demand of the commissioner of public lands, or his order or his successor, free of exchange, at any place in this state designated by the commissioner, of all moneys so deposited by him with said depositary, and the interest thereon at the rate fixed by the state board of finance. Such bond or securities shall be at least equal to the amount of the moneys to be received by said depositary, conditioned as hereinbefore provided, and shall, before any deposit by the commissioner of public lands, be approved by the state board of finance.

Such depositary may be examined from time to time as by existing laws provided in relation to state depositaries. [L. '11, p. 300, § 3.]

§ 5071-4. Rate of Interest.

The state board of finance shall from time to time fix the rate of interest to be paid by said depositary or depositaries upon said moneys deposited with it or them by the commissioner of public lands, as provided in section 5071-1. The rate of interest shall be not less than two (2) per cent per annum on all such deposits made by the commissioner of public lands. [L. '11, p. 301, § 4.]

§ 5071-5. Quarterly Statement.

Every state depositary selected as hereinbefore provided for the receipt and deposit of moneys by the commissioner of public lands, shall quarterly on the first of January, April, July and October file with the state auditor a sworn statement of the amount of moneys on deposit with it to the credit of the commissioner of public lands, together with a computation of the interest earned thereon at the rate fixed by the state board of finance, said computation and statement of interest to be computed upon the daily balance on deposit by the commissioner, and said statement or computation shall also be made to the state board of finance. The interest shall thereupon be forthwith remitted by the depositary to the state treasurer and by him placed in and credited to the general fund. [L. '11, p. 301, § 5.]

§ 5071-6. Report.

The statements required of the depositaries shall be upon such forms as may be prescribed by the state board of finance, and shall be accompanied by the affidavit of the president and cashier of such depositary, to the effect that it is in all respects true and correct, and that except for the interest therein credited, neither said depositary nor any officer, agent or employees thereof, nor any person in its behalf, has in any way whatsoever given, paid or rendered, or promised to give, pay or render to any member of the state board of finance, or to any person or corporation whatever, any money, credit, service or benefit whatsoever by reason or in consideration of a deposit with it of any portion of the moneys in the custody, possession or control of the commissioner of public lands. Any person who shall make any false statement in any affidavit required by this section shall be guilty of perjury. [L. '11, p. 301, § 6.]

§ 5071-7. Designation and Deposit of Moneys.

Upon the taking effect of this act the state board of finance shall forthwith designate a state depositary, or depositaries for the purposes herein mentioned, and upon notice of such selection to the commissioner of public lands the commissioner shall at once deposit in such depositary or depositaries, all moneys in his possession and under his official custody and control; and all moneys deposited in banks or other institutions at the time of the taking effect of this act, which have been deposited by the commissioner of public lands awaiting final action of the state board of land commissioners, or awaiting the further operation of the land laws, or for any other purpose,

shall at once be transferred to the state depository or depositories selected by the state board of finance, and be subject to all the provisions, requirements and conditions of this act. [L. '11, p. 302, § 7.]

CHAPTER XI.

CITY DEPOSITARIES.

§ 5079. Surety Bond of Bank—Contract as to Interest.

Before any such designation shall become effectual and entitle the treasurer to make deposits in such bank or banks, the bank or banks so designated shall, within ten (10) days after the same is filed with the comptroller, file with the comptroller of such city a contract with said city wherein said bank shall agree to pay not less than one and one-half per centum on the cash daily balances of all municipal funds kept by such treasurer in said bank, while acting as such depository; such payments to be made monthly to said city while said deposit continues in said depository; said contract shall run to said city and be in such form as shall be approved by the mayor and corporation counsel; and such bank shall also file with the comptroller of such city a surety bond or bonds to such city to the amount of the deposits of such city that may be carried in such bank, conditioned for the prompt payment thereof on checks duly drawn by the said treasurer; or in lieu thereof shall deposit with the said comptroller good and sufficient municipal, school district, county or state bonds or warrants, United States bonds, first mortgage railroad bonds listed on the New York Stock Exchange, or local improvement bonds or warrants, or public utility bonds or warrants, issued by or under the authority of any municipality of the state for water, power or light plants or maintenance thereof upon which principal or interest is not in default at the time of such deposits. Such surety bonds or securities shall be in such form as shall be approved by the corporation counsel of such city and the sufficiency of such surety bonds or such securities shall be approved by the mayor and comptroller of such city. When such bonds have been duly approved and filed with the comptroller of said city, he shall immediately certify to the city treasurer the amount of bonds or securities filed by such bank or banks, whereupon the city treasurer shall be authorized to make deposits in such bank up to the amount of surety bonds or securities, so filed. [L. '13, p. 353, § 1.]

§ 5086.

See notes to § 5094.

CHAPTER XIII.

COUNTY ROAD AND BRIDGE BONDS.

§ 5094.

Under the rule that the authority to issue bonds will not be inferred, and that general statutory provisions yield to subsequent special ones, the specific provision of this section authorizing a county to issue bonds for the purpose of making new roads or improving established roads, excludes the idea that it may issue bonds

for the general repair of roads; and the law on that particular subject not authorizing the same, such bonds could not be issued under the general law, section 5086 et seq., previously passed at the same session of the legislature, authorizing a county to issue bonds for strictly county purposes: *Shea v. Skagit County*, 68 Wash. 233, 122 Pac. 1061.

§ 5095. How to be Held—Ballots—Bonds, When to Issue, and Requisites of.

Such election may be held at the times and in the manner provided for holding general elections in this state, and it may be held as a special election at such time as the board of county commissioners may designate. The ballots used must contain the words "Bonds, Yes," and "Bonds, No." If three-fifths of the legal ballots cast on the question of issuing bonds for the improvement contemplated in the last section shall be in favor of bonds, the said commissioners must issue said bonds in due and legal form, and negotiate or float the same to the best advantage for the county, at not less than par value. Such bonds must bear the signature of the chairman of such board of commissioners, and be countersigned by the county auditor of the county in whose name they are issued, with the seal of the county thereunto attached; and the coupons must be signed by said chairman and said county auditor, and each bond so issued must be registered in the office of the county treasurer, in a book provided for that purpose, which must show the date, number and amount of the bond, and the name, and address of the person to whom the same is issued. [L. '13, p. 475, § 1.]

§ 5101-1. County Road Bonds—Limitation—Manner of Voting.

The board of county commissioners of any county may, whenever a majority thereof shall so decide, submit to the voters of their county at an election the question whether the said board shall be authorized to issue negotiable coupon road bonds of the county to the amount not to exceed five per centum of the taxable property in said county for the purpose of constructing a new road or roads, or improving established roads within said county, or for aiding in so doing, as prescribed in this act. The word "improvement" wherever employed in this act shall be deemed to embrace any undertaking for any or all of said purposes. The word "road" wherever employed in this act shall be deemed to embrace all highways, roads, streets, avenues, bridges, and other public ways. The provisions of this act shall apply not only to roads which are or shall be under the general control of the county, but also to all parts of state roads in such county and to all roads which are situated or are to be constructed wholly or partly within the limits of any incorporated city or town therein, provided the board of county commissioners finds that the same form or will become a part of the public highway system of such county, and will connect with existing roads in such county. Such finding may be made by the board of county commissioners at any stage of the proceedings before the actual delivery of the bonds. The constructing or improving of any and all such roads, or the aiding therein, is hereby declared to be a county purpose. The question of the issuance of bonds for any undertaking which relates to a number of different roads or parts thereof, whether intended to supply the whole expenditure or to aid therein, may be submitted to the voters as a single proposition in all cases where such course is consistent with the provisions of the state constitution. If the county commissioners in submitting any such proposition relating to different roads or parts thereof find that such proposition has for its object the furtherance and accomplishment of the construction of a system of public and county highways in such county, and constitutes and has for its object a single purpose, such finding shall be presumed to be correct, and upon the issuance of the bonds such presumption shall become

conclusive. No proposition for bonds shall be submitted which proposes that more than forty per cent of the proceeds thereof shall be expended within any city or town or within any number of cities and towns. [L. '13, p. 62, § 1.]

§ 5101-2. Time of Election—Form of Ballots—Bonds—Form.

Such election may be held at the times and in the manner provided for holding general elections in this state, or it may be held as a special election at such time as the board of county commissioners may designate. The ballots used must contain the words, "Bonds, Yes," and "Bonds, No." If three-fifths of the legal ballots cast on the question of issuing bonds for the improvement contemplated in the last section shall be in favor of bonds, the said commissioners must issue such negotiable bonds in due and legal form, and negotiate or float the same in such manner as they may deem to the best advantage for the county, at not less than par value. The bonds authorized by this act shall be issued in the name of the county, in denominations of not less than one hundred nor more than one thousand dollars; they shall be payable either (1) to some person or corporation (named therein) or the bearer, or (2) simply to the bearer, at such time as shall be stated therein, not more than twenty years after the date of issue, and bear interest at a rate not exceeding six per cent per annum, payable semi-annually; they may be made payable in any city in the United States containing a national bank; they shall bear the signature of the chairman of the board of county commissioners, and be countersigned by the county auditor of the county with the seal of the county thereunto attached; and the interest coupons shall be signed by said chairman and said county auditor, and each bond so issued must be registered in the office of the county treasurer in a book provided for that purpose, which must show the date, number and amount of the bond, date of maturity, rate of interest, and the name and address of the person to whom the same is issued: Provided, That it shall be lawful, in case the county commissioners shall so order, for the coupons to bear lithographed or engraved fac-similes of the signatures of the chairman and county auditor instead of their original signatures. The county seal need not be affixed to the coupons. Each coupon must show the number of the bond to which it belongs. Such bonds and coupons shall be printed, engraved or lithographed on good bond paper. [L. '13, p. 63, § 2.]

§ 5101-3. Tax Levy for Interest—Sinking Fund—Investment.

The county commissioners must ascertain and levy annually a tax sufficient to pay the interest on all such bonds whenever the same becomes due. At least five years prior to the maturity of such bonds and thenceforward in each year until their maturity, the county commissioners must ascertain and levy a tax sufficient to accumulate during such series of years a fund equal to the principal sum of all such bonds then remaining outstanding and unpaid, and the amount of such tax as collected shall be by the county treasurer credited to a special fund for the payment of the principal of such bonds, which shall be designated "Road Bonds of — Sinking Fund," (the blank to be filled by inserting the year in which the bonds are issued), and no part of said fund shall be diverted to any other purpose than the payment of such principal. But such fund or any accumulated part thereof

may be invested at any time or times in such manner and under such safeguards as may hereafter be provided by the statutes of this state, in which case all interest or premiums that may be realized on any such investment, as well as the principal thereof, shall be credited to such fund. All such taxes levied either for interest or for the sinking fund shall be a lien upon all property within the county and must be collected in the same manner as other taxes are collected. The county treasurer must pay out of any money belonging to the fund accumulated from the taxes levied to pay the interest as aforesaid, the interest upon all such bonds when the same becomes due upon presentation at the place of payment of the proper coupon; all coupons so paid must be reported to the county commissioners at their first meeting thereafter. Whenever the coupons are payable at any place other than the city in which the county treasurer keeps his office, it shall be the duty of the county treasurer seasonably to remit to a suitable fiscal agent (which shall be either a fiscal agent appointed by the state of Washington or some responsible fiscal agent approved by the county commissioners) at the place of payment the amount of money required for the payment of any coupons which are about to fall due. When any such bonds or coupons are paid, the county treasurer shall suitably and indelibly cancel the same. [L. '13, p. 64, § 3.]

§ 5101-4. Notice of Election.

The commissioners must give notice in some newspaper having a general circulation in said county for a period of at least four (4) weeks next preceding the date of the election, setting forth the proposition as to amount and duration of the bonds to be issued, and the rate of interest thereon which is not to be exceeded, and stating in such notice the road or roads to be built or improved. Such notice need not describe the road or roads with particularity, but it shall be sufficient either to describe the same by termini and with a general statement as to the course of the same, or to use any other appropriate language sufficient to show the purpose intended to be accomplished. The commissioners may, at their option, give such other or further notice as they may deem advisable. When the bonds are issued they may be made to bear the rate of interest stated in the notice or any less rate. [L. '13, p. 65, § 4.]

§ 5101-5. Proceeds of Bonds—City Assistance—Limitation of Expenses.

When such bonds are sold, the money arising therefrom shall be immediately paid into the treasury of the county, and shall be drawn only for the improvement for which they were issued, under the general direction of the county commissioners; Provided, That if such improvement includes in whole or in part the constructing or improving of one or more roads, or any part or parts thereof, within the limits of any incorporated city or town and if the county commissioners shall find that the amount of the proceeds of such bonds intended to be expended for any such improvements within such corporate limits will probably not be sufficient to defray the entire expense of such improvement therein, and if they further find it to be equitable that such city or town should bear the remainder of such expense, they shall have power to postpone any expenditure therefor from the proceeds of such bonds until such city or town shall have made provision

by ordinance for proceeding with such improvement within its corporate limits at its own expense so far as concerns the cost thereof over and above the amount of such bond proceeds available therefor. In such case it shall be lawful for the county commissioners to consent, under such general directions as they shall impose, that the proper authorities of such city or town shall have actual charge of making the proposed improvement within such corporate limits, such city or town acquiring any needed property or rights and doing the work by contract or otherwise in accordance with the charter or laws governing such city or town, but the same shall be subject to the approval of the county commissioners so far as concerns any payment therefor from the proceeds of such bonds. In such case, as the work progresses and money is needed to pay therefor, the county commissioners shall, from time to time, by proper order or orders, specifying the amount and purpose, direct the county treasurer to turn over to the city or town treasurer such part or parts of the proceeds of the bonds as may be justly applicable to such improvement or part thereof within such city or town, and any money so received by such city or town treasurer shall be inviolably applied to the purpose so specified. When that portion of the entire improvement which lies within any such city or town can readily be separated into parts, the procedure authorized by this section may be pursued separately as to any one or more of such parts of the general improvement. Nothing contained in this act shall be construed to render the county liable for any greater part of the expense of any improvement or part thereof within any city or town than the proper amount of the proceeds of such bonds, or to prevent such city or town from raising any part of the cost of any such improvement or part of improvement, over and above the amount arising from the proceeds of such bonds, by assessment upon property benefited, or by contribution from any of its general or special funds in accordance with the provisions of the charter or laws governing such city or town. The provisions of this section, other than the direction for the payment into the county treasury of the money arising from the sale of the bonds, need not be complied with until after the issuance of the bonds and the validity of the bonds shall not be dependent upon such compliance. [L. '13, p. 66, § 5.]

§ 5101-6. Validating Provisions.

In case at any election in any county the question of incurring any such indebtedness or issuing any such bonds has been submitted to the voters of such county by the county commissioners at any time within one year next prior to the day when this act shall take effect, and substantially in conformity herewith, and the vote at such election was such as would have authorized, by sufficient majority of votes, the incurring of such indebtedness and the issuance of such bonds had this act been in force, and had such vote been taken pursuant to the provisions of this act, then in that case such election and vote and all the proceedings in connection therewith had or taken in manner and form aforesaid, and the bond issue intended to be authorized by such proceedings and vote, be and the same are hereby validated and confirmed, with the same effect as if this act had been in force during all such time, and the county commissioners of such county are authorized and empowered to proceed with the matter of incurring such indebtedness and issuing such bonds by sale thereof and completing all pro-

ceedings in the manner provided by this act, and to expend the money arising from such bonds and to proceed with the improvement, whether within or without the limits of any city or town, in the manner provided by this act. [L. '13, p. 67, § 6.]

§ 5101-7. Act Concurrent.

This act shall not be construed as repealing or affecting any other act relating to the issuance of bonds for road or other purposes, but shall be construed as conferring additional power and authority: Provided, That any proceedings which may have been begun under any other act but which are in substantial conformity with the provisions of this act may be completed under the provisions of this act, with the same effect as if this act had been in force when such other proceedings were begun. [L. '13, p. 68, § 7.]

CHAPTER XV.

VALIDATING INDEBTEDNESS IN COUNTIES, CITIES AND TOWNS.

§ 5108a. Manner of Ratifying Indebtedness.

Any county, city or town in this state other than any county or city of the first class may ratify in the manner prescribed by this act, the attempted incurring of any indebtedness of such county, city or town, by the issuing of warrants, making of contracts, or creations of other evidences of indebtedness on the part of such county, city or town, by the corporate authorities thereof at any time prior to the passage of this act, when the only ground of the invalidity of such indebtedness so to be ratified is that, at the time of such attempted incurring thereof, the same, together with all other then existing indebtedness of such county, city or town, exceeding one and one-half per centum of the taxable property in such county, city or town, ascertained by the last assessment for state and county purposes previous to the attempted incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes, and that such indebtedness was so attempted to be incurred without the assent of three-fifths of the voters therein voting at an election held for that purpose. [L. '11, p. 614, § 1; L. '13, p. 480, § 1.]

This act is the same as the act of 1911, except that the latter covered "any" county, city, or town.

§ 5109a. Notice of Election.

Whenever the corporate authorities of any such county, city or town shall deem it advisable that the ratification authorized by this act shall be obtained, they shall provide therefor by ordinance or resolution, which shall specify separately the amount of each distinct class of such indebtedness so to be ratified, the date or period of the attempted incurring by the corporate authorities of each separate class thereof, and the general nature of the indebtedness composed in each distinct class and shall provide for the holding of an election for that purpose, at which the attempted incurring of such indebtedness shall be submitted to the voters in such county, city or town for ratification or approval, of which election notice, to be provided for in such ordinance or resolution, shall be given by publishing the same in a newspaper published in such county, city or town once a week for at

least four successive weeks, and if no newspaper is published in such city or town, then by publishing such notice for the same period in a newspaper published in the county wherein such city or town is situate and of general circulation therein. Each distinct class of such indebtedness so specified shall be the subject of a distinct vote in favor of or against the ratification thereof, and such vote shall designate the class of indebtedness referred to by the description thereof used and the amount specified in the ordinance or resolution. [L. '11, p. 615, § 2; L. '13, p. 480. § 2.]

§ 5110a. Vote Necessary to Ratify.

If at an election held as provided for in section 5109a, three-fifths of the voters of such county, city or town, voting at such election, shall vote in favor of the ratification of any distinct class of such indebtedness, specified in the ordinance or resolution providing for such election, then such indebtedness shall thereby become and is hereby declared to be validated and a binding obligation upon such county, city or town, when the only ground of the previous invalidity of such indebtedness is that at the time of the incurring thereof so ratified, the same, together with all other then existing indebtedness of such county, city or town, exceeding one and one-half per centum of the taxable property in such county, city or town ascertained by the last previous assessment for state and county purposes (except that in incorporated cities the assessment shall be taken from the last assessment for city purposes): Provided, That neither anything in this act contained nor the vote cast at any such election shall be deemed to validate or authorize any indebtedness, which, together with all other indebtedness of such county, city or town existing at the time of the attempted incurring of the same exceeded any constitutional limitation of indebtedness which might be incurred with the assent of three-fifths of the voters in such county, city or town voting at an election to be held for that purpose: And provided further, That this act shall apply only to indebtedness attempted to be incurred prior to the passage hereof. [L. '11, p. 615, § 3; L. '13, p. 481, § 3.]

§ 5111a. Construction.

The words "corporate authorities," used in this act, shall be held to mean the legislative or managing body of any county, city or town. [L. '11, p. 616, § 4; L. '13, p. 482, § 4.]

CHAPTER XVIII.

FUNDS AND TAX LEVIES IN CERTAIN CITIES.

§ 5129.

This section creating in all cities of less than twenty thousand inhabitants a current "expense fund" and an "indebtedness fund," supplanted former laws requiring

moneys from the same sources to be paid into the "general fund": State ex rel. Polson v. Hardcastle, 68 Wash. 548, 124 Pac. 110.

§ 5131. Levies.

Such municipal corporations shall levy and collect annually a property tax for the payment of current expenses, not exceeding ten mills on the dollar; a tax for the payment of indebtedness (if any indebtedness exist) not

exceeding six mills on the dollar, and all moneys collected from the taxes levied for payment of current expenses shall be credited and applied by the treasurer to "current expense fund"; and all moneys collected from the taxes levied for the payment of indebtedness shall be credited and applied to a fund to be designated as the "indebtedness fund": Provided, That any such municipal corporation having at present an existing indebtedness it may levy and collect annually a property tax for the payment of current expenses, not exceeding fifteen mills on the dollar. [L. '13, p. 274, § 1.]

TITLE XXXV. FISH AND OYSTERS.

CHAPTER IV.

REGULATION OF SALMON AND STURGEON FISHING.

§ 5187. Closed Season in Other Waters.

It shall be unlawful to take or fish for salmon in the waters of Grays Harbor or its tributaries from the 15th day of March to the 15th day of April, and from the 25th day of November to the 25th day of December in each year. And also it shall hereafter be unlawful to take or fish for salmon in any of the following named tributaries of Grays Harbor from the 15th day of August to the 15th day of November in each year above the points hereinafter described, to wit: It shall be unlawful to take or fish for salmon in the Chehalis river above a point one-half mile below the mouth of the Wynooche river; it shall be unlawful to take or fish for salmon above a point one-half mile above the mouth of the Humptulips river; it shall be unlawful to take or fish for salmon above a point one-half mile above the mouth of the Elk river; it shall be unlawful to take or fish for salmon above a point one-half mile above the mouth of the Johns river. The fish commissioner is hereby empowered to indicate the points above which fishing may not be done as provided hereinbefore, by driving piles at the point in said streams above designated, which shall mark the points above which said fishing shall not be done. It shall be unlawful to take or fish for salmon in the waters of Willapa Harbor or its tributaries from the 15th day of March to the 15th day of April, and the 1st day of August to the 1st day of September and from the 5th day of December to the 5th day of January in each year. And, also, it shall be unlawful to take or fish for salmon in any of the following tributaries of Willapa Harbor above tide-water in said rivers: North river, Willapa river, Nasel river, Palix river, Nema river, and Bear river, and for the purposes of this act the head of the tide water shall be on North river at the upper end of the lower log boom; on the Willapa river, the main wagon bridge near Willapa City; on the Nasel river, the gap of the main log boom; on the Bear river, Masny's Landing; on the Nema and Palix rivers at the head of navigation for fish boats at mean low tides: Provided, That for two years next ensuing after the passage of this act, all licenses now in force above these specific points may be renewed and continued in force, but no new licenses shall be issued for fishing above these points. Nothing in this act shall be construed to prevent fishing with hook and line, commonly termed angling, in any of the above rivers. It shall be unlawful to take or fish for salmon or sturgeon in the Columbia river or its tributaries or in any of the waters or sloughs thereof west of the north and south line between sections 14 and 15 in township 15, east of the Willamette meridian, or within three miles outside of the mouth of said Columbia river, by any means whatever in any year between 12 o'clock meridian on the 1st day of March, and 12 o'clock meridian on the 1st day of May, and between 12 o'clock meridian on the 25th day of August and 12 o'clock meridian on the 10th

day of September, and between 6 o'clock P. M. on Saturday of each week and 6 o'clock P. M. on the Sunday following from the 1st day of May to the 25th day of August, both inclusive, of any year. And it shall be unlawful to take or fish for salmon in the Columbia river or any of its tributaries easterly of the north and south line between sections 14 and 15 in township 15, east of the Willamette meridian, by any means whatever in any year between 12 o'clock meridian on the 15th day of March and 12 o'clock meridian on the 1st day of June or between 12 o'clock meridian on the 25th day of August and 12 o'clock meridian on the 10th day of September, except the Snake river. And it shall be unlawful to take or fish for salmon in the Snake river, or any of its tributaries, by any means whatever, in any year between 12 o'clock meridian on the 1st day of March and 12 o'clock meridian on the 1st day of June, or between 12 o'clock meridian on the 1st day of August and 12 o'clock meridian on the 5th day of September. And it shall be unlawful to take or fish for salmon by any means whatever, except with hook and line, commonly termed angling, in the Kalama river, Lewis river, Wind river, Little White Salmon river, Wenatchee river, Methow river, Little Spokane river, and Colville river, and in the mouths thereof, and in the Columbia river within one mile below the mouth of the above-named rivers: Provided, No traps shall be located on or within three miles below the mouth of the Lewis river. It shall be unlawful at any time to take any fish with a net, trap or other device than hook and line in Chambers creek in the county of Pierce, or within two hundred and fifty yards of the mouth of said creek, and the mouth of said creek shall be construed to mean the junction where the fresh and salt waters meet at low tide. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof for each and every offense be subject to a fine of not less than fifty dollars nor more than one thousand dollars, or may be imprisoned in the county jail not less than ten days nor more than one year, or may be both fined and imprisoned. [L. '11, p. 496, § 1.]

This section, regulating the fishing for salmon and making a different closed season in different waters of the state, is not unconstitutional as class legislation or arbitrary and unreasonable, as it affects equally and impartially all persons similarly situated: *State v. Tice*, 69 Wash. 403, 41 L. R. A., N. S., 469, 125 Pac. 168.

§ 5191.

A federal permit is not a prerequisite to the issuance of a state license for a fish-trap, and failure to secure the same cannot be urged as an excuse for trespass on the location, it being a matter between the locator and the federal authorities: *Muller v. Apex Fish Co.*, 57 Wash. 140, 106 Pac. 625.

§ 5200.

A conviction of polluting a stream, under this section, is sustained where it appears that the defendant was foreman of the only mill on the stream, and that sawdust was conveyed from the mill to the bank and allowed to escape into the stream in

sufficient quantities to endanger the spawn and fish therein: *State v. Botchford*, 71 Wash. 114, 127 Pac. 837.

As to powers of state under fish laws to punish for polluting streams, see note in 39 L. R. A. 589. See, also, 1 L. R. A., N. S., 752.

§ 5212.

Where a license for a fish-trap expires before any trap has been actually constructed, the place becomes open water subject to the first proper location for the next season: *Muller v. Apex Fish Co.*, 57 Wash. 140, 106 Pac. 625.

§ 5214.

A clerical error in giving a fish-trap location as a specified section corner in township 37, instead of township 33, will not invalidate a location, where the plat sufficiently identified the site by locating it off the west coast of Whidby Island, since no one could be misled: *Muller v. Apex Fish Co.*, 57 Wash. 140, 106 Pac. 625.

Under the general act, applying to all the waters of the state, providing that a salmon fishing license for one year from April 1st shall be deemed abandoned if, during the "fishing season" covered by the license, the locator fails to construct his appliances, the term "fishing season" applies only to waters where there is a regular fishing season, as on the Columbia river, and locations in Puget Sound are not abandoned upon failure to construct appliances during the summer and fall runs, since salmon abound in Puget Sound at all times of the year, and there is no distinct fishing season within the meaning

of the act; and an involuntary abandonment could not be worked during the life of the license: *Gorman & Co. v. Andrews*, 59 Wash. 394, 109 Pac. 1033.

As to the granting of fishing privileges to individuals, see note in 60 L. R. A. 487.

A map for a fishing location sufficiently describes the location, within this section, where it fixes the upstream limit so that a person would have no trouble in locating it; and it is not necessary to describe the downstream limit, which the law fixes three hundred feet distant: *Guinn v. Roelofs*, 71 Wash. 342, 128 Pac. 653.

CHAPTER VII.

STATE OYSTER COMMISSION AND OYSTER LAND RESERVES.

§ 5245.

Where the law required the state oyster commission to examine all natural oyster-beds and establish reserves, and the commission established reserves in the vicinity of certain lands which were excluded from the reserve, making the same subject to sale, and such lands were afterward sold by the state, the state is concluded by the acts of the commissioners, who are presumed to have done their duty, in the

absence of fraud or improper motive on their part, and cannot attack the deeds on the ground that the original applicants for the land knew that the same contained natural oyster-beds and had made false affidavits to secure the sale of the land: *State v. Houston*, 56 Wash. 268, 105 Pac. 474.

As to the regulation of oyster fishing, see note in 11 L. R. A. 583.

TITLE XXXVI.

FORESTS AND FOREST FIRES.

§ 5277-1. Defining Terms.

In this act, unless the context or subject matter otherwise requires, the word "board" shall be held to mean "state board of forest commissioners"; "forester" shall be held to mean "state forester and fire warden"; "warden" shall be held to mean "fire warden"; "wardens" shall be held to mean "fire wardens"; "ranger" shall be held to mean "forest ranger"; "rangers" shall be held to mean "forest rangers"; "one" shall be held to mean "person, firm or corporation," and "forest material" shall be held to mean "forest slashing, chopping, woodland or brushland." [L. '11, p. 623, § 1.]

§ 5277-2. Powers and Duties of Board.

The board shall supervise all matters of forest policy and forest management under the jurisdiction of the state, and shall have power to authorize all needful and proper expenditures for forest protection; it shall have full power to appoint a forester; to make rules and regulations for the prevention, control and suppression of forest fires as it deems necessary; to regulate and control the official acts of the forester, his assistants, the wardens, and the rangers, and to remove at will any of these officials. It shall be the duty of the board to collect information regarding the timber lands owned by the state, through investigation made by the forester, his assistants, the wardens and the rangers regarding the condition of the timber lands belonging to the state, the investigation to include any damage caused by forest fires, and any illegal cutting, or trespassing upon the state timber lands.

The board is hereby authorized, when in its judgment it appears advisable, to accept on behalf of the state, any grant of land within the state, which shall then become a part of the state forest: Provided, That no grant shall be accepted until the title has been examined and approved by the attorney general of the state and a report made to the board of the result of such examination. [L. '11, p. 623, § 2.]

§ 5277-3. Appointment of Forester—Audit of Bills.

The board shall appoint a forester at an annual salary, the amount of which shall be fixed by the board, and payable in equal monthly installments out of the state treasury, in the same manner as the salaries of other state officials are paid.

The forester shall be entitled to all office and other necessary expenses incurred by him under the authority of the board while in the actual performance of his duties. All expenses so incurred shall be submitted in full detail to the board for examination, and if approved and allowed by the board, shall be presented to the state auditor, who shall, if found correct, draw his warrant upon the state treasurer for the amount so allowed, and the state treasurer is hereby authorized to pay said amount due out of any moneys in the state treasury appropriated for this purpose.

The board shall audit and inspect all bills of salary and expenses incurred by the wardens for their official accounts, and all other bills properly authorized by the wardens for the prevention, suppression, checking, or control of forest fires. When so audited and inspected, the board shall present a statement thereof for each county, accompanied by the original bills, to the state auditor, who shall audit the same, and if found correct, the state auditor shall draw his warrant on the state treasurer in payment thereof, and the state treasurer is hereby authorized to pay said warrants out of any money in the treasury appropriated for such purposes. [L. '11, p. 624, § 3.]

§ 5277-4. Assistants—Duties.

The forester may at his discretion, subject to the approval of the board, appoint trained forest assistants, possessing technical qualifications, and may employ necessary clerical assistants, and fix the amount of their respective salaries, which shall be payable in equal monthly installments to each assistant so appointed or employed.

He shall act as secretary of the board, or he may delegate that duty to one of his assistants. He shall, acting under the supervision of the board, and whenever he may deem it necessary to the best interests of the state, co-operate in forest surveys, in forest studies, in forest products studies, in forest fire fighting and patrol, and in the preparation of plans for the protection, management, replacement of trees, wood-lots, and timber tracts, with any of the several departments of the governments of other states, and with the government or with the departments of the government of the United States, with the Dominion of Canada, or with any province thereof, and with counties, towns, corporations, and individuals within the state of Washington.

He shall, subject to the rules and regulations of the board, have direct charge and supervision of all matters pertaining to forestry, including the forest fire service of the state.

The term "forest fire service" as used in this act shall be held to include all wardens, rangers and help especially employed for preventing or fighting forest fires.

In times of emergency or unusual danger the forester is empowered to mass the forest fire service of the state where its presence might be required by reason of forest fires, and to take charge of, and direct the work of suppressing such fires.

The forester shall enforce all laws for the preservation of the forests within the state, investigate the origin of all forest fires, vigorously prosecute all violators of this act; prepare and print for public distribution an abstract of the forest laws and the forest fire laws of Washington, together with such rules and regulations as may be formulated by the board.

The forester may, with the approval of the board, publish for free distribution, information pertaining to forestry, and to forest products, which he may consider of benefit to the people of the state.

It shall be the duty of the forester to annually notify the county clerk in each county where wardens or rangers are appointed, giving the names of such appointees.

The forester shall furnish notice printed in large letters on cloth, calling attention to the dangers from forest fires, and to the penalties for the viola-

tion of this act; such notices to be posted in conspicuous places by the wardens or rangers in all timbered districts along roads and trails, streams and lakes, frequented by tourists, campers, hunters and fishermen, and in other visited regions.

The forester shall, subject to the approval of the board, prepare all necessary printed forms for use of wardens and rangers, in connection with the granting of applications for permits to burn; for the appointment of wardens and rangers, and any and all forms or blanks required or desirable, and shall supply each warden and ranger with such forms and blanks.

The forester shall become familiar with the location and the areas of all state timbered and cut-over lands, and shall prepare maps of each of the timbered counties showing the state land therein, and supply such maps to each warden and in all ways that are practical and feasible protect such lands from the dangers of fire, trespass, and the illegal cutting of timber, reporting from time to time direct to the board such information as may be of benefit to the state in the care and protection of its timber.

It shall be the duty of the forester to institute inquiry into the extent, kind, value and condition of all timber lands within the state; the amount of acres, and the value of the timber that is cut and removed each year, to determine what state lands are chiefly valuable for growing timber; the extent to which timber lands are being destroyed by fire; and also to examine into the production, quality and quantity of second-growth timber, with a view to ascertaining conditions for reforestation, and not later than the first day of December of each year, make a written report to the board upon all such tracts so examined by him, together with detailed information as to the work of the forest fire service of the state. [L. '11, p. 624, § 4.]

§ 5277-5. Wardens—Duties of Forester and Wardens—Compensation.

The forester shall, subject to the approval of the board, have power to appoint within any county in this state where there is timber requiring protection, one or more wardens for all or any portion of the period during which the forester deems that forest fire dangers exist.

The forester may, subject to the approval of the board, and at such times and in such localities as he deems the public welfare demands, employ one or more wardens whose duty it shall be to examine deforested lands of the state, and ascertain if such lands are chiefly valuable for agriculture, or if they are chiefly valuable for timber growing, with a view to reforestation. The said wardens shall, under the direction of the forester, engage in the discovery of inflammable material, and cause, or assist in, the burning of such material at such times as the burning can be done without endangering adjacent timber, or other property. The said wardens, under the direction of the forester, shall prevent and detect trespass and illegal cutting upon state timber lands, and shall enforce the laws in respect to such trespass and illegal cutting.

The forester shall have power to temporarily suspend any warden or ranger who may be incompetent or unwilling to discharge properly the duties of his office, and to appoint his successor temporarily, until his action shall be passed upon by the board.

Each warden shall receive compensation not to exceed four dollars (\$4.00) per day, and also necessary and proper expenses for the time actually employed.

The wardens shall make their headquarters at the county seat of the county which they represent, and be equipped with suitable office quarters in the county courthouse by the county commissioners.

The board of county commissioners of any county in which there has been no warden appointed, may request the forester to appoint a warden, and the forester may, if in his judgment the necessity exists, appoint, subject to the approval of the board, one or more wardens for each county.

The authority of the wardens respecting the prevention, suppression and control of forest fires, summoning, impressing or employing help, or making arrests for the violation of this act, may extend to any adjacent county, or to any part of the state in times of great fire danger.

The salaries and necessary expenses of all wardens, together with all expenses incurred for help and assistance in forest fire protection, shall be borne in the proportion of two-thirds by the state and one-third by the county in which the service was given and the expense incurred for forest fire protection.

All accounts of the wardens shall be submitted to the forester, as well as all bills for forest fire protection authorized by the wardens, and when such bills are approved and paid as provided for in section 5277-3, the amount of one-third of all such outlays in each county shall be due and payable on demand from each of said counties into the state treasury, and credited to the fund appropriated by this act.

All wardens and rangers shall render reports to the forester on such blanks or forms, or in such manner, and at such times as may be ordered, giving a summary of how employed, the area of country visited, expenses incurred, and such other information as may be called for by the forester. [L. '11, p. 627, § 5.]

§ 5277-6. Duties of Warden.

Each warden shall be at all times under the direction and control of the forester, and shall perform such other duties at such times and places as he may direct.

It shall be the duty of wardens to post over the forest areas notices of warning giving the date of the closed season as provided for in section 5277-8, and copies of all such laws and rules as they may be directed to post by the forester.

They shall investigate all fires and report all of a serious or threatening character to the forester immediately. They shall patrol their districts; visit all parts of roads and trails, and frequented places and camps as far as possible, warn campers or other users of fire, see that all locomotives are provided with spark-arresters, and with adequate devices for preventing the escape of fire or live coals from ash-pans and fire-boxes, in accordance with the law; extinguish small or smoldering fires; summon, impress or employ help to stop conflagrations; see that all laws for the protection of forests are enforced, and arrest and cause to be prosecuted all offenders. [L. '11, p. 628, § 6.]

§ 5277-7. Ex-officio Rangers—Compensation.

All state land cruisers, all game wardens, when approved by the forester, and all rangers and assistant rangers of the United States forest service, when recommended by their forest supervisors, and commissioned by the forester, shall be ex-officio rangers.

Timber cruisers and citizens of the state advantageously located may, at the discretion of the forester, be appointed rangers, and vested with their duties and powers.

Rangers shall receive no compensation for their services except when employed in co-operation with the state under the provisions of this act, and shall not create any indebtedness, or incur any liability on behalf of the state: Provided, That rangers actually engaged in extinguishing, or preventing the spread of fire in brush, slashings, choppings, timber or elsewhere that may endanger timber or other property, shall when their accounts for such services have been approved by the fire wardens in authority, be entitled to receive compensation for such services at the rate of twenty-five cents (25c) per hour. [L. '11, p. 629, § 7.]

§ 5277-8. Closed Season—Fires—Permits.

No one shall burn any forest material within any county in this state in which there is a warden or ranger during the months of June to September, inclusive, in each year, which period is hereby designated as the closed season, without first obtaining permission in writing from the forester, or a ranger, and afterwards complying with the terms of said permit; and anyone violating any provisions contained in the preceding portions of this section shall, upon conviction thereof, be fined not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00), or be imprisoned in the county jail not exceeding thirty (30) days. Such permission for burning shall be given only upon compliance with such rules and regulations as the board prescribe, which shall be only such as the board deems necessary for the protection of life or property.

The forester, any of his assistants, any warden or ranger, may at his discretion, refuse, revoke or postpone the use of permits to burn when such act is clearly necessary for the safety of adjacent property. [L. '11, p. 629, § 8.]

Under this section, prohibiting the burning without a permit, during the summer months, of any forest material, defined by section 1 to mean "forest slashing, chopping, woodland or brush land," one may be convicted of burning "logs and stumps"

located in his own dooryard, since a yard in which there are logs and stumps is manifestly located in a forest or slashing or woodland: *State v. Hendricks*, 68 Wash. 670, 123 Pac. 1077.

§ 5277-9. Burning Material—Control—Penalty.

No one shall burn any forest material until all dry snags, stubs and dead trees over twenty-five (25) feet in height, within the area to be burned, shall have been cut down, and until such other work shall have been done in and around the slashing or chopping, to prevent the spread of fire therefrom, as shall be required to be done by the forester, or any warden or ranger.

When any person shall have obtained permission from the forester, or warden or ranger, to burn any slashings made for the purpose of clearing land, the warden may, at his discretion, furnish him with a man to super-

wise and control the burning, who shall represent and act for such warden, and shall have all the power and authority of a warden while engaged in such service, including the right to revoke such permit, if in his opinion the burning authorized would endanger any valuable timber or other property. Such man shall serve only until such time as the party burning may be able to keep the fire under control himself.

The forester and wardens are hereby authorized and empowered to employ a sufficient number of men to extinguish or prevent the spreading of any fires that may be in danger of destroying any valuable timber or other property in this state. The forester, or any warden by special authority of the forester, may provide needed tools and supplies, and transportation when necessary for men so employed.

Every man so employed, and also the representative of the warden supervising the burning, shall be entitled to compensation of twenty-five cents per hour for each hour's actual service; and the warden shall issue a certificate to each man so employed showing the number of hours worked by him and the amounts due to him, upon which, after approval by the forester, the man shall be entitled to receive payment from the state in the manner provided for in section 5277-3.

Any person refusing to render assistance when called upon by any warden, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [L. '11, p. 630, § 9.]

§ 5277-10. Suspension of Permits and Game Laws.

In times and localities of unusual fire danger, the governor, with the advice of the forester, may suspend any or all permits or privileges authorized by section 5277-8, and may prohibit absolutely the use of fire therein mentioned.

Whenever during an open season for the hunting of any kind of game within this state, it shall appear to the governor that by reason of extreme drought, the use of fire arms or fire by hunters is liable to cause forest fires, he may by proclamation suspend the open season and make it a closed season for the shooting of wild birds or animals of any kind, for such time as he may designate, and during the time so designated all provisions of law relating to closed seasons for game shall be enforced. [L. '11, p. 631, § 10.]

§ 5277-11. Removing Notices—Penalty.

Any person who shall willfully or needlessly deface, or remove any warning placard or notice posted under the requirements of this act, shall be guilty of a misdemeanor, and shall upon conviction be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00) for each offense, or by imprisonment in the county jail not exceeding thirty (30) days.

Any person who shall upon any land within this state, set and leave any fire that shall spread or damage or destroy property of any kind not his own, shall upon conviction, be punished by a fine of not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00). If such fire be set or left maliciously, whether on his own or on another's land, with intent to destroy property not his own, he shall be punished by a fine of not less than

one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or imprisonment in the county jail for not less than one month, nor more than one year, or by both such fine and imprisonment, and shall be liable for all damages in a civil suit.

During the closed season, any person who shall kindle a fire on land not his own, in or dangerously near any forest material and leave same unquenched, or who shall be a party thereto, or who shall by throwing away any lighted cigar, matches, or by use of firearms, or in any other manner, start a fire in forest material not his own, and leave same unquenched, shall upon conviction, be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00) or be imprisoned in the county jail not exceeding two (2) months. [L. '11, p. 631, § 11.]

§ 5277-12. Notice of Damage.

Any and all inadequately protected forests, or deforested land covered wholly or in part by any inflammable debris, or otherwise likely to further the spread of fire, which by reason of such location or condition, or lack of protection, endangers life or property, when adjoining, lying near, or intermingling with other forest land, is hereby declared to be a public nuisance, and whenever the forester shall learn thereof, he shall notify the owner, or person in control or possession of said land, advise him of means and methods that should be taken for its protection, and request him to take the proper steps to that end. [L. '11, p. 632, § 12.]

§ 5277-13. Burning Wood-waste—Penalty.

It shall be unlawful for anyone manufacturing lumber or shingles, or other forest products, to destroy wood-waste material by burning the same at or near any mill situated within one-quarter of one mile of any forest material, without properly confining the place of said burning and without further safeguarding the surrounding property against danger from said burning by such additional devices as the forester may require.

It shall be unlawful for anyone to destroy any wood-waste material by fire within any burner or destructor operated at or near any mill, and situated within one-quarter of one mile of any forest material, or to operate any power-producing plant using in connection therewith any smokestack, chimney, or other spark-emitting outlet, without installing and maintaining on such burner, or destructor, or on such smokestack, chimney or other spark-emitting outlet, a safe and suitable device for arresting sparks.

Anyone violating the provisions of this section shall upon conviction thereof, be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) for each and every violation, or by imprisonment of not less than thirty (30) days in the county jail. [L. '11, p. 632, § 13.]

§ 5277-14. Closed Season—Restrictions.

It shall be unlawful for anyone to operate any spark-emitting railroad locomotive, logging locomotive, logging, or farming engine, or boiler, at any time during the closed season, or for anyone to operate any railroad locomotive, logging locomotive, or logging or farm engine or boiler, within one-

quarter of one mile of any forest material during the closed season, without such railroad locomotive, logging locomotive, logging, or other engine or boiler is provided with and uses a safe and suitable device for arresting sparks.

It shall be unlawful for anyone to operate during the closed season any railroad locomotive, logging locomotive, or logging, or other engine or boiler, within one-quarter of one mile of any forest material, without such railroad locomotive, logging locomotive, or logging or other engine or boiler is provided with and uses an adequate device to prevent the escape of fire or live coals from all ash-pans, and all fire-boxes, except when said ash-pans and said fire-boxes are being cleaned when not in motion.

Everyone failing to comply with the provisions of this section, shall upon conviction pay a fine for each railroad locomotive, logging locomotive, or other engine or boiler, for each day so operated without such spark-arresting or without such adequate device to prevent the escape of fire or live coals from said ash-pans or said fire-boxes, of not less than ten dollars (\$10.00), nor more than fifty dollars (\$50.00) per day for each railroad locomotive, logging locomotive, or other engine or boiler so used, and shall be prohibited from further use of such railroad locomotive, logging locomotive, or other engine or boiler until such spark-arrester or such adequate device for preventing the escape of fire or live coals from said ash-pans and said fire-boxes, is provided and used therewith. [L. '11, p. 633, § 14.]

§ 5277-15. Railroads—Fire on Right of Way.

No one operating a railroad shall permit to be deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right of way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

Anyone violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars (\$25.00), nor more than one hundred dollars (\$100.00) or be imprisoned in the county jail not exceeding thirty (30) days.

Wardens and rangers shall report any lack of sufficient spark-arresters, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offense. [L. '11, p. 634, § 15.]

§ 5277-16. Closed Season—Prohibitions.

Everyone clearing right of way for railroad, wagon road, or other road, shall pile and burn on such right of way all refuse timber, slashings, choppings and brush cut thereon, as rapidly as the clearing or cutting progresses, and the weather conditions permit, or at such other times as the forester, or any of his assistants, or any warden may direct, and before doing so, shall obtain a permit.

During the closed season such burning shall not be required to be done, while the forester, any of his assistants, or any warden in authority shall refuse to issue a permit for such burning.

No one slashing brush or timber for the purpose of clearing land, or cutting or logging timber, shall fell, or permit to be felled, trees, in such a manner that the tops or branches shall fall into green timber not owned by the one felling or permitting the felling of such trees, without first obtaining permission of the owner of said green timber. [L. '11, p. 634, § 16.]

§ 5277-17. Stationary Engineers—Watchman—Regulations.

Everyone operating a stationary engine, for the logging of timber, or the clearing of land of tree stumps, or other wood material, shall during the closed season:

(a) Maintain a watchman at the point where the said donkey engine, or other portable or stationary engine may be located, said watchman to be on duty for at least two hours following every time when the said donkey engine, or other portable stationary engine shall cease operations.

(b) Cut down all snags, stubs and dead trees over twenty-five feet in height within a radius of fifty (50) feet from each donkey engine, or other portable or stationary engine. [L. '11, p. 635, § 17.]

§ 5277-18. Fire Patrol.

Everyone operating a logging locomotive during the closed season, shall:

Have a man whose duty it shall be to follow each logging locomotive, except a locomotive using oil for fuel, for the purpose of acting as fire patrol, the said man to begin the said patrol at approximately thirty (30) minutes after the starting of the logging locomotive which it is his duty to follow.

Anyone who shall violate any of the provisions contained in section 5277-16, 5277-17, or 5277-18, shall be punished by a fine not to exceed one hundred dollars (\$100.00) or by imprisonment in the county jail for not less than thirty (30) days. [L. '11, p. 635, § 18.]

§ 5277-19. Arrests.

The forester, his assistants, wardens, rangers, and all police officers are hereby empowered to make arrests without warrant of persons violating this act. [L. '11, p. 636, § 19.]

§ 5277-20. Duty of Prosecuting Attorney.

Whenever an arrest shall have been made for a violation of any of the provisions of this act or whenever information of such violation shall have been lodged with him, the prosecuting attorney of the county in which the criminal act was committed, shall prosecute the offender or offenders, with all diligence and energy. If any prosecuting attorney shall fail to comply with the provisions of this section, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), and by imprisonment of not less than thirty (30) days, nor more than one year in the county jail. The penalties of this section shall apply to any magistrate, with proper authority, who refuses or neglects to cause the arrest and prosecution of any person or persons when complaint under oath of violation of any provisions of this act has been lodged with him. [L. '11, p. 636, § 20.]

§ 5277-21. **Fines.**

All fines collected under this act shall be paid into the county treasury of the county in which the offense was committed. [L. '11, p. 636, § 21.]

§ 5287.

This section, permitting the burning of logs, stumps, drift and brush heaps in small quantities under personal supervision was

repealed by section 5277-8, prohibiting the burning of any forest material without a special permit: *State v. Hendricks*, 68 Wash. 670, 123 Pac. 1077.

TITLE XXXVII.

FRAUDS.

CHAPTER I.

STATUTE OF FRAUDS.

§ 5288.

Notes and a chattel mortgage given in part payment of a voidable land contract not executed by the vendor's wife cannot be set aside as a fraud upon creditors on the theory that they were given without consideration: *Koth v. Kessler*, 59 Wash. 641, 110 Pac. 540.

As to absence of consideration as giving fraudulent color to conveyance, see note in 90 Am. St. Rep. 514.

The evidence is sufficient to support findings of the good faith of an assignment of proceeds of insurance policies to a debtor's brother, where it appears that he held a bona fide second mortgage upon the property destroyed by fire, of which the agent was informed when the policies were written, that his claim was recognized by the first mortgagee to whom the policies were payable as his interest might appear, and by the insurance companies before garnishment, and that the assignment and proofs of loss recognizing the same were made before the issuance of the writs of garnishment: *Wheatman v. Kane*, 55 Wash. 226, 104 Pac. 258.

A transfer of all stock in a corporation will not be held fraudulent as to creditors where the stock was transferred for a valuable consideration not so inadequate as to suggest fraud, and the creditors took no action for fifteen years, knowing that the debtor was in straightened circumstances while the corporation was prospering, and where it was within their power to have discovered that his connection with the corporation as a stockholder had ceased: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

As to application to choses in action of statute against fraudulent conveyances, see note in 5 Ann. Cas. 370.

A preferred creditor does not lose his preference from the fact he made a cash payment of an excess in order to procure payment of his debt, the debtor refusing to make the conveyance without such payment: *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347.

As to what constitutes participation by creditor in fraudulent intent by debtor to convey, see note in 31 L. R. A. 609.

§ 5289.

An insurance agent is not bound by oral statements of his employee, made after

a policy was issued and not known to him, to the effect that an insurance company was solvent and that they would stand back of the policy if the company was not good: *Beckman v. Edwards*, 59 Wash. 411, Ann. Cas. 1912B, 40, 110 Pac. 6.

Where an insurance company was liable on an indemnity policy only after actual payment of the judgment, the agent's oral promise to plaintiff to pay the judgment was the promise to pay the debt of another, and void as within the statute of frauds: *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69.

A promise by a promoter and principal stockholder in a corporation that if a creditor would forego its demand for immediate payment for goods sold to the corporation and would continue to sell and deliver goods to it, he would pay the same and become responsible therefor, and would indemnify and hold harmless the seller for any loss on account of the extension of credit or sale of goods to it, is a promise to answer for the debt or default of another, within the statute of frauds, section 5289, and void when not in writing; and it is immaterial that he is directly interested as a stockholder: *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60.

In such a case, the facts being admitted, the construction is one of law for the court: *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60.

The statute of frauds, being personal to the debtor, cannot be taken advantage of by sureties who guaranteed the performance of a lease which was voidable under the statute of frauds: *Backus v. Feeks*, 71 Wash. 508, 129 Pac. 86.

Where a building contract recited that it is between, and it was signed by, the contractor, as party of the first part, and the owner as party of the second part, the obligation of the alleged sureties also signing the contract is a collateral and not an original undertaking, and is within the statute of frauds: *Mead v. White*, 53 Wash. 638, 132 Am. St. Rep. 1092, 23 L. R. A., N. S., 1197, 102 Pac. 753.

A foreign corporation is liable for the purchase price of machinery, as upon an original oral promise, and the transaction is not within the statute of frauds, where its agent told plaintiff he had a job for him, and a week later came to plaintiff and gave the measurements for a blow-pipe system to be installed in the mill of an-

other company, ordered the goods, and on plaintiff's objection that such company did not have good financial standing, directed plaintiff to send the bill to such company and "we will pay the bill," it appearing that the leading object in the defendant company in installing the system was to enable the mill to fill defendant's orders for lumber: *Burns v. Bradford-Kennedy Lumber Co.*, 61 Wash. 276, 112 Pac. 359.

An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is an original promise, and not within the statute of frauds, where the society refused to defend and regarded it as a personal controversy between the plaintiff and the defendant: *Mazzini Society v. Corgiat*, 63 Wash. 273, 115 Pac. 93.

Where a contractor for dwellings sublet the plumbing, and failed to pay for the work, the owner's oral promise to the plumber to pay him, if he would not file a lien against the premises, is an original undertaking, and not a promise to answer for the debt or default of another within the statute of frauds: *Wells & Morris v. Brown*, 67 Wash. 351, 121 Pac. 828.

An agreement not to file a mechanic's lien against property is a sufficient consideration for the oral promise of the owner to pay for the work, so as to make the promise an original undertaking and not within the statute of frauds, and it is immaterial that the right to file the lien could have been contested for failure to comply with the statute relating to duplicate statements of the material furnished: *Wells & Morris v. Brown*, 67 Wash. 351, 121 Pac. 828.

There is an original undertaking on sufficient consideration, and not a promise to answer for the debt of another, within the statute of frauds, where the principal creditor of a contractor was interested in seeing him complete a grading contract, the proceeds of which had been assigned to it, and upon a threatened foreclosure of a chattel mortgage upon the contractor's outfit, promised the mortgagee to pay any balance due, if the mortgagee would forego foreclosure until the contract was completed: *McKay v. Northern Bank & Trust Co.*, 69 Wash. 186, 124 Pac. 372.

A promise by the purchaser of sheep to pay the balance due on a chattel mortgage, in consideration of the consent of the mortgagees to the transfer, is an original promise upon an independent consideration, and not to answer for the debt of another within the statute of frauds: *Bicknell v. Henry*, 69 Wash. 408, 125 Pac. 156.

An oral promise by defendant to pay plaintiff any sum up to three hundred dollars which, on final settlement between plaintiff and a third person, might be found due to the plaintiff, is within the

statute of frauds: *Taylor v. Howard*, 70 Wash. 217, 126 Pac. 423.

Where the complaint in an action upon an oral contract guaranteeing the debt of another alleged the loan of money in general terms without disclosing the true foundations of the case, the defendant may, under the plea of the general issue, take advantage of the statute of frauds, although ordinarily he could not do so without specially pleading it: *Taylor v. Howard*, 70 Wash. 217, 126 Pac. 423.

An oral promise by an accommodation indorser to pay the note in any event and save another harmless is not a promise to pay the debt of another, within the statute of frauds, but is an independent personal promise: *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

As to what is a contract to answer for the debt or default of another, see note in 126 Am. St. Rep. 488. And see notes in Ann. Cas. 1912B, 222 and 446. Also notes in 2 Ann. Cas. 506; 6 Ann. Cas. 671; 10 Ann. Cas. 895; 12 Ann. Cas. 1101.

An oral contract whereby a vendor agreed not to declare a forfeiture of a contract to purchase land for five years, if the vendee would plant and cultivate an orchard and remain on the land, is void under the statute of frauds requiring contracts not to be performed within one year to be in writing: *Spokane Canal Co. v. Coffman*, 61 Wash. 357, 112 Pac. 383.

As to contract void under the statute of frauds, as not to be performed within a year, see note in 138 Am. St. Rep. 590.

CONTRACTS FOR A BROKER'S COMMISSIONS.—An agreement with brokers whereby the owner of premises offered to take a fixed sum for his property, the brokers to have all that they could get over that sum, is within this section of the statute of frauds: *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837.

This section, requiring contracts for the payment of a broker's commission on the sale of real estate, is not retroactive, and has no application to contracts made prior to its enactment: *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130.

This section applies only to contracts between the owner of the land and the agent to sell, and an oral contract between brokers to divide commissions is valid: *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497.

A broker's contract for the sale of real estate rests in parol, and is void within this section, where it appears that the vendor refused to sign a proposed contract giving the brokers the exclusive right to sell the land and retain all received over twelve thousand dollars as commissions, but later wrote that she objected to some parts of the contract, which she said no doubt could be fixed by a satisfactory talk, that they could send down their man and if they sold she wanted twelve thousand dol-

lars net, and that they could keep the letter as a contract until they came down, although she afterward consummated a deal with a purchaser procured by the brokers for fifteen thousand dollars; since the letter does not accept the terms of the contract and they cannot therefore be read together as one, and the statute requires that the amount of the compensation be fixed in the writing: *Crouch v. Forbes*, 63 Wash. 564, 116 Pac. 14.

An oral contract between brokers to divide commissions is not within this section, requiring an agreement employing a broker to sell real estate to be in writing: *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19.

Where the defendants, real estate brokers, having orally agreed with plaintiff to divide commissions on a sale of real estate, fraudulently represented the same as cash when in fact the commission received was a lot of greater value, a constructive trust *ex maleficio* arises, which does not fall within the statute of frauds and may be established by parol evidence: *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19.

As to commissions to persons effecting a sale for land owners, see notes in 12 Am. St. Rep. 589; 28 Am. St. Rep. 546; 139 Am. St. Rep. 225. See, also, notes in Ann. Cas. 1912A, 202, 1267.

Letters to a broker fixing a price which owners would take for their property "and let you have six months' time to sell it in," on commission, merely authorize the broker to find a purchaser, and not to make a binding contract of sale that can be specifically enforced: *Lawson v. King*, 56 Wash. 15, 104 Pac. 1118.

Verbal authority to find a purchaser for land does not authorize the agent to execute a binding contract of sale: *McLeod v. Morrison & Eshelman*, 66 Wash. 683, 38 L. R. A., N. S., 783, 120 Pac. 528.

The words, "Commission to be paid when 2d payment is made to M. & M., \$625," after the signature of a vendor at the foot of a contract to purchase real estate, is not a sufficient memorandum of the agreement, within this section: *McCrea v. Ogden*, 54 Wash. 521, 103 Pac. 788.

A broker is the agent of the vendors where it appears that he approached them advising that he had a prospective purchaser, that they agreed to pay a commission in case of a sale, and that the broker signed a contract as "agent for the owner," which was approved in writing by the owners, thereby ratifying the agency: *Lawler v. Armstrong*, 53 Wash. 664, 102 Pac. 775.

Where brokers exceeded their authority by reducing the price, including a guaranty and guaranteeing the number and kind of apple trees, their contract of sale is not binding upon their principal, especially

when made subject to his approval: *Smith v. Craig*, 61 Wash. 528, 112 Pac. 513.

In such a case, the contract as made is not ratified by the fact that the owner thereafter offered to consent to the reduced price, agreeing to make a list of the trees, although the brokers thereupon struck out the guaranty as to the trees: *Smith v. Craig*, 61 Wash. 628, 112 Pac. 513.

A memorandum of an agreement for the employment of a broker to sell real estate is insufficient, under this section, where it fails to name any broker or agent and employs none, describes no real estate, and contains no agreement for compensation: *Swartswood v. Naslin*, 57 Wash. 287, 106 Pac. 770.

This section, providing that an agreement employing an agent or broker to sell real estate for compensation or commissions shall be void unless in writing, applies only to contracts between the owner of the land and the agent to sell, and an oral agreement between brokers whereby one was to pay the other a specified commission for assistance in finding purchasers is enforceable: *Leigh v. Yancy*, 67 Wash. 18, 120 Pac. 512.

Where a written contract for a broker's commissions on a percentage basis was abrogated on negotiating a sale, and a flat commission of five hundred dollars orally agreed upon, and the contract of sale made no reference to commissions except to provide that purchase money paid should, in case of default, be forfeited to the agents "to the extent of their agreed upon commissions," the second contract is not a mere modification of the first; and the contract of sale is insufficient as a memorandum of the agreement for commissions to entitle the broker to recover commissions under the statute of frauds requiring any agreement authorizing a broker to sell real estate for a commission to be in writing: *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34.

As to what constitutes employment by real estate broker that will entitle him to commissions, see note in 27 L. R. A., N. S., 786.

As to necessity that the broker's authority be in writing, see note in 9 L. R. A., N. S., 933.

While an agreement to pay a broker's commissions must, under this section, be in writing, and an executory written agreement therefor cannot be rescinded or abrogated by an oral executory agreement, it may be modified or abrogated by an executed or partly performed oral agreement; and there is sufficient part performance of such an oral agreement to rescind, where it appears that performance of a written agreement to exchange properties and pay commissions was refused because conditions were not met, that, in order to induce the exchange, the contract was orally modified by the broker's agreeing to ac-

cept in lieu of the agreed eight hundred dollars commissions, the sum of two hundred dollars in cash and two lots, that the exchange was thereupon effected, the two hundred dollars paid, and a conveyance of the lots tendered, the same constituting such partial performance as to estop the other broker from asserting its invalidity: *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462.

A broker's contract to sell real estate, he only having authority to find a purchaser, is ratified where, with full knowledge of the contract and all the material facts, nothing was done to disavow the sale or question the broker's authority to make it, and letters were written promising a deed as soon as it could be secured: *McLeod v. Morrison & Eshelman*, 66 Wash. 683, 38 L. R. A., N. S., 783, 120 Pac. 528.

The fact that an unauthorized broker's contract to sell real estate was executed under seal does not prevent an implied ratification of the contract from silence and acquiescence therein, especially in view of section 8751, abolishing the use of private seals in contracts and deeds: *McLeod v. Morrison & Eshelman*, 66 Wash. 683, 38 L. R. A., N. S., 783, 120 Pac. 528.

As to the essentials of the validity of transactions by real estate agents to bind owners, see note in 8 Ann. Cas. 851. See, also, note in 44 L. R. A. 321.

Under this section, a broker cannot recover for effecting an exchange of his principal's property, where the written contract employed him to make the exchange for certain specified property, which on inspection proved unsatisfactory and such trade was never consummated, although the broker was afterward instrumental in effecting an exchange for other property not mentioned in the written contract of employment: *Reitz v. Bryant*, 71 Wash. 53, 127 Pac. 583.

Brokers who procured a purchaser to whom a sale was made through continuous negotiations covering twelve days cannot be deprived of their commissions by an attempted discharge because of their inability to secure a loan by which the deal was to be consummated, where the owner himself procured the loan and consummated the deal, on terms somewhat different from those originally contemplated: *Merritt v. American Catering Co.*, 71 Wash. 425, 128 Pac. 1074.

A broker authorized to purchase wheat at seventy-five cents per bushel net at warehouse, which gave the purchaser control of the shipping, did not perform his contract, where he purchased it at seventy-eight cents, f. o. b., which gave the seller control of the shipping; especially where he reported the sales at "seventy-five cents net to the farmer," when the warehouse charges were only one and one-half cents, and where he purchased certain wheat on his own responsibility at a price three

cents per bushel in excess of the authorized price: *Sheeran v. Ford Grain Co.*, 71 Wash. 604, 129 Pac. 378.

In such a case, where the broker was instructed to return and get the price reduced according to instructions, which he was unable to do, whereupon the purchaser secured a cancellation of the contracts and accepted the wheat at seventy-seven cents, f. o. b., the same was in the nature of a compromise, and in an action by the broker for commission, the purchaser is entitled to offset its damages by reason of the excess price paid and its expenses: *Sheeran v. Ford Grain Co.*, 71 Wash. 604, 129 Pac. 378.

A contract to pay a commission on the sale of a cafe, being for the sale of personal property, is not within the statute of frauds (section 5289), requiring an agreement employing an agent to sell or purchase real estate to be in writing, notwithstanding that the owner agreed to take part or all of his price in land, and the agent effected a trade of the cafe for land, which was consummated: *Merritt v. American Catering Co.*, 71 Wash. 425, 128 Pac. 1074.

The contract of persons who sign "as sureties," at the foot of a written building contract between the contractor and the owner, is not in writing, and is void as within the statute of frauds, where the writing contains no provision connecting the sureties with it or showing their relation to the parties: *Mead v. White*, 53 Wash. 638, 132 Am. St. Rep. 1092, 23 L. R. A., N. S., 1197, 102 Pac. 753.

An oral contract with a broker to pay commissions on the sale of real estate, void under the statute of frauds, raises a moral obligation which is sufficient consideration to support a subsequent written agreement to pay the same, after the rendition of the services: *Muir v. Kane*, 55 Wash. 131, 19 Ann. Cas. 1180, 26 L. R. A., N. S., 519, 104 Pac. 153.

A contract void within the statute of frauds cannot be reformed upon parol evidence: *Mead v. White*, 53 Wash. 638, 132 Am. St. Rep. 1092, 23 L. R. A., N. S., 1197, 102 Pac. 753.

The statute of frauds does not apply to an oral agreement to advance the money to bid in property at a sale and hold the same in trust for another, whereby a constructive trust is created, and it is immaterial who had possession of the property: *McSorley v. Bullock*, 62 Wash. 140, 113 Pac. 279.

As to oral agreement by bidders at judicial sale to share property purchased by one as within the statute of frauds, see note in Ann. Cas. 1912B, 320.

A trust *ex maleficio* does not arise from a mere verbal promise by the purchaser of one of several lots to attend to the matter of acquiring the title to abutting tide lands for the benefit of the purchasers of other

lots in the same block, made at the same time, where the parties were entire strangers, the promisor had no funds or property in his hands belonging to the others and none was furnished and he did not agree to advance any for the contemplated purchase, and he was not to receive any compensation for the volunteered service, and in acquiring a deed for himself, the grantors of the tide lands were not concerned as to what parties were to be benefited by the purchase, notwithstanding representations that the purchaser was acting for the benefit of himself and neighbors: *Cushing v. Heuston*, 53 Wash. 379, 102 Pac. 29.

Judicial sales do not fall within the statute of frauds: *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 60.

The rule that an oral modification of a written lease is void has no application, where it appears that the oral agreement was partially performed by allowing the lessee to remain in possession and pay rent to a third party pending the termination of litigation between the lessor and the third party, and that the lessor subsequently recognized it by forbearance in neither demanding nor collecting rent: *Oregon etc. R. Co. v. Elliott Bay Mill & Lumber Co.*, 70 Wash. 148, 126 Pac. 406.

§ 5290.

MEMORANDUM.—A signed offer for five thousand acres of "Northern Pacific Scrip," under a special act of Congress, the price to be "fifteen dollars per acre net to you," is a sufficient memorandum of the sale of goods, wares and merchandise to take the same out of the operation of the statute of frauds, although it fixes no time for tender and payment, as a reasonable time would be presumed to be contemplated: *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co.*, 56 Wash. 529, 106 Pac. 207.

Under the statute of frauds of the state of Oregon, requiring a contract for the sale of personal property of the value of over fifty dollars to express the consideration, it is sufficient if the contract, without stating the consideration in express terms, shows mutual promises, and it is evident that the promise on one part was the consideration for the promise on the part of the other: *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

As to the consideration, and when it must be expressed, see note in 60 Am. St. Rep. 432.

The defense that a contract is void under the statute of frauds for want of sufficient memorandum must be specially pleaded: *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co.*, 56 Wash. 529, 106 Pac. 207.

As to the necessity of pleading specially the statute of frauds where the defendant

denies the contract, see note in Ann. Cas. 1912D, 46.

An oral modification of a written contract of sale of goods is not void under the statute of frauds, where, within the exception of this section, the purchaser "received and accepted part of the goods" and paid for the same: *Sedro Vencer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100.

As to the effect of part performance to take the contract out of the statute of frauds, see note in 12 L. R. A. 123.

An absolute acceptance of an engine and hay baler is shown, sufficient to take an oral sale thereof out of the operation of the statute of frauds, where it appears that the agent, authorized to purchase the same, received the engine and baler early in June and hauled them to the purchaser's ranch, where they remained, long prior to the commencement of the action, the purchaser knowing that the seller claimed an absolute sale, delivery, and acceptance, the purchaser making no demand for a test thereof as provided for in the contract: *Adams County Mercantile Co. v. Walla Walla Livestock Co.*, 64 Wash. 285, 116 Pac. 669.

As to continuance of existing possession by vendee as sufficient delivery to take verbal sale of goods out of the statute of frauds, see note in 13 Ann. Cas. 715.

A parol sale of wheat f. o. b. cars, under a general custom in the locality that the title did not pass until delivery on board the cars, is within the statute of frauds: *Peacock Mill Co. v. Honeycutt*, 55 Wash. 18, 103 Pac. 1112.

The oral sale by plaintiff of a half interest in a partnership is not void for want of any delivery sufficient to satisfy the statute of frauds, where the plaintiff turned over the sole management and control of the business, which was assumed by the defendant, the property not being capable of manual delivery: *Gaisell v. Johnston*, 68 Wash. 470, 123 Pac. 783.

The oral sale by plaintiff of a half interest in a partnership business in consideration of defendant's note for five hundred dollars, plaintiff to pay a firm debt of one hundred dollars, is taken out of the operation of the statute of frauds by plaintiff's payment from his personal assets of the firm debt of one hundred dollars pursuant to the agreement: *Gaisell v. Johnston*, 68 Wash. 470, 123 Pac. 783.

Under this section, an execution sale will not be enjoined at the suit of the wife, where it appears that she transferred the property to her husband in fraud of her creditors, by a deed reciting a valuable consideration, and that thereafter the execution debt was contracted by the husband upon the faith of his apparent title, whereupon he reconveyed the property to the wife in fraud of his execution creditor, before such creditor acquired a lien on the land:

Kalinowski v. McNeny, 68 Wash. 681, 123 Pac. 1074.

As to relation of husband and wife as element of fraud in conveyances from one to the other, see note in 90 Am. St. Rep. 499.

§ 5292.

The presumption that property paid for from a wife's separate estate and deeded to the husband is a gift can only be overcome by clear, cogent and convincing evidence establishing the trust relation: **Denny v. Schwabacher**, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137.

As to the effect of investment by husband in his own name of wife's separate property in real estate to create trust in her favor, see notes in 6 L. R. A., N. S., 381 and 26 L. R. A., N. S., 161.

In an action to quiet title, the evidence is insufficient to show that an absolute deed made by a husband and wife was in trust, where the wife's testimony to that effect was contradicted by her husband, who testified that he negotiated the sale and that the deed was made upon full consideration: **Palmer v. Abrahams**, 55 Wash. 352, 104 Pac. 648.

Under this section a deed from the husband to a wife in consideration of love and affection is not shown to have been made in good faith, where it was made on the same day that suit was brought against the husband, and before judgment the husband and wife joined in a deed of other property

which was admittedly a fraud upon creditors; and a mere assertion by the wife that there was no collusion is not sufficient under the circumstances: **Adams v. Wingard**, 53 Wash. 560, 102 Pac. 426.

Under this section, the presumption that a transfer by a husband to a wife of one hundred and ninety-nine shares of corporate stock, valued at fourteen thousand dollars, is fraudulent as to creditors, is not overcome by clear and satisfactory proof, as required, where it appears that the husband was indebted on a judgment for eight thousand nine hundred dollars, that he was being pressed for payment, that his claim that he did not know of the judgment was unfounded in fact and that he claimed that the transfer was in consideration of five thousand dollars borrowed and of other stock which he had borrowed and was holding for his wife, which at one time was of the value of nine thousand dollars, but was worth only one thousand dollars at the time of the transfer of the stock in question; and it further appears that the five thousand dollars came from the sale of a house valued at seven thousand five hundred dollars to which the husband had contributed six thousand dollars, that he had made statements that he owned the stock, admitted that he had no intention of paying the judgment, and his evidence was wholly uncorroborated: **Dill v. Carver**, 70 Wash. 103, 126 Pac. 86.

As to burden of proof where fraud is asserted in respect to a transfer from husband to wife, see note in 56 L. R. A. 823.

CHAPTER II.

BULK SALES LAW.

§ 5296.

In an action against a buyer of a stock of goods in bulk, to recover upon an express contract to assume a promissory note of the vendor, the plaintiff need not prove affirmatively compliance with the sales in bulk law

requiring a verified statement of the names and addresses of the creditors of the vendor; and there is no presumption that the law was not complied with: **Mooney v. Mooney Co.**, 71 Wash. 258, 128 Pac. 225.

As to the burden of proving fraud generally, see note in 1 Ann. Cas. 809.

§ 5299. Bulk Sale Defined—Waiver by Creditors.

Any sale or transfer of a stock of goods, wares or merchandise, or all or substantially all, of the fixtures and equipment used in and about the business of the vendor, out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade theretofore conducted by the vendor, shall be sold or conveyed or whenever an interest in or to the business or trade of the vendor is sold or conveyed, or attempted to be sold or conveyed, shall be deemed a sale and transfer in bulk in contemplation of this act: Provided, however, That if such vendor produces and delivers a written waiver of the provisions of this act from his creditors as shown by such verified statements then and in that case the provisions of this section shall not apply. [L. '13, p. 610, § 4.]

TITLE XXXVIII.

GAME.

CHAPTER I.

STATE GAME WARDEN AND DEPUTIES.

§ 5323.

Repealed. See § 5395-53, *infra*.

§ 5326-1. Authority to Search—Prima Facie Evidence.

Any game wardens, any sheriff, deputy sheriff, constable or police officer, shall have power to search without warrant any person and examine any conveyance, vehicle, game bag, game basket, game coat or other receptacle for game or game fish, and all cold storage rooms, warehouses, markets, taverns, boarding-houses, restaurants, clubs, eating-houses, saloons and other places where game or game fish may be kept or sold, and to search and examine all packages or boxes, which he has reason to believe contain evidence of the infraction of the laws of this state, for the protection of wild fowl, trout or other game fish, game, game birds and song birds, and if upon diligent inquiry he can discover evidence sufficient in his judgment to secure the conviction of the alleged offenders or shall have cause to believe that sufficient evidence exists to justify the same he shall at once institute proceedings to punish the alleged offenders, and hindrance or interference with such search and examination shall be prima facie evidence of the violation of the laws by the party or parties who hinder or interfere with such search or examination. Any of the persons above mentioned may at any time seize and take possession of any and all game, wild fowl, game fish, game birds, song birds, or trout which has been caught, taken or killed at any time, in any manner, or for any purpose, or had in possession or under control or which have been shipped, contrary to the laws of this state. The search and seizure provided for in this act may be made without warrants. [L. '11, p. 396, § 2.]

Penalty for violating this section, see § 5364-2.

CHAPTER II.

HUNTERS' LICENSES.

§§ 5327, 5328, 5333, 5337.

Repealed. See § 5395-53, *infra*.

CHAPTER III.

GAME PRESERVES, ISLANDS, ETC.

§ 5341-1. Game Preserve in Pierce County.

Any person who shall hunt, take, kill, trap, snare, maim, destroy or molest any game bird, water fowls, shore birds or deer at any season of the year in that part of Pierce county, Washington, bounded by the waters of

Puget Sound and Commencement Bay, and a line beginning where the line between townships 19 and 20 north intersects the easterly shore of Puget Sound, and running thence east to the corner common to sections 3 and 4, township 19 north, range 3 east and sections 33 and 34, township 20 north, range 3 east; thence due north to the shore of Commencement Bay, or upon the waters of Steilacoom Lake, Gravelly Lake, American Lake, Sequelitchew Lake or the islands therein, or within one mile of the shores of any of said lakes, or upon any part of sections 1, 2, 11, 12, 13, 14, 22, 23, 24, 25, 26, 27 and 28, township 19 north, range 2 east, sections 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29 and 30, township 19 north, range 3 east, and section 34 and the south half of section 27, township 20 north, range 3 east, shall be guilty of a misdemeanor: Provided, That this act shall not apply to persons holding certificates giving the right to take birds, their nests or eggs, for scientific purposes, as now provided by law. [L. '11, p. 384, § 1; L. '13, p. 382, § 1.]

§ 5341-2. Discharging Gun a Crime.

Any person who shall discharge any rifle within the above-described territory shall be guilty of a misdemeanor: Provided, That this section shall not apply to peace officers, officers or enlisted men in the United States army, and the officers and enlisted men in the National Guard of Washington, or any other state, while engaged in the performance of their respective duties as such officers or enlisted men: And provided further, That this section shall not apply to public or private shooting galleries or rifle ranges. [L. '11, p. 385, § 2; L. '13, p. 383, § 2.]

§ 5341-3. Disposition of Fines.

All fines collected under the provisions of this act shall be turned over to the county treasurer and by him placed in the game protection fund. [L. '13, p. 383, § 3.]

CHAPTER V.

PROHIBITED PURPOSES, APPLIANCES, AND METHODS OF HUNTING.

§§ 5354, 5356.

Repealed. See § 5395-53, *infra*.

§ 5358. Use of Sink-boxes, Sneak Boats, etc., Prohibited.

Every person who shall use any sink-box or sink boat or sneak boat for the purpose of shooting wild ducks, geese, swan or other water fowl, or who shall use any battery, swivel or pivot gun, or any gun other than one to be held in the hands and fired from the shoulder, at any time, for the purpose of shooting wild ducks, geese, swan, brant or other water fowl; or who shall build any structure in any of the waters of this state for the purpose of shooting therefrom wild ducks, geese, swan, or other water fowl; or who shall at any time between one-half hour after sunset and one-half hour before sunrise fire off any gun or build any fire or flash any light, or burn any powder or other inflammable substance upon the shores of any feeding grounds frequented by wild ducks, geese, swan or other water fowl, with intent thereby to shoot, kill, injure, destroy or disturb any of such water fowl, shall be

guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided.

The term "sneak boat" as used in this act shall be deemed to mean any boat, skiff, steam or gasoline launch, or floating battery, except an ordinary open rowboat or canoe propelled by hand with side oars, such oars to be not less than five (5) feet in length and one oar to be used on each side of the boat or canoe. All occupants of such boat or canoe to be in an upright position so that at all times they shall be visible from the waist up while in pursuit of such ducks, geese, brant or other water fowl. [L. '13, p. 90, § 1.]

CHAPTER VI.

OPEN SEASON, BAY LIMIT, PROHIBITED PLACES, POSSESSION, SALE, ETC.

§ 5360. Deer, Mountain Sheep and Caribou—Open Season—Limit—Killing in Water.

Every person who shall, within the state of Washington at any time between the first day of November and the first day of September of the following year, hunt, pursue, take, kill, injure, destroy or possess any deer, mountain goat, mountain sheep or caribou, shall be guilty of a gross misdemeanor, and upon conviction thereof shall be punished as hereinafter provided. Every person who shall, within the state of Washington, during the season when it is lawful to kill same, take or kill more than two deer, or shall kill any female deer or spotted fawn, shall be guilty of a gross misdemeanor, and, upon conviction thereof, shall be punished as hereinafter provided. Every person who shall at any time shoot or kill in any manner a deer when such deer is in any river or lake, or body of salt water, or shall hunt or chase deer with dogs, shall be deemed guilty of a gross misdemeanor, and upon conviction thereof shall be punished as hereinafter provided. [L. '11, p. 395, § 1.]

Penalty for violating this section, see § 5364-2.

§§ 5361-5365.

Repealed. See § 5395-53, *infra*.

§ 5364-1. Notice of Liberation of Imported Birds.

Whenever any imported species of game birds shall have been liberated in any county of this state by the county commissioners, such commissioners shall give notice thereof by publication for three successive weeks in a newspaper published at the county seat of such county, and thereafter it shall be unlawful to hunt, take, kill, or molest any such imported birds within such county for three years after the date of the first publication of such notice. [L. '11, p. 397, § 5.]

Penalty for violating this section, see § 5364-2.

§ 5364-2. Penalty.

Any person violating any of the provisions of this act shall be guilty of a misdemeanor. [L. '11, p. 397, § 6.]

"Act" in this section refers to sections 5360, 5326-1, 5365-1, 5391-1, and 5364-1.

§ 5365-1. Sale of Birds.

It shall be unlawful for any person at any time to sell or offer for sale any of the song birds, game birds or game animals protected by the laws of the state of Washington. [L. '11, p. 397, § 3.]

Penalty for violating this section, see § 5364-2.

§ 5367.

Repealed. See L. '13, p. 380, § 53.

§§ 5371, 5372, 5379, 5380, 5384, 5385, 5389.

Repealed. See § 5395-53, infra.

CHAPTER VII.

GAME FISH.

§ 5391-1. Notice of Stocked Streams or Lakes.

Whenever any lake or stream shall have been stocked or planted with game fish under the laws of the state of Washington the county commissioners shall give notice thereof by publication for three successive weeks in a newspaper published at the county seat of the county in which such lake or stream is situated, it shall be unlawful for any person to take or fish for, or take fish of any species whatever, in the waters of the lake or stream so stocked or planted, for two years after the first publication of such notice. [L. '11, p. 397, § 4.]

Penalty for violating this section, see § 5364-2.

§ 5393-1. Black Bass and Perch in Silver Lake, Cowlitz County.

Every person who shall—

(1) Fish for or catch black bass or perch in the waters of Silver Lake, in Cowlitz county, between the 15th day of April and the 15th day of June in any year, or

(2) Fish for, or catch black bass or perch in the waters of such lake at any time except with hook or line, or

(3) Catch more than twelve black bass or twenty-five perch in the waters of such lake, in any one day,

—Shall be guilty of a misdemeanor. [L. '11, p. 299, § 1.]

CHAPTER VIII.

GAME CODE OF 1913.

§ 5395-1. County Game Commission.

A county game commission is hereby created, the said game commission to consist of three residents of each county, and there shall be a county game commission for each county in this state. [L. '13, p. 356, § 1.]

§ 5395-2. Chief Game Warden and Deputy—Appointment—Compensation.

There shall be appointed by the governor a chief game warden who shall reside west of the Cascade Mountains and a chief deputy game warden who shall reside east of the Cascade Mountains. The chief game warden and chief deputy game warden shall each receive not to exceed the sum of

eighteen hundred dollars (\$1,800.00) per year and their necessary traveling expenses while engaged in their official duties, to be paid out of the money received from the state game and fishing licenses to be collected under the provisions of the laws of this state, provided there are sufficient funds received into the state game fund hereafter created with which to make such payments. Traveling expenses shall be first paid, and if there is not sufficient money to pay the full salaries hereby provided for the funds in said fund shall be paid pro rata to the said chief game warden and chief deputy game warden. The county game commission shall be appointed on the recommendation of the board of county commissioners of each county and the appointment of such commissioners for all counties west of the Cascade Mountains shall be made by the chief game warden, and the appointment of all game commissioners east of the Cascade Mountains shall be made by the chief deputy game warden. The said appointments shall be made upon the recommendation of the county commissioners, but in case the county commissioners fail to recommend such county game commissioners for appointment upon the request of said state game wardens within ten days after written notice so to do, then and in that case the chief game warden may appoint in counties west of the Cascade Mountains, and the chief deputy game warden may appoint for counties east of the Cascade Mountains. The game commission for each county shall appoint a county warden. Each county warden shall receive a salary of not less than twenty-five dollars (\$25.00) per month nor more than one hundred and twenty-five dollars (\$125.00) per month, the amount of which shall be fixed by the county game commission of each county and shall be paid solely out of the money received from county game licenses and fines, and no salary shall be fixed by said commission in excess of the amounts of the receipts herein provided for. The county [state] game warden and the chief deputy game warden shall have general supervision and control of the county game wardens and county deputy wardens, and may transfer them on official business from one county to another whenever in their judgment it is advisable so to do. [L. '13, p. 357, § 2.]

§ 5395-3. Annual Reports of Warden.

It shall be the duty of each county warden to make a report annually to the state game warden or the chief deputy game warden, in whose jurisdiction he may reside, and the chief deputy game warden shall make a report annually to the chief game warden, and the chief game warden shall biennially make a report to the governor of the state, which said report shall contain all the information concerning the acts of the county game wardens, and all such other acts connected with the enforcement of the game laws as may come to his notice. The chief game warden and the chief deputy game warden, the game commissions and the county wardens shall have jurisdiction to enforce all of the laws of the state relating to game birds, game animals and game fish. The county game commission shall have an office in the office of the county commissioners at the county seat. [L. '13, p. 358, § 3.]

§ 5395-4. Duties of County Game Commission.

Said county game commission shall enforce the laws of the state within their respective counties involving the protection and propagation of all

game birds, game animals, game fish and harmless birds and animals. Said county game commission shall have charge of:

(1) The propagation and preservation of such varieties of game and game fish as it shall deem to be of public value.

(2) The collection and diffusion of such statistics and information as shall be germane to the purpose of this act.

(3) The construction, control and management of all county game and game fish hatcheries, including the control of grounds owned or leased for such purposes: Provided, That whenever any county game commission desires to establish a game fish hatchery it shall be the duty of the state fish commissioner to supervise the erection of such hatchery and the planting of any fish fry taken from such hatchery: And provided further, That no person in the state of Washington shall plant any fish or fish fry in any of the bodies of water in the state of Washington without the written consent of the state fish commissioner.

(4) The receiving from the United States commissioner or other person, and the gathering, purchase and distribution to the waters of this state of all game fish, spawn or fry.

(5) The taking of game fish from the public waters of the state for propagation and stocking of other waters therein.

(6) The seizure and disposition of all game birds, game animals and game fish, either taken, killed, transported or possessed contrary to law, and of all dogs, guns, seines, nets, boats, lights, or other instrumentalities unlawfully used or held with intent to use in pursuing, taking, attempting to take, concealing or disposing of the same.

(7) The county game commission in their respective counties shall have the power and authority by giving notice thereof by publication for three successive weeks in a newspaper published at the county seat of such county describing such lands to be set aside as a game preserve, to set aside certain parts or portions of their respective counties as game preserves wherein no game bird or game animal or game fish can be caught or killed within the boundaries thereof, for such time and so long as they may see fit and proper: Providing, however, That no game preserve or preserves so set aside by said county game commission shall consist of more than three (3) townships in any one county. [L. '13, p. 358, § 4.]

§ 5395-5. Fiscal Report to County Auditor.

Said county game commission shall, on or before December 1st of each year, submit to the county auditor a detailed report of their actions, including the amount of money received from all sources, an inventory of all game, fish, guns, dogs, seines, nets, and other property seized and sold or destroyed, with the names of the purchasers and the amount received, and an itemized statement of their disbursements. The books and vouchers of said county game commission shall be subject to examination by the public examiner at all times. [L. '13, p. 359, § 5.]

§ 5395-6. Employees.

The county game commission may appoint and employ a sufficient number of deputy game wardens and office assistants as may be necessary to

carry out the purposes of this chapter, and fix their periods of service and compensation. [L. '13, p. 360, § 6.]

§ 5395-7. Execution of Writs.

The state game wardens, the county game commission and county game warden, and all deputy game wardens appointed by them, shall have full power and authority to serve and execute all warrants and process of the law issued by the courts in enforcing the provisions of this act, or any other law of this state, relating to preservation and propagation of game and game fish, in the same manner as any constable or sheriff may serve and execute the same; and for the purpose of enforcing any game laws of this state they may call to their aid any sheriff, deputy sheriff, constable or police officer, or any other person, and it shall be the duty of all sheriffs, deputy sheriffs, constables or police officers and other persons, when so called upon, to enforce and aid in enforcing any game laws of this state. The state game wardens, the county game commission, the county game warden and deputy game warden shall have the power to arrest without a warrant any person or persons found in the act of violating any law enacted for the purpose of protecting or propagating game or game fish. [L. '13, p. 360, § 7.]

§ 5395-8. Bonds.

All appointees shall give bonds to be approved by the county game commission, and said bonds filed in the office of the county auditor, conditioned for the faithful discharge of their respective duties as follows: Each regular deputy [county] game warden one thousand dollars. [L. '13, p. 360, § 8.]

§ 5395-9. Terms Defined—Agency No Excuse.

The words "sell" and "sale" as used shall be construed as meaning a sale or offer to sell or having in possession with intent to sell, use or dispose of the same contrary to law. The word "person" shall be deemed to include partnerships, associations and corporations, and no violation of any of the provisions of the game law shall be excused for the reason that the prohibited act was done as the agent or employee of another, or that it was committed by or through an agent or employee of the person charged. The word "possession" shall be deemed to include both actual and constructive possession as well as control of the article referred to. The terms "waters of the state" shall be held to include all the boundary waters of the state, and the laws of this state shall be deemed to extend and be in force and effect over, upon and in all waters thereof. The terms "any part thereof" or "the parts thereof" whenever used shall be deemed to include the hides, horns, and hoofs of any animal so referred to, and the plumage and skin and every other part of any bird so referred to. The term "fur-bearing animals" shall not be deemed to include deer, elk, moose, caribou, mountain goat, mountain sheep, or gray squirrel. [L. '13, p. 361, § 9.]

§ 5395-10. Inspection of Hotels, etc.

The state game wardens or any member of the county game commission, the county game warden or any deputy game warden may, at his discretion, from time to time inspect hotels, restaurants, cold-storage houses or plants and ice-houses commonly used in storing meats, game or fish for private

parties, including all buildings used for a like purpose, for the purpose of determining whether game or game fish are kept therein in violation of the laws of this state. Any person in possession or control, or in charge of any hotel, restaurant, storage plant or building referred to, or any part thereof, who refuses or fails to permit the state game wardens, the county game warden or any deputy game wardens to enter any such building, or any part thereof, or any receptacle therein, for the purpose of making such inspection, is guilty of a gross misdemeanor. [L. '13, p. 361, § 10.]

§ 5395-11. Contraband Game, Seizure and Search.

Any game bird, game animal, game fish or any part thereof, caught, killed, shipped or had in possession or under control, contrary to any of the laws of this state, is hereby declared to be contraband. The state game wardens, the county game commission, the county game warden or any deputy game warden, sheriffs and their deputies, constables and police officers, shall seize and take possession of any and all game birds, game animals or game fish, or any parts thereof, which have been caught, taken or had in possession or under control or shipped contrary to any of the laws of this state. Any court having jurisdiction shall, upon complaint showing probable cause for believing that any game bird, game animal, game fish, or any part thereof, caught, taken, killed or had in possession, or under control by any person, or shipped or transported contrary to the laws of the state, is concealed or illegally kept in any building, car or receptacle, issue a search-warrant and cause a search to be made in any such place for any game birds, game animals, game fish, or any part thereof, and may cause any building, inclosure or car to be entered and any apartment, chest, box, locker, crate, basket, package, or any other receptacle, whatsoever kind or description, to be broken, opened and the contents thereof examined. All such officers taking or seizing any such game birds, game animals, game fish, or any part thereof, shall at once report all the facts attending the same to the county game commission. [L. '13, p. 362, § 11.]

§ 5395-12. Contraband Device.

All nets, seines, lanterns, snares, devices, contrivances and materials while in use, or had and maintained for the purpose of catching, taking, or killing, or attracting, or deceiving any game bird, game animal, or game fish, contrary to any of the laws of this state, within this state, or upon or within the boundary thereof, including fish-houses, inclosures or other sheltering structures or appliances erected or maintained in any waters, or on the shores of any lake, pond or stream is hereby declared to be a public nuisance. The state game wardens, the county game commission and their deputies, sheriffs and their deputies, constables and police officers, shall, without warrant or process, take, seize, abate or destroy any and all of the same while being used, had or maintained for such purpose, and no liability shall be incurred therefor to any person. [L. '13, p. 362, § 12.]

§ 5395-13. Witnesses.

In any prosecution under the laws of this state a participant in the violation thereof may testify as a witness against any other persons violating the same, without incriminating himself in so doing. The evidence so

given shall not be used in any criminal proceedings against such witness. [L. '13, p. 363, § 13.]

§ 5395-14. Exchange Specimens.

The state game wardens or the county commission may secure by purchase or otherwise, or by exchange, specimens of game birds, game animals, or game fish, with the game commission or game wardens of other counties and states for propagating purposes and not otherwise, and may also grant permission under the seal of said commission to any accredited representative of any incorporated society of natural history to collect for scientific purposes only, nests, eggs, game birds, game animals or game fish protected by the laws of this state. Such specimens shall not be sold or transferred. [L. '13, p. 363, § 14.]

§ 5395-15. Disposition of Fines.

All fines collected and bonds forfeited under any of the game laws of this state shall be paid into the county treasury of the county wherein the conviction was had and placed to the credit of the county game fund to be used only for the protection and propagation of game birds, game animals and game fish. [L. '13, p. 363, § 15.]

§ 5395-16. Disposition of Other Moneys.

All moneys collected by the county game commission upon licenses issued by it, including moneys received for fines and other sources, shall be paid into the county treasury and credited to the game fund, and be used for the purpose of propagating and enforcing the game laws of this state within their respective counties. [L. '13, p. 364, § 16.]

§ 5395-17. Rewards.

Every person, other than a regular salaried game warden or peace officer, entering a complaint that any of the provisions of this act are violated and a conviction thereon is secured shall be entitled to one-half of the fine imposed and collected by the court in such action: Provided, That said reward to the informer shall not exceed the sum of twenty-five dollars (\$25.00). [L. '13, p. 364, § 17.]

§ 5395-18. Obstructing Commission.

No person shall obstruct the state game warden, the county game commission, or any county game warden or deputy game warden, while engaged in gathering game fish spawn; nor shall any person place in any stream or river any logs or other debris at any time when said state game wardens, county game commission and their employees are gathering spawn, or about to gather spawn or catch fish for that purpose, in any such stream or river or body of water: Provided, This does not apply to log or shingle bolts for commercial purposes. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. The state game wardens, or the county game commission may institute a civil action in the name of the state of Washington to recover from any person or persons obstructing them in the performance of their duties, or who shall place such debris in such stream to the damages resulting therefrom, in addition thereto may

in such action enjoin such party or parties from doing the acts prohibited. [L. '13, p. 364, § 18.]

§ 5395-19. Oath.

The state game wardens, the county game commission, county game warden and any deputy game warden is hereby authorized to administer oaths, and may require any statement to them or him in applications for licenses, or in any report submitted to them or him in any manner connected with the discharge of their duties, to be made under oath. Any person failing or refusing to make any such statement under oath or falsely making an oath shall be guilty of a misdemeanor. [L. '13, p. 364, § 19.]

§ 5395-20. Penalty for Resisting Commission and Wardens.

Any person who shall resist or obstruct the state game wardens, the county game commission, county game warden or deputy game wardens, or other peace officers of this state, in the discharge of their duties while enforcing the game laws, shall be guilty of a gross misdemeanor. [L. '13, p. 365, § 20.]

§ 5395-21. Game Property of State.

No person shall at any time or in any manner acquire any property in, or subject to his dominion or control, any of the game birds, game animals, or game fish, or any parts thereof, of the game birds, game animals or game fish herein mentioned, but they shall always and under all circumstances be and remain the property of the state; except, that by killing, catching or taking the same in the manner and for the purposes herein authorized, and during the periods when the killing is not herein prohibited, the same may be used by any person at the time, in the manner and for the purposes herein expressly authorized; and whenever any person kills, catches, injures, takes, ships, or has in his possession, or under control, any of the game birds, game animals, or game fish, or any parts thereof, mentioned in this chapter, at a time or in a manner prohibited by this chapter, such person shall thereby forfeit and lose all right to the use and possession of such game bird, game animals, or game fish, or any parts thereof, and the state shall be entitled to the sole possession thereof: Provided, That the state wardens, or the game commission of each county shall grant permission to persons to have in their possession and allow the sale and shipping of game birds or game animals for propagation only. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 365, § 21.]

§ 5395-22. Nest and Eggs.

No person shall at any time take or have in his possession or under control, break or destroy or in any manner interfere with any nest, or the eggs of the kinds of birds the killing of which is at any or all times prohibited. Any person guilty of violating this section shall be guilty of a misdemeanor. [L. '13, p. 366, § 22.]

§ 5395-23. Hunting Deer With Dogs.

Any person who shall at any time shoot or kill in any manner a deer when such deer is in any river or lake, or body of salt water, or shall hunt or chase deer with dogs, shall be deemed guilty of a gross misdemeanor and

upon conviction thereof shall be punished as hereinafter provided. [L. '13, p. 366, § 23.]

§ 5395-24. Trap or Ensnare.

It shall be unlawful at any time [for any person] to set, lay, prepare, or have in his possession, any trap, snare, artificial light, net, bird lime, swivel-gun or set-gun or any contrivances whatever for the purpose of catching, taking or killing any of the game animals or game birds in this state, except that decoys and blinds may be used in hunting wild ducks, geese or brant. Any person violating any of this section shall be guilty of a misdemeanor. [L. '13, p. 366, § 24.]

§ 5395-25. Grouse, Pheasant, Quail, etc.

Every person who shall, within the state of Washington, hunt, pursue, take, kill, injure, destroy or possess any ruffed grouse, Hungarian partridge, prairie chicken, sage hen, Chinese, English, golden, Mongolian, silver, black neck or Japanese pheasants, or any species of quail or any species of imported upland game birds, between the 1st day of December and the 1st day of October of the following year, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided: Provided, That it shall be unlawful for any person to pursue, take, or kill in the state of Washington, any Hungarian partridge prior to the 1st day of October, 1920: And provided, further, That in all counties of the state of Washington lying east of the western boundary of the counties of Okanogan, Chelan, Kittitas, Yakima and Klickitat, it shall be unlawful to hunt, pursue, take, kill, injure, destroy or possess any Chinese, native pheasant, prairie chicken, or turtle dove, between the 1st day of November and the 15th day of September of the following year: And it is further provided, That it shall be unlawful to kill or have in possession any quail between the last day of November and the first day of October of the following year: And provided further, That it shall be unlawful to kill or have in possession any blue grouse between the first day of December and the first day of September of the following year: Provided further, That in all counties except Spokane county lying east of the western boundary of the counties of Okanogan, Chelan, Kitsap [Kittitas], Yakima and Klickitat it shall be unlawful to hunt, pursue or kill, or have in possession any species of quail until the first day of October, 1915: Provided, further, That in the counties of Kittitas and Yakima it shall be unlawful to kill or have in possession any western prairie chicken, eastern prairie chicken, native pheasant, Hungarian partridge, bob white quail, California valley quail, scaley partridge or sage hen until the first day of October, 1915: Provided, That in the counties of Kittitas and Yakima it shall be lawful to hunt, take, pursue, kill or have in possession, California mountain quail during the month of September of any year: Provided further, That in the counties of Kittitas and Yakima it shall be unlawful to hunt, take, pursue, kill or have in possession Chinese pheasants except from the first day of October to the 15th day of October of any year: Provided further, That in the counties of Kittitas and Yakima it shall be unlawful to kill or have in possession any native pheasant or ruffed grouse until the first day of October, 1915: Provided, That in all the counties lying east of the western boundary of Okanogan, Chelan, Kittitas, Yakima and

Klickitat it shall be unlawful to hunt, take, pursue, or kill or have in possession any blue grouse between the first day of December and the first day of September of any year: Provided, That in the county of Asotin it shall be unlawful to hunt, kill or have in possession any Chinese pheasants until October 1st, 1915: Provided, That in the county of Okanogan it shall be unlawful to hunt, pursue, take, kill, injure or destroy any species of partridge, sage hen, quail or any imported game bird, until the first day of October, 1915: Provided, however, That in all counties of the state lying west of the summit of the Cascade Mountains blue grouse may be killed during the last fifteen days of the month of September. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor: And provided further, That it shall be unlawful after the passage of this act for any person to take or kill within the state of Washington any sage grouse, commonly known as sage hen; any band-tailed pigeon, commonly known as wild pigeon, or any wood duck (*aix sponsa*); and in the counties of Whatcom, Skagit, Snohomish, King, Pierce, San Juan and Island, to take any ruffed grouse, commonly known as native pheasant. [L. '13, p. 366, § 25.]

§ 5395-26. Bag Limit.

Every person who shall, during the season when it is lawful to hunt the same, kill more than five prairie chickens, grouse, partridge, Hungarian partridge, native pheasant, Chinese, English, golden, Mongolian, silver, black-neck or Japanese pheasant, or more than ten quail or any or all kinds in any one day, shall be guilty of a misdemeanor: Provided, That no person shall in any one day kill more than five of the game birds mentioned in this section it being the intention thereof to limit the bags of one day to five birds, no matter how many varieties of these protected upland birds are included in the bag: Provided further, That ten quail may be killed in one day during the season when it is lawful to hunt the same, but the limit of upland game birds, if quail are included in the same for one day, shall never exceed ten upland birds, but in no event more than five of the above-named birds other than quail and the limit of the bag for one week shall never exceed twenty-five upland birds. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 368, § 26.]

§ 5395-27. Ducks, Geese and Brant.

Every person who shall, within the state of Washington, hunt, pursue, take, kill, injure, destroy or possess any goose, brant, mallard duck, canvass back duck, widgeon, spoon bill, gray duck, sprig tail, or any game duck, whether mentioned or named herein, or any snipe, curlew, plover, rail, or any surf or shore game birds, between the 1st day of February and the 1st day of October of the same year, shall be guilty of a misdemeanor: Provided, That in the counties of Okanogan, Ferry, Stevens, Douglas, Grant, Lincoln, Spokane, Adams, and Whitman, it shall be unlawful to kill geese, brant, or any species of game duck and curlew, plover, rail or any species of surf or shore game birds between the 1st day of February and the 15th day of September of the same year: Provided, That it shall be unlawful to kill or have in possession at any time any species of swan. Any person violating the

provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 369, § 27.]

§ 5395-28. Bag Limit.

Every person who shall, in the state of Washington, during the season when it is lawful to hunt the same, kill more than twenty (20) ducks, geese, or brant, in any one week, shall be guilty of a misdemeanor, it being the intention hereof to limit bags in any one week to twenty of the above-mentioned birds, no matter how many varieties of those birds are included in said bag; and for the purposes of this act the week shall be deemed to begin at midnight on Wednesday night, and any person violating the provisions of this act shall be guilty of a misdemeanor. [L. '13, p. 369, § 28.]

§ 5395-29. Possession Limited.

Every person, company, club, partnership, firm or corporation, boarding-house keeper, hotel-keeper, restaurant-keeper, market keeper or cold-storage plant, their owners, proprietors, officers, managers, agents or servants, who shall offer for sale or for market, or barter for, or exchange or keep in their possession any time of the year, any deer, moose, caribou, antelope, mountain sheep or mountain goat of any kind, or the various kinds of quail or the various kinds of Chinese, English or Mongolian pheasants, grouse, native pheasants, ptarmigan, partridge, Hungarian partridge, prairie chicken, sage hen or any kind of wild duck, goose, brant, rail, plover or game shore birds, or any portion of the meats of said animals or birds, shall be guilty of a misdemeanor. Possession by the above-named persons or corporations of any of the animals or game birds mentioned or named herein or any of the meats of the same shall be presumptive evidence that said animals or birds or the meats of the same was unlawfully taken by the person having possession of the same, and upon conviction thereof shall be punished as hereinafter provided: Provided, That any person may have in his possession, or in cold storage, for his own use only the number and kind of animals and birds permitted to be taken by this act, during the time when the same may be taken, provided the same were taken by the person, so having them in his possession or obtained by gift for his use only, or otherwise taken as provided in the previous section of this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 369, § 29.]

§ 5395-30. Sale of Game.

It shall be unlawful for any person at any time to sell or offer for sale any of the game birds, game animals or song birds protected by the laws of the state of Washington. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 370, § 30.]

§ 5395-31. Other States—Game Unlawful.

Every person who shall at any time have in his possession or under control within this state any game birds, game animals or game fish, or any part thereof, which has been caught, taken or killed outside of this state at a time when it is unlawful to have in possession or under control such game birds, game animals or game fish, or parts thereof, if caught, taken or killed

in this state, or which have been unlawfully taken or killed outside of this state or unlawfully shipped therefrom into this state shall be guilty of a misdemeanor. [L. '13, p. 370, § 31.]

§ 5395-32. Possession Unlawful.

It shall be unlawful to have in possession or under control by any person, any game birds, game animals or game fish or any parts thereof, the killing of which is at any time prohibited; the same shall be prima facie evidence that it was the property of this state at the time it was caught, taken or killed, and that it was caught, taken or killed in this state when the killing, taking or possession thereof is by this chapter declared to be unlawful, that such taking or killing occurred during the closed season. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. [L. '13, p. 371, § 32.]

§ 5395-33. Deer, Elk, Moose, Mountain Goat and Mountain Sheep.

No person shall, within the state of Washington, hunt, catch, take, kill, ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within or without the state, purchase, expose for sale, have in possession with intent to sell, sell to any person or have in possession or under control at any time, any elk, moose, caribou, deer, fawn, mountain sheep or mountain goat, or any part thereof, including the hides, horns or hoofs except as herein provided: Provided, That deer, mountain sheep and mountain goat may be killed between October 1st and December 1st of the same year, and any deer, mountain goat and mountain sheep, or any part thereof, may be had in possession by any person during the said time, but no person shall kill or have in possession during said time more than two deer, nor more than one mountain goat or mountain sheep, or parts thereof: Provided, That in the county of Okanogan every person who shall at any time between the first day of November and the first day of September of the following year hunt, pursue, take, kill, injure, destroy or possess any deer, shall be guilty of a misdemeanor: And provided further, That every person who shall within the county of Okanogan during the season when it is lawful to kill the same, take or kill, more than one deer, or shall kill any female deer, or spotted fawn, shall be guilty of a misdemeanor: And provided further, That any person who is lawfully in possession of any deer, mountain goat or mountain sheep, or any part thereof, may ship, or cause to be shipped in the manner provided for by this chapter, but not otherwise. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor: And provided further, That after the year 1925 male antlered moose and elk may be killed between October 1st and 15th of the same year, and any such male elk or moose or part thereof may be had in possession by any person during the time aforesaid, but no person shall kill or have in possession during said time more than one male antlered elk or moose or part thereof: And provided further, That when any deer, mountain goat, mountain sheep or any parts thereof are lawfully in possession of any person as provided for in this chapter such person may continue in the possession of the same for five days after the time herein limited for the killing of said animal: And provided further, That no cow, female elk or moose can be killed or had in possession at any time. Any person violating

any of the provisions of this section shall be deemed guilty of a gross misdemeanor. [L. '13, p. 371, § 33.]

§ 5395-34. State Game Fund—County Funds.

There is hereby established a fund to be known as the state game fund which shall consist of all moneys received for state hunting and game fish licenses, and all such other sums as the legislature may from time to time appropriate and set aside for the purposes provided for in this act. Said state game fund shall also consist of ten per cent of all moneys received by the county officers for county hunting and game fish licenses, and from fines and costs which shall be paid into the state treasury, and constitute a part of said state game fund, said payments to be made quarterly on the last day of each quarter of the year, beginning on the first day of March. Such state game fund shall be used for the payment of the salaries and expenses of the state game wardens provided for by this act, and their necessary traveling and office expenses, and for propagation, protection, introduction, purchase and distribution of any game, animals, birds or fishes. Ninety per cent of all moneys received in any county from the sale of county hunting and game fish licenses, and from fines and costs, shall be expended in the said county from which the same are collected, and shall be so spent in the payment of salaries and expenses of the county game wardens or special deputies appointed in said county by the county game commission, and for the protection, introduction, propagation and purchase of animals, birds and game fishes in said county, and in the enforcement of the game and game fish laws within said county from which said moneys are received. All payments made under the provisions of this act shall be made by warrant in the usual manner, and shall be audited by the state and county officers in the same manner as other claims against the state of Washington and the various counties are audited. [L. '13, p. 372, § 34.]

§ 5395-35. Game Fish—Licenses.

It shall be unlawful for any person to hunt, pursue, catch, kill or take any of the game animals, game birds or game fish protected by the laws of this state during the season when it is lawful to hunt, pursue, take or kill the same without such person having procured before the time of such hunting, pursuing, catching or killing, a hunting or fishing license therefor duly issued to him by the county or state authorities.

The licenses provided for in this act shall be issued by the county auditors of the respective counties, and shall be as follows:

(a) A resident of this state may obtain a hunting and fishing license by paying the county auditor the sum of one dollar (\$1.00) which shall entitle the holder thereof to hunt or fish within the county where such license is issued until the first day of March next following the date of its issuance, at any time when it is otherwise lawful to hunt or fish.

(b) Any person who is a resident of this state may obtain from any county auditor a state hunting and fishing license by the payment of five dollars (\$5.00), which license shall entitle the holder thereof to hunt and fish in any part of the state until the first day of March next following the date of its issuance, whenever it is otherwise lawful to hunt or fish within said state.

(c) A nonresident of the state of Washington may obtain a hunting and fishing license by paying to the county auditor the sum of ten dollars (\$10.00), which shall entitle the holder thereof to hunt and fish in any county in the state up to and including the first day of March next following the date of its issuance, when it would otherwise be lawful to hunt or fish in said county.

(d) Provided, however, That a county fishing license shall entitle the holder thereof to fish on either side of any stream or river, when the said stream or river shall constitute the boundary between two counties.

(e) The county auditor shall, upon application and the payment of two dollars (\$2.00), issue to any nonresident of this state a license to take, catch, or kill any game fish in any lawful manner within the county where the license is issued, whenever it is lawful to take, kill or catch any game fish.

(f) Licenses issued under the provisions of this act shall be nontransferable, and any person hunting or fishing shall, upon demand of any warden, or deputy warden, exhibit his license, and a failure or refusal to exhibit such license shall be prima facie evidence that such person has no license.

(g) Any person hunting or fishing without having obtained the license herein provided for, or doing any other act which by this act is declared to be unlawful, in cases where no other specific penalty is provided, shall be guilty of a misdemeanor.

(h) Provided, however, That nothing in this act shall prevent any woman, or minor under the age of sixteen (16) years, who is an actual resident of this state, from fishing at any time when it is otherwise lawful to fish. [L. '13, p. 373, § 35.]

§ 5395-36. Application for License.

In applying for any license under this act the applicant shall make a written application which shall describe the applicant as to age, weight, height and complexion, and the license issued shall contain the said description as contained in said application, and in all cases other than that of a nonresident the application shall be accompanied by a statement to the effect that he is a resident of the state of Washington, his place of residence, and any person who falsely states that he is a resident of the state of Washington when he is not such, shall be guilty of a misdemeanor. [L. '13, p. 375, § 36.]

§ 5395-37. Sale Prohibited.

Any person who takes or kills or has in his possession with intent to sell, sells, offers or exposes for sale, ships by common carrier, conveys or causes to be conveyed, has in his possession with intent to ship, or to convey in any manner to any point within or without the state, any game animals, game birds or game fish, or any part thereof, including the hides and horns, or any person who buys any such game animals, game birds or game fishes or part thereof in violation of any of the provisions of this chapter or any common carrier or agent thereof, who ships or aids or abets in shipping any such game animals, game birds or game fish or any part thereof, or have possession of same with intent to ship or transport or convey to any point

either within or without the state, shall be guilty of a gross misdemeanor. [L. '13, p. 375, § 37.]

§ 5395-38. Artificial Lights.

Any person who hunts for any of the protected game animals, game birds or game fishes with a jack light or other artificial light of any class, kind or description shall be guilty of a misdemeanor. [L. '13, p. 375, § 38.]

§ 5395-39. Export or Import.

Every steamboat company, railroad company, express company or common carrier, their officers, agents and servants and every other person who shall transfer or carry from one point to another within the state or take out of the state, or who shall receive for the purpose of transferring from this state any of the wild game birds, game animals, game or game fish enumerated in this act shall be guilty of a misdemeanor: Provided, That nothing in this section shall be construed to prevent any steamboat company, express company, railroad or other common carrier, their officers, agents and servants from receiving any of the game birds, game animals or game fishes enumerated in this act from transferring them from one point to another point within this state when said game birds, game animals or game fish are accompanied by an affidavit in duplicate by the shipper, that the same is not shipped for sale or profit; said affidavit may be furnished if necessary at destination. Such affidavit shall describe said game animals, game birds and game fish and shall be attached to said shipment while in transit from one point to another or furnished at its destination and the duplicate must be sent to the game commission or game warden of said county. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 375, § 39.]

§ 5395-40. Beavers.

No person shall in any manner hunt for, trap, take, catch or kill any beaver in this state, or have in his possession alive or dead any beaver or any part thereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 376, § 40.]

§ 5395-41. Game Fish.

No person shall catch, take, kill or have in his possession or have under control for any purpose whatever except as hereinafter provided, any of the game fish hereinafter mentioned within the periods mentioned, to wit: Any variety of trout except Dolly Varden or bull trout or any variety of pike, between the 31st day of December and 1st day of May following or any black, grey or Oswego bass, croppie, perch, bullhead, or sunfish between the first day of May and the 15th of July of the same year. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 376, § 41.]

§ 5395-42. Limit of Catch.

No person shall catch, take, kill or have in his possession more than fifty game fish in any one day, nor more than twenty pounds and one game fish in any one day, nor more than thirty pounds and one game fish in any one calendar week, nor in any other manner than by angling for them with hook and line held in the hand or attached to a rod so held, and no person shall

have in his possession any game fish caught, taken or killed in any of the waters of this state except as provided in this chapter. Any person violating this section shall be guilty of a misdemeanor. [L. '13, p. 377, § 42.]

§ 5395-43. Private Fish Hatcheries.

No person shall have in his possession for sale or with intent to sell, expose or offer for sale or sell to any person, any trout or other game fish at any time, or ship or cause to be shipped or have in possession with intent to ship to any person either within or without the state any such game fish, or have any such game fish in his possession during the season for taking the same: Provided, That nothing in this act shall be construed to be in conflict with the provisions of sections 5171-5182 inclusive of Remington & Ballinger's Annotated Codes and Statutes of Washington. Any person violating this section shall be guilty of a misdemeanor. [L. '13, p. 377, § 43.]

§ 5395-44. Size of Trout.

No person shall at any time catch, take, kill, or have in his possession or under his control any trout or bass of any variety whatever which are less than six inches in length. Any person catching such game fish shall at once return the same to the water from whence they are taken with as little injury as possible. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 377, § 44.]

§ 5395-45. Nonresident, Possession of.

No person shall ship, have in his possession with intent to ship or cause to be shipped beyond the borders of this state any fish of the kind mentioned in this chapter: Provided further, That any nonresident of this state who is desirous of taking any fish beyond its boundaries for his personal use may carry with him on the same train or conveyance not to exceed fifty fish nor more than twenty pounds and one fish caught by him: Provided further, That all boxes, bags or packages of any description used in shipping or taking game fish out of the state shall be plainly marked with the name and address of the consignor and consignee, and with the description and contents of the package. Any person who violates this section shall be guilty of a misdemeanor. [L. '13, p. 377, § 45.]

§ 5395-46. Devices—Public Nuisances.

Nets of any description being used in any of the fresh waters of this state above tide water are hereby declared and are a public nuisance, and it shall be the duty of all county game commissioners, game wardens and their deputies, police officers and constables without warrant or process, to take, seize, abet and destroy any and all of the same. And any person using same shall be guilty of a misdemeanor. The game wardens and their deputies, sheriffs and their deputies, police officers, and constables shall seize any and all nets and seines when illegally used and all game fish taken therewith and at once report the seizure to the county game commission or game warden. Every person using, aiding or abetting the use of any such nets or other devices contrary to the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 378, § 46.]

§ 5395-47. Fishways and Dams.

No person shall catch, take or kill in any stream within four hundred feet of any fishway or dam or have in his possession or under his control any game fish so caught, taken or killed. Any person who violates any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 378, § 47.]

§ 5395-48. Explosives, etc.

No person, shall lay, set, use or prepare any drug, poison, lime, medicated bait, nets, fish berries, dynamite or other explosive or any other deleterious substance whatever, or lay, stretch or place any tip-up, snare or net or trot line, or any wire string, rope or cable of any kind, class or description in any of the waters of this state with intent thereby to catch, take or kill any game fish. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 378, § 48.]

§ 5395-49. Providing Fishways.

Any person owning, erecting, managing or controlling any dam or other obstruction across the river, creek or stream within the state or forming the boundary lines of this state, shall construct in connection with such dam, durable fishways, in such manner and in such shape and size that the free passage of all game fish inhabiting such waters shall not be obstructed. Such fishway shall be maintained in good condition and kept in good repair by the person so owning, controlling, managing, operating, or using such dam or obstruction. If any person fails to construct or keep in good repair, durable and efficient fishways, as herein provided for within a period of ten days after notice, the county game commission may construct or repair the same and the cost thereof may be recovered from the owner or any persons managing or being in control thereof in a civil action brought in the name of the state of Washington. Any moneys so received shall be credited to the game protection fund. All fishways heretofore or hereafter erected in any dam or obstruction across any of the streams of this state shall at all times be under the supervision of the county game commission. Any person who violates any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 379, § 49.]

§ 5395-50. Casting Sawdust in Rivers or Streams.

Every person who shall cast or discharge or permit to be cast or discharged into any waters of this state any sawdust, planer shavings, or other lumber waste, shall be guilty of a misdemeanor. [L. '13, p. 379, § 50.]

§ 5395-51. Defining Offense.

The killing of every single bird, animal or fish protected by the laws of this state shall constitute a separate offense. [L. '13, p. 379, § 51.]

§ 5395-52. Attempt Violations.

Any attempt to violate any of the provisions of any section of this chapter shall be deemed a violation of such provision and any person attempting to violate any of the provisions of this chapter shall be guilty of a mis-

demeanor, unless otherwise designated as a gross misdemeanor. [L. '13, p. 380, § 52.]

§ 5395-53. Repealing and Saving Clause.

Sections 5323, 5327, 5328, 5333, 5337, 5354, 5356, 5361, 5362, 5363, 5364, 5365, 5367, 5371, 5372, 5379, 5380, 5384, 5385 and 5389 of Remington & Ballinger's Annotated Codes and Statutes of Washington, and all other acts or parts of acts inconsistent with the provisions of this chapter are hereby repealed: Provided, If any section of this act should be declared unconstitutional it shall not affect any other section or part of section thereof. [L. '13, p. 380, § 53.]

§ 5395-54. Catching of Fish in Clarke County—Appliances.

Every person, firm or corporation who shall fish for or catch fish excepting carp with any net, seine, trap, set net or similar appliance in Lake river or any of the sloughs of the Columbia river in Clarke county, Washington, shall be guilty of a misdemeanor. [L. '13, p. 385, § 1.]

§ 5395-55. Limit on Catch.

Every person who shall with hook and line, commonly called angling, catch more than twelve black bass or more than fifty croppies in any one day in any of the waters described in section 5395-54, shall be guilty of a misdemeanor. [L. '13, p. 385, § 2.]

TITLE XL.

HEALTH.

CHAPTER II.

VITAL STATISTICS.

§ 5424. Registration Districts.

For the purpose of this act the state shall be divided in registration districts as follows: Each city and incorporated town shall constitute a primary registration district, and each county, exclusive of the portion included within cities and incorporated towns, shall be subdivided by the state registrar into districts in such manner as may appear necessary for the convenience of the people, and each such district shall constitute a primary registration district, and each primary registration district shall be numbered by the state registrar. [L. '13, p. 554, § 1.]

§ 5425. Local Registrars—Duties—Death Certificates and Burial Permits.

The health officer of each city and incorporated town shall be the local registrar in and for such primary registration district and shall perform all the duties of local registrar as hereinafter provided. The state registrar shall appoint a suitable person to be local registrar in and for each district not included in cities and incorporated towns, who shall hold such position during the pleasure of the state registrar and shall perform all the duties of local registrar, as hereinafter provided. Each local registrar shall immediately appoint in writing a deputy who shall be authorized to act in his stead in case of absence, death, illness or disability. [L. '13, p. 555, § 2.]

§ 5441. Compensation of Local Registrars.

Each local registrar shall be paid the sum of twenty-five cents for each birth and death certificate properly and completely made out and registered with him and by him returned to the state registrar on or before the fifth day of the following month, which sum shall cover and include the making out of the burial permit and copy of the certificate to be filed and preserved in his office. And in case no births or deaths were registered during any month, the local registrar shall be paid the sum of twenty-five cents for each report to that effect, properly made out in accordance with the directions of the state registrar: Provided, That all local registrars who receive regular compensation as health officers shall not be entitled to the fee of twenty-five cents, above mentioned, but the duties of the local registrar shall be considered as a part of their duty as local health officer. All accounts payable to local registrars under the provisions of this act shall be paid by the treasurer or other lawful officer, out of the funds of the county or city, upon warrants drawn by the county auditor, or other proper local officer of such county or city, which warrant shall specify the number of certificates, properly registered and reports promptly returned where no births or deaths are registered: Provided, however, That no warrant shall be issued to any local registrar until he shall present a certificate from the state registrar stating the number of

certificates and reports of no births and no deaths properly returned to the state registrar, which certificates the state registrar shall issue during the months of January, April, July and October of each year, after he shall have received the certificates and reports for the months next preceding. [L. '13, p. 555, § 3.]

§ 5442.

The presumption that the laws of a sister state are the same as our own, which provide that a death certificate filed with a county auditor shall be prima facie evidence of the facts recited, does not make a death certificate filed in a sister state prima facie

evidence in the courts of this state: *Thompson v. Seattle, Renton & Southern R. Co.*, 71 Wash. 436, 128 Pac. 1070.

As to the presumption that statutes of a foreign state are similar to those of domestic forum, see note in 1 Ann. Cas. 459.

CHAPTER III.

STATE BOARD OF DAIRY AND FOOD COMMISSION.

§§ 5444a—5445d.

Repealed. See L. '13, p. 201, § 14.

CHAPTER V.

MANUFACTURE AND SALE OF DAIRY PRODUCTS.

§ 5446a.

The evidence is sufficient to warrant the jury in finding that milk, taken from defendant's delivery wagon, was intended for human food, where his driver testified that he had completed his delivery, that the sample was taken from a can of sour milk which he was taking home and he had no milk in any other can, but the city inspector testified that he examined five or six cans out of thirty-five or forty on the wagon and found milk in all of them, and there was other testimony that the milk taken was not sour: *Seattle v. Erickson*, 55 Wash. 675, 25 L. R. A., N. S., 1027, 104 Pac. 1128.

The jury is warranted in finding that milk was watered where two chemists who analyzed a sample found it below normal in its percentage of butter fats, and solids, one testifying that the milk was watered and the other that it was only skimmed: *Seattle v. Erickson*, 55 Wash. 675, 25 L. R. A., N. S., 1027, 104 Pac. 1128.

As to what is "milk," see note in Ann. Cas. 1912B, 388.

§§ 5448b, 5448g, 5448k, 5448m.

Repealed. See L. '13, p. 201, § 14.

CHAPTER VI.

ADULTERATION OF FOODS, DRINKS AND DRUGS.

§ 5460.

Repealed. See L. '13, p. 201, § 14.

§ 5465.

Repealed. See L. '13, p. 201, § 14.

CHAPTER VII.

SALE OF MILK IN CITIES OF THE FIRST CLASS.

§ 5478.

A compliance with this section is not a condition precedent to the prosecution of a person for violating the pure milk law, in view of other provisions of the law, section 5468, providing for the delivery of samples of the milk taken and that no evidence of the analysis shall be given if such samples are not delivered on request, and section

5477, providing that a producer of milk is not liable unless the milk is taken upon his premises or while in his possession and a sealed sample thereof given to him: *State v. Burnam*, 71 Wash. 199, 128 Pac. 218.

As to police regulations prescribing standard of quality of milk, see note in 1 L. R. A., N. S., 918. See, also, notes in 4 Ann. Cas. 119 and 18 Ann. Cas. 321.

§ 5481-1. Sale in Bottles—Label.

Hereafter no bottled milk or bottled cream shall be offered for sale, sold or otherwise disposed of in cities of the first class in the state of Washington, unless the caps on all such bottles containing the milk or cream indicate and have inscribed thereon the name of the dairy, person, firm or corporation offering the same for sale. [L. '11, p. 133, § 1.]

§ 5481-2. Penalty.

Any person, firm or corporation in the state of Washington selling or offering for sale any bottled milk or bottled cream which do not have inscribed on the caps of the bottles the name of the dairy, person, firm or corporation offering the same for sale, shall be guilty of a misdemeanor. [L. '11, p. 133, § 2.]

The title of this act limits the operation of this and the next section to cities of the first class.

§ 5481-3. Substituting Label—Penalty.

Any person, firm or corporation in the state selling or offering for sale any bottled milk or bottled cream with caps containing the name of some person, firm or corporation other than the owner of the same, for the purpose of inducing or securing a sale, or in any other way wrongfully or fraudulently brand the same as to name, or otherwise, shall be guilty of a misdemeanor. [L. '11, p. 133, § 3.]

See note to § 5481-2.

CHAPTER X.**QUARANTINE AT SEAPORTS, PEST-HOUSES, ETC.****§ 5525.**

An ordinance making it unlawful for any one outside the crematory department to haul refuse through the streets is not restricted by this section, requiring owners of

private property to remove the source of filth upon twenty-four hours' notice, the latter affording merely a cumulative remedy: *Smith v. Spokane*, 55 Wash. 219, 19 Ann. Cas. 1220, 104 Pac. 249.

CHAPTER XIII-A.**COUNTY TUBERCULOSIS HOSPITALS.****§ 5554-1. County may Maintain—Buildings—Funds.**

The board of county commissioners of any county shall have power to establish, provide and maintain hospitals and to employ visiting nurses for the care and treatment of persons suffering from tuberculosis, but whenever a hospital is established as herein provided, such visiting nurse or nurses shall be under the control of and subject to the directions of the board hereinafter designated as the board of managers of such hospital.

For these purposes, said board of county commissioners shall have the following powers:

To purchase or lease real property therefor or to use for this purpose lands already owned by the county, providing such site shall first be approved by the state board of health.

To erect all necessary buildings, make all necessary improvements or repairs and alter any existing building for the use of said hospital: Provided,

That such buildings be separate and apart from those designated as almshouses, or county infirmaries: And provided further, That the plans for such erection or alteration shall first be approved by the state board of health.

To use county moneys, to levy taxes and to issue bonds as authorized by law to raise a sufficient amount of money to cover the cost of procuring a site, constructing and equipping hospitals and for the maintenance thereof, and all other necessary and proper expenses herein authorized, and create a fund to be known as the "Tuberculosis fund," from which all expenses herein provided for shall be paid.

To appoint a board of managers for said hospitals as hereinafter provided. To accept and hold in trust for the county any grant of land, gift or bequest of money, or any donation for the benefit of the purposes of this act, and apply the same in accordance with the terms of the gift. [L. '13, p. 592, § 1.]

§ 5554-2. Board of Managers—Term.

When the board of commissioners shall have determined to establish a hospital for the care and treatment of persons suffering from tuberculosis and shall have acquired a site therefor and shall have awarded contracts for the necessary buildings and improvements thereon, it may appoint three citizens of the county, only one of whom may be a physician, who shall constitute the board of managers of said hospital. The term of office of each member of said board shall be three years, and the term of one of such managers may expire annually, the first appointments shall be made for the respective terms of three, two and one years. Appointments of successors shall be for the full term of three years, except that appointment of persons to fill vacancies occurring by death, resignation or other cause shall be made for the unexpired term. Failure of any manager to attend four consecutive meetings of the board shall cause a vacancy in his office, unless said absence is excused by formal action of the board of managers.

The managers shall receive no compensation for their services, but shall be allowed their actual and necessary traveling and other expenses, to be audited and paid in the same manner as the other expenses of the hospital. No manager shall be removed from office except for cause shown and after a public hearing on charges reduced to writing. A copy of said charges and the verdict thereon shall be filed with the county auditor. [L. '13, p. 593, § 2.]

§ 5554-3. Superintendent—Salaries.

The board of managers shall appoint a superintendent of the hospital, who shall be the secretary of the board and shall hold office at the pleasure of said board. Said superintendent shall not be a member of the board of managers, and shall be a qualified practitioner of medicine.

Said board of managers shall fix the salaries of the superintendent and all other officers and employees and the management of said hospital shall be entirely in the hands of such board. [L. '13, p. 593, § 3.]

§ 5554-4. County Treasurer to be Treasurer.

The county treasurer of any county which establishes such an institution shall be the treasurer of such institution, and shall receive all moneys raised

by taxation or otherwise or paid for the maintenance of inmates of such institution, and shall disburse all moneys to be paid on account of such institution upon warrants drawn upon such fund by the county auditor, as approved by the board of managers. [L. '13, p. 594, § 4.]

§ 5554-5. Application for Admission to Hospital.

Any person having resided one year within the county in which the hospital is situated desiring treatment in such hospital, may apply in person to superintendent or to any reputable physician for examination and such physician, if he finds that said person is suffering from tuberculosis in any form may apply to the superintendent of the hospital for admission of said person. Upon receipt of such application, if there be a vacancy in said hospital, the superintendent shall notify the person named in such application to appear in person at the hospital. If upon personal examination the superintendent and board of managers are satisfied that such person is suffering from tuberculosis he shall be admitted. All applications shall be in writing and shall state whether applicant can pay in whole or in part for his care and treatment while at the hospital, and every application shall be filed and recorded in a book kept for the purpose in the order of receipt. When said hospital is completed and ready for the treatment of patients, or whenever thereafter [there] are vacancies therein, admission to said hospital shall be made in the order in which the names of applicants shall appear upon the application book to be kept as above provided, in so far as such applicants are certified to by the superintendent to be suffering from tuberculosis, except that advanced cases shall always be provided for first. No discrimination shall be made in the accommodation, care or treatment of any patient because of the fact that the patient or his relatives contribute to the cost of his maintenance in whole or in part, and no patient shall be permitted to pay for his maintenance in such hospital a greater sum than the average per capita cost of maintenance therein, including a reasonable allowance for the interest on the cost of the hospital; and no officer or employee of such hospital shall accept from any patient thereof, any fee, payment or gratuity whatsoever for his services. When all persons who are otherwise qualified to admission to any hospital provided by this act are accommodated and provided for, persons who have not resided in the state for one year prior to applying shall be eligible to admission. [L. '13, p. 594, § 5.]

§ 5554-6. Support of Patients.

Whenever a patient has been admitted to said hospital from the county in which the hospital is situated, the superintendent shall cause inquiry to be made as to his circumstances, and of the relatives of such patient legally liable for his support. If he find that such patient or said relatives legally liable for his support, are able to pay for his treatment in whole or in part, an order shall be made directing such patient, or said relatives to pay to the county treasurer for the support of such patient, a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual per capita cost of maintenance. The county commissioners shall have the power and authority to collect such sum from said patient or his estate, or from his relatives legally liable for his support. If the superintendent find that such patient, or said relatives, are not able to pay, either in

whole or in part, for his care and treatment in such hospital, said patient shall be admitted free of charge. [L. '13, p. 595, § 6.]

§ 5554-7. State Board of Health to Inspect.

All hospitals established or maintained under the provisions of this act shall be subject to inspection by any authorized representative of the state board of health, state board of control, the state board of supervision and control of public offices, and the board of county commissioners, and the resident officers shall admit such representatives into every part of the hospital and its buildings and give them access on demand to all records, reports, books, papers and accounts pertaining to the hospital. [L. '13, p. 595, § 7.]

§ 5554-8. Government for Hospital.

Wherever a hospital for the care and treatment of persons suffering from tuberculosis exists in connection with, or on the grounds of a county almshouse, the board of commissioners may appoint a board of managers for such a hospital, and such hospital and its board of managers shall thereafter be subject to all provisions of this act, in like manner as if it had been originally established hereunder. [L. '13, p. 596, § 8.]

§ 5554-9. Cities or Counties may Contract for Care.

Any resident of the state of Washington living outside of a county maintaining a tuberculosis hospital may apply for treatment, or any city, village or county may apply on behalf of its charges and the same may be provided for under a stipulated agreement by the party, municipality or county to pay a weekly sum designated by the board of managers of such hospital, but nonresidents of a county shall not be provided for to the exclusion of residents of said county. [L. '13, p. 596, § 9.]

§ 5554-10. Payments by State.

There shall be paid by the state treasurer quarterly to the counties maintaining such hospitals, three dollars per week for each person in such institution during the time of confinement as hereinafter provided; except those paying full maintenance. [L. '13, p. 596, § 10.]

§ 5554-11. Managers Report.

On the first day of July and quarterly thereafter the board of managers of any county operating such institution shall certify to the state auditor, the county auditor and the state board of control the number of persons cared for at public expense in such institution, the date when such persons were admitted, and the number of weeks each was cared for during the preceding quarter, which certificate shall be attested by the board of managers and sworn to by the superintendent, and when said board of control shall approve the same, the state auditor shall draw a warrant for the amount due according to the provisions of this act. [L. '13, p. 596, § 11.]

§ 5554-12. County Commissioners may be Managers.

Whenever the board of county commissioners shall manage such hospitals, such board shall have the same powers and be subject to the same regulations as herein provided for a board of managers. [L. '13, p. 596, § 12.]

§ 5554-13. State Aid.

Hospitals operated by municipalities of the first class, now existing, or hereafter established and maintained for the treatment of tuberculosis exclusively, may receive state aid by complying with the provisions of this act, except such institutions shall not be required to operate under a board of managers as provided herein, nor shall said institutions be subject to the provisions of this act regarding charge to patients, except those patients for whom said institutions receive state aid. [L. '13, p. 597, § 14.]

§ 5554-14. Supervision by State Board of Control.

The supervision of institutions operating under the provisions of this act shall be by and under the state board of control. No institution operating hereinunder shall be refused participation in the state aid herein provided for, except after the approval of the state board of health. [L. '13, p. 597, § 15.]

§ 5554-15. Use of Hospital.

After the establishment in any county of a hospital as herein provided for, no person suffering from tuberculosis shall be taken care of or treated at any almshouse or county institution, other than such hospital, except in cases of emergency. [L. '13, p. 597, § 16.]

TITLE XLI.

HIGHWAYS.

CHAPTER I.

THE LAW OF TRAVEL.

§ 5558.

Where an automobile, driven on the left side of a street, struck a pedestrian, it is not prejudicial error to give an inaccurate instruction that the law requires vehicles to remain on the right side of the street and that a driver violating such law is bound to exercise a higher degree of care than if he were on the right side, in view of this section, requiring passing vehicles to seasonably turn to the right of the center of the road, and section 5569, requiring automo-

biles on passing to turn to the right, and the general "law of the road," arising from usage requiring persons upon a continuously used street to keep upon the right side: *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876.

As to the duty to keep to right or left side of road, see note in 48 Am. St. Rep. 368.

As to negligence in the use of streets under the law of the automobile, see note in 108 Am. St. Rep. 213.

§ 5561-1. Width of Tires.

It shall be unlawful for any person or corporation to transport in any cart, wagon, automobile truck or other vehicle over and along roads in any county where the character of the material of which the roads in such county are constructed and the climatic conditions prevailing in such county render the transportation of greater loads per inch of width of tire injurious to such roads, any load that shall not be so limited and adjusted that the bearing of the load, including the weight of the vehicle, upon the road as transmitted through the axle to any tire, shall not exceed four hundred pounds per inch of width of such tire, for tires two inches in width or less; and for tires in excess of two inches in width, but not to exceed five inches in width, the load per inch per width of tire shall not exceed four hundred pounds per inch of width of tire plus fifty pounds per inch of width in excess of two inches; and for tires five inches in width the load shall not exceed five hundred fifty pounds per inch of width of such tire; and for tires in excess of five inches in width the load per inch of width shall not exceed five hundred fifty pounds per inch of width of tire plus seventy pounds per inch of width in excess of five inches: Provided, That if the diameter of the wheels bearing the load exceed three feet, an additional load of fifty pounds per inch of width of tire may be carried on such wheels for each foot of diameter of such wheel in excess of three feet. [L. '13, p. 482, § 1.]

§ 5561-2. Roads Requiring Wide Tires.

It shall be the duty of the board of county commissioners of the respective counties of the state to determine whether or not the character of the material of which the roads of such county are constructed and the climatic conditions prevailing in such county render it necessary that the provisions of this act be enforced in such county, and to enter such determination in the record of the proceedings of the board, and when such determination shall be that the character of the material of which the roads of such county are constructed and the climatic conditions prevailing in such county are such as to render

it injurious to such roads to allow greater loads per inch of width of tire to be transported over and along the roads of such county, the provisions of this act shall be effective in such county, provided, that the provisions of this act shall not apply to vehicles merely passing through and not commonly used therein. [L. '13, p. 483, § 2.]

§ 5561-3. Penalty.

Every person or corporation transporting greater loads per inch of width of tire over and along the state and county roads within any county where the board of county commissioners has determined that this act shall be effective, shall be guilty of a misdemeanor and for a third violation of the provisions of this act shall be guilty of a gross misdemeanor. [L. '13, p. 483, § 3.]

CHAPTER II.

AUTOMOBILES AND MOTORCYCLES.

§ 5563.

Under this section, requiring the owner of every automobile to file in the office of the secretary of state his name and address and a description of the vehicle owned by him and obtain a certificate, the certificate is prima facie proof of ownership; and an instruction that it was a mere circumstance to be considered in determining the credibility of witnesses is properly refused: *De-lano v. La Bounty*, 62 Wash. 595, 114 Pac. 434.

§ 5569.

See notes to § 5558.

§ 5570.

Negligence in failing to stop an automobile, upon signal by the driver of a horse that had taken fright, is sufficient to sustain a verdict for the plaintiff, even though the other grounds of negligence were not made out: *Brown v. Thorne*, 64 Wash. 18, 111 Pac. 1047.

The right to operate an automobile carries the right to make the usual noises incident thereto: *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

Where a horse has been excited and becomes unmanageable, it is the duty of the operator of an automobile to stop the machine, as it is presumed to be always under control: *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

The driver of an automobile must take notice of the road, and it is his duty to stop on signal, if he can without accident, when requested to do so by the driver of a horse not under control: *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

As to the duty and liability of operator of automobile with respect to horses encountered on the highway, see note in 14 L. R. A., N. S., 251.

In an action for injuries caused by a runaway team, a general denial of an allegation that the team, while under the joint control of the defendants, ran into the plaintiff, admits of evidence upon the part of the defense that the team was running away and beyond the control of the defendants: *Kimble v. Stackpole*, 60 Wash. 35, 35 L. R. A., N. S., 148, 110 Pac. 677.

In an action for injuries caused by a runaway team, a verdict for the defendants is properly directed where there was nothing to show what caused the team to run away, or that it was a fractious team, and it appeared that the defendants were not negligent and did all in their power to control it: *Kimble v. Stackpole*, 60 Wash. 35, 35 L. R. A., N. S., 148, 110 Pac. 677.

A complaint alleging that a team was frightened by the negligence of the driver of an automobile in blowing his whistle when directly opposite the team while driving at a high rate of speed in violation of a city ordinance, in such a manner as to frighten the team, fairly includes the rate of excessive speed as a proximate cause of the accident: *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

There is sufficient evidence of negligence in the driving of an automobile, whereby a team was frightened and ran away, to require the case to be submitted to the jury, where it appears that the automobile was run at a speed of twenty or twenty-five miles an hour, on a street where there were many teams and where the city ordinances prohibited a speed in excess of ten miles an hour, that the driver passed within fifteen feet of the team, and blew his whistle when directly opposite, and did not notice the horses before they started to run: *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

In an action for injuries to plaintiff's horse and buggy in a collision with defendant's automobile, where the evidence is conflicting as to whether plaintiff was guilty

of contributory negligence in driving on the left side of the street near a turn, findings for the plaintiff are supported by evidence that the automobile struck the left side of the buggy and horse before it had turned straight with the street: *Schoening v. Young*, 55 Wash. 90, 104 Pac. 132.

§ 5571.

It is actionable negligence to drive an automobile on a city street at a rate of speed exceeding the speed limit and approach a pedestrian near an intersecting street without sounding an alarm, in violation of positive law: *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

As to speed of automobile in the aspect of negligence, see note in 25 L. R. A., N. S., 40.

A pedestrian struck by an automobile when about to board a street-car waiting near a street intersection is not guilty of contributory negligence, as a matter of law, where, before starting for the car, he looked back and saw no automobile in the street, and walked toward the street-car without again turning to look back, in the absence of any sound of a horn or other warning, other witnesses also testifying that the street was clear when he started for the car: *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

As to the reciprocal duty to use care imposed upon automobile operators and pedestrians, see note in 38 L. R. A., N. S., 487.

CHAPTER III.

CONTROL AND MANAGEMENT OF COUNTY ROADS.

§ 5575.

See notes to § 5680.

§ 5585. Expenditure of Funds.

All the funds in the county treasury raised by the taxation herein provided shall be expended by the county commissioners and all road and bridge construction, improvements or repairs shall be made by the county commissioners in the following manner:

First. All road construction, improvement or repairs of which the estimated cost shall be under two thousand five hundred dollars, and all bridge construction, improvement or repairs of which the estimated cost shall be under five hundred dollars, may be done under the direction of the county commissioners and the county engineer.

Second. All road construction, improvement or repairs, of which the estimated cost shall be two thousand five hundred dollars or more shall be let by contract by the county commissioners on plans and specifications previously prepared by the county engineer under the direction of the board of county commissioners to the lowest and best bidder; calls for said bids to be made by publication in the official county paper for not less than three consecutive weeks prior to the time set by the county commissioners for the opening of bids: Provided, That in any county having no official county paper, such notice shall be given by posting for ten days a notice in three of the most public places in such counties. The county commissioners shall require a bond of the successful bidder for the full amount of the contract price of construction, improvement or repair of roads conditioned for the faithful performance of the contract according to law, and any requirements the county commissioners may impose at the time of advertising for bids. The board of county commissioners shall have the right to reject any and all bids, and in the event of the rejection of all bids, said board of county commissioners may in its discretion, by an unanimous vote, cause such road construction, improvement or repairs to be made by day labor or force account according

to the plans and specifications: Provided further, That the board of county commissioners may in its discretion provide for the surfacing of any road with crushed rock, macadam, gravel or other material by day labor or force account without advertising for bids as herein provided.

Third. All bridge construction, improvement or repair, of which the estimated cost shall be five hundred dollars or more except in case of emergency as hereinafter provided, shall be let by contract by the board of county commissioners in the same manner as provided for road construction, improvements or repairs under this section: Provided further, That in the event of an emergency whereby the delay of advertising for and letting bids would endanger property and unduly cut off communication by travel over such bridge, such contract may be made and entered into without the publication of notice as herein provided.

Fourth. Each bidder shall deposit with his bid a certified check in an amount equal to five per cent of his bid. Should the bidder to whom the contract is awarded fail to enter into a contract with the commissioners and furnish the bond hereinbefore provided within five days after notice of such award, the amount of said check shall be forfeited to the general road and bridge fund of the county. [L. '11, p. 308, § 1.]

See notes to § 5680.

No emergency exists excusing the county commissioners from letting a bridge contract without competitive bids within the contemplation of this section, in the case of new construction and where all the former means for crossing the river remained intact, and

there was no sudden increased demand rendering existing facilities inadequate for the short time (three weeks) necessary for advertising for bids: *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226.

As to duty of municipality to let contract to lowest bidder, see note in 50 Am. St. Rep. 490.

CHAPTER IV.

LEVY AND COLLECTION OF ROAD TAXES.

§§ 5590-5593.

Repealed. See L. '13, p. 479, § 9.

§ 5590-1. Levy—General Road and Bridge Fund—District Funds.

For the purpose of raising revenue for the construction, maintenance and repair of county roads, bridges and wharves the board of county commissioners shall annually at the time of making the levy for general county purposes make additional levies as follows:

(a) A tax of not more than four mills on the dollar on all taxable property in the county, which tax shall be kept in a fund known as the "General Road and Bridge Fund," and shall be kept separate and distinct from any other funds of the county.

(b) A tax of not more than four mills on the dollar on all taxable property in each road district previously established by the board, which tax shall be kept separate and distinct from other funds of the county in a fund for each road district known as "Road District No. ——— county": Provided, That in any incorporated city or town, fifteen per cent of all money collected for the general road and bridge fund in such city or town may be expended inside said city or town on roads and bridges connecting with roads leading out into the country known or designated as county roads, under the supervision of the county commissioners. [L. '13, p. 476, § 1.]

§ 5590-2. General Expenditures—Limitations.

The expenditures from the general road and bridge fund shall be made only for the purpose of constructing, maintaining and repairing such county roads, bridges and wharves which are or will be main thoroughfares or lines of travel for all the inhabitants of the county, and for the purpose of purchasing, operating and maintaining machinery, quarries and gravel pits used in such construction, maintenance and repair. [L. '13, p. 476, § 2.]

§ 5590-3. Expenditures from District Funds.

The expenditures from the road district funds shall be made only for the purpose of constructing, maintaining and repairing such roads, bridges and wharves as are situated within the road district and which shall be in the nature of branch roads or feeders to the main highways passing through the district, and for the further purpose of purchasing, operating and maintaining machinery and equipment used in such construction, maintenance and repair within the district. All bridges herein mentioned shall include all bridges of over twenty feet in length when constructed of wood or over ten feet when constructed of concrete, in counties that have or may hereafter adopt township organization. [L. '13, p. 477, § 3.]

§ 5590-4. General Provisions Applicable.

All of the taxes provided for in this act shall be levied, collected and disbursed by the same officers and in the same manner as taxes levied for the county current expense fund. [L. '13, p. 477, § 47.]

§ 5590-5. Indebtedness—Limit.

The board of county commissioners shall have no power to create a debt or incur any liability, or in any way bind the county for any of the purposes mentioned in sections 5590-2 and 5590-3, for any amount in excess of eighty per centum of the amount levied in the fiscal year for either the general road and bridge fund or any of the district road and bridge funds, unless after deducting such eighty per centum there is cash in the particular fund against which the liability is incurred: Provided, however, That in case of an unforeseen catastrophe which could not have been anticipated at the time the estimates were computed for such fiscal year, the board of county commissioners shall have authority, after passing a resolution setting out the facts, to issue warrants, which together with the cash on hand, will be sufficient to take care of the particular case, but the amount of such warrant indebtedness shall be included in the levy for the fund against which such warrants are drawn made for the next succeeding fiscal year. All contracts, authorizations, allowances, payments and liabilities to pay, made or attempted to be made in violation of this act shall be void and shall never be the foundation or basis of a claim against a county, and all officers of such county are charged with notice of the condition of the treasury of said county and the extent of the claims against the same. All county commissioners, county auditors, county treasurers and any other officers authorizing or aiding to authorize, or auditing, or allowing any claim or demand upon or against such county, or any fund thereof, in violation of any of the provisions of this act, shall be liable in person and upon their several official bonds to the county of which they are officers, or to the person or persons, corporation or corpo-

rations, damaged by such illegal authorization to the extent of his or its loss by reason of the nonpayment of the claim. [L. '13, p. 477, § 5.]

§ 5590-6. Warrants—Validation.

All warrants outstanding issued prior to January 1, 1913, by any county of the state against either the general road and bridge fund or any district road and bridge fund are hereby validated in so far as such warrants are invalid because of the fact that the board of county commissioners did not have authority to create any indebtedness for road and bridge purposes. [L. '13, p. 478, § 6.]

§ 5590-7. Special Indebtedness Fund.

In any of the counties which, on the first day of January, 1913, had a warrant indebtedness in any of the road and bridge funds there is hereby created a special indebtedness fund which shall be designated as follows: "Special General Road and Bridge Indebtedness Fund, — County," and "Special District Road and Bridge Fund of District Number —, — County." All warrants outstanding on the first of January, 1913, shall be transferred to and paid out of the special indebtedness funds hereby created. All uncollected taxes levied the year 1912 and prior years, either for general road and bridge purposes or district road and bridge purposes, shall be credited as they are collected to the special indebtedness fund or the fund for which such taxes were levied. [L. '13, p. 478, § 7.]

§ 5590-8. Indebtedness—Special Levies.

At the time of making the levy in October, 1913, for road and bridge purposes, the board of county commissioners of each county which on the first day of January, 1913, had any outstanding warrants against the general road and bridge fund, or any district road and bridge fund, shall make a levy of six mills on the dollar on all the taxable property in the county or district for each special indebtedness fund hereby created, or so much thereof as shall be necessary to pay the warrants with accrued interest in each indebtedness fund. The board of county commissioners shall continue to make such special levies in each succeeding year until all of the warrants in each special indebtedness fund are paid. When all of the warrants in each indebtedness fund are paid, with accrued interest, such fund shall be extinguished and the surplus, if any, together with all credits accruing thereto, shall be transferred to the regular general road and bridge fund or district road and bridge fund. [L. '13, p. 479, § 8.]

CHAPTER VII.

ROAD POLL TAX.

§§ 5594—5602.

Repealed. See L. '13, p. 479, § 9.

CHAPTER VIII.

FRANCHISES AND RIGHTS IN HIGHWAYS.

§ 5613.

This and the next section, validating franchises granted by the county commissioners

to use county roads or highways "outside the limits" of incorporated cities or towns, to the extent that such roads have been actu-

ally occupied prior to the passage of the act, refers to grants made outside of city limits at the time of the attempted grant, and is not limited to franchises granted in territory still under control of the county commissioners at the time of the passage of the act: *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202.

The legislature has power to pass a retro-active curative statute which validates the

ultra vires county grant of franchises in public roads outside of the limits of a city, actually occupied, although the territory has since become incorporated as a town of the fourth class: *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202.

As to the validity of retrospective laws, see note in 120 Am. St. Rep. 468.

As to retrospective laws validating municipal contracts, see note in 27 L. R. A. 696.

CHAPTER IX.

LAYING OUT AND OPENING COUNTY ROADS.

§ 5623.

Superseded, see § 5623-1 et seq.

See notes to § 9368.

Since the fee of public highways rests in the abutting owner, he may maintain irrigating ditches in the untraveled portion thereof; and his rights will be protected by an injunction against one trespassing thereon by diverting the water by a continuing act resulting in special damage: *Holm v. Montgomery*, 62 Wash. 398, 34 L. R. A., N. S., 506, 113 Pac. 1115.

As to the ownership in an abutting land-

holder to the fee of the soil of the highway, see note in 101 Am. St. Rep. 103.

The evidence is insufficient to show the establishment of a county road over certain lands, where the county commissioners' record of an order establishing the road was so indefinite that it could not be located with reference to the government subdivisions, and an engineer's projection of the field-notes of the survey did not bring the road within one hundred feet of the land in question, and there was no proof that the road as opened by the supervisors passed over the land: *Dahlstrom v. Anderson*, 56 Wash. 575, 106 Pac. 127.

§ 5623-1. Laying Out.

County roads shall be laid out and established by order of the county commissioners of the proper county in the manner hereinafter provided. [L. '11, p. 305, § 1.]

§ 5623-2. Resolution.

When deemed advisable that a road be established, the board of county commissioners shall, at a regular meeting, by unanimous vote pass a resolution and enter same on the minutes of the board, which resolution shall describe the terminal points of such proposed road and the width and general course of same. The resolution need not set forth the manner of construction, the cost, nor describe the several tracts or parcels of land through which the same shall run. The resolution shall declare that the laying out and establishment of the road is considered a public necessity and shall direct the county engineer to make an examination of the proposed route of said road as hereinafter provided. [L. '11, p. 305, § 2.]

§ 5623-3. Engineer's Duty.

The county engineer shall make an examination of the proposed route of such road and, if necessary, a survey of same. If, however, after an examination, he deems the same to be impracticable, he may so report to the board of county commissioners without making a survey, or he may examine or survey any other route that would subserve that purpose, and make a report thereon. [L. '11, p. 305, § 3.]

§ 5623-4. Petition of Householders.

In addition to the method hereinabove provided, ten or more householders of the county residing in the vicinity of a proposed road may petition the board of county commissioners for the establishment of such road. Such petition shall describe the terminal points of said road and the general course of same. [L. '11, p. 306, § 4.]

§ 5623-5. Bond.

If the board of county commissioners so order the petition shall be accompanied by a bond in the penal sum of three hundred dollars (\$300) payable to the county, executed by one or more persons as principal or principals, with two or more sufficient sureties, and conditioned that the petitioners will pay into the county treasury the amount of all costs and expenses incurred in examining and surveying the proposed road and in the proceedings in case the road shall not be established, or in case the application is for the purpose of changing the road for the benefit of the land owner or owners, and no such change shall be made until such cost bill has been paid and the road graded. When the cost is assessed against the principal petitioner, the clerk of the board of county commissioners shall file the cost bill with the county treasurer, who shall proceed to collect the same. Before considering the petition the board may require the petitioners to secure waivers for the right of way from the land owners, and, in such case, before an examination or survey is ordered, the waivers shall be filed with the board of county commissioners. [L. '11, p. 306, § 5.]

§ 5623-6. Examination by Engineer.

Upon the filing of said petition and said bond, if required, the board of county commissioners shall examine and approve same and if found sufficient shall direct the county engineer to make an examination and survey, as provided for in section 5623-3. [L. '13, p. 306, § 6.]

§ 5623-7. Warrants for Awards—Deposit—Decree.

At the time of the hearing on the establishment of said road as provided for by law, the board of county commissioners shall direct the auditor to draw warrants in favor of the record owner or owners of said property appropriated in said proceeding for the amount of the award made by the board for the appropriation thereof. The auditor shall cash said warrants if the same be not accepted by said owner or owners by the time said petition to condemn is filed with the clerk of the superior court as provided for by law and shall deposit said moneys in court for the use and benefit of said owner or owners. If said warrants be accepted by said owner or owners, or if said money be withdrawn from the registry of the court, the county shall be entitled to a decree of appropriation vesting full title to the property in the county. [L. '11, p. 306, § 7.]

§ 5623-8. Right of Way may be Condemned.

If any award of damages is not accepted at the time of said hearing it shall be deemed rejected, and the board must then, by order, direct proceedings to procure the right of way to be instituted in the superior court

of the county by the county attorney of the county in the manner provided by law for the taking of private property for public use. [L. '11, p. 307, § 8.]

§ 5623-9. Condemning Gravel-beds and Stone Quarries.

Counties shall have the right in the manner provided for in this act, to condemn land or other property for the purpose of securing gravel-beds, stone quarries or other material suitable for the construction, building or repair of county roads, and shall have the right to condemn the right of ways to reach such property and to gain access thereto. The proceedings shall be the same as provided for herein for the establishment and condemnation of county roads. [L. '11, p. 307, § 9.]

§ 5623-10. Widening County Roads.

The county shall have the right, in the manner provided for in this act, to condemn land and other property for the purpose of widening county roads already established, to any width allowed by law, and to condemn land and other property for the purpose of changing the course or location of roads already established. [L. '11, p. 307, § 10.]

§ 5632. Wages Paid.

The chainmen, rodmen, axmen, flagmen, and all necessary assistants employed in such survey to assist the county engineer, shall be paid such salary for their services as the board of county commissioners shall determine upon, to be paid out of the proper fund of the county. [L. '11, p. 342, § 1.]

§ 5634.

Land owners cannot object to the confirmation of the establishment of a county road because of insufficiency of the county's tender of compensation for land to be taken, which, under this and the next section, is not final, the statute providing that, if such tender is not accepted by the land owners,

condemnation proceedings must be instituted for the purpose of fixing the damages: *Strunz v. Spokane County*, 67 Wash. 235, 121 Pac. 75.

§ 5656.

See notes to § 9368.

CHAPTER X.

ROADS BY USER.

§ 5657.

To create a highway by prescription the use or possession must be open, notorious, continuous and adverse; and none is shown where it appears that the use, in all for about eighteen years, was commenced under a temporary grant of a right of way to a county limited to five years, after which time the county refused to expend money because the right of way had expired or was in dispute, until immediately preceding the commencement of the action, over the owners' protest, and that the owners at all times paid taxes thereon, and from time to time maintained gates, since nothing transpired to convert the permissive use into an adverse use: *Scheller v. Pierce County*, 55 Wash. 298, 104 Pac. 277.

As to the acquisition of a highway by prescription, see note in 57 Am. St. Rep. 748.

Roads across unimproved arid lands become public highways by user, where they were well defined and commonly traveled for more than thirty years, the county officers repaired and improved them within the last five years, and the public used them continuously as public highways for many years: *M'Whorter v. Forney Brothers & Co.*, 69 Wash. 414, 125 Pac. 164.

As to evidence to establish such user as takes the place of a dedication of highway, see note in 11 L. R. A. 56.

This section is only a statute of limitations, and has no application where the road has not been kept up at public expense: *State v. Seattle*, 57 Wash. 602, 27 L. R. A., N. S., 1188, 107 Pac. 827.

In an action to declare a road a public highway by prescriptive use it is admissible, under a general denial, to show that the use

was only permissive under a lease: *Dennis v. Gary*, 56 Wash. 112, 105 Pac. 172.

A public road by prescriptive use is not shown where it appears that the road was constructed and used almost exclusively as a logging road under written leases, and no public money was spent on it: *Dennis v. Gary*, 56 Wash. 112, 105 Pac. 172.

A public highway by prescription over certain lands is not established by proof that, in an open country, a road had been used in the general direction claimed, changes having been made in the travel as the country settled up until the whole section was platted with streets and cross-streets, and at the time of the trial the change in travel was so complete that no part of the original way remained in existence unless over the

particular strip, public buildings and dwellings having been built in the road as shown by the earlier maps, portions of it having been fenced, and no part of it having been used as a road for many years: *Dahlstrom v. Anderson*, 56 Wash. 575, 106 Pac. 127.

Proof of user, in early times of a road as a public highway is not proof of establishment of a county road over the tract by county officers: *Dahlstrom v. Anderson*, 56 Wash. 575, 106 Pac. 127.

As to the evidence of user necessary to establish right of highway, see note in 11 L. R. A. 56.

As to effect of mere use of highway over public domain as acceptance of grant of right of way, see note in 9 L. R. A., N. S., 1223.

CHAPTER XII.

VACATION OF COUNTY ROADS.

§ 5673.

Ballinger's Code, section 3803, providing that any county road that has been or may hereafter be authorized which remains unopened for public use for five years is hereby vacated, cannot, since the enactment of this section, adding a proviso to that effect, have any application to streets dedicated in town plats (withdrawn on rehearing): *Mohr v. Pierce County*, 65 Wash. 370, 118 Pac. 321, 119 Pac. 747.

A street dedicated in a town plat was not abandoned by five years' nonuser, under Ballinger's Code, section 3803, where it appears that it was cleared up, graded, and opened for public use in 1890, and was open for public use until 1908, when it was obstructed by defendant: *Mohr v. Pierce County*, 65 Wash. 370, 118 Pac. 321, 119 Pac. 747.

A street is open for public use to such an extent as to prevent its abandonment by nonuser, as provided in this section, where an electric railroad company, by virtue of a right of way deed, went upon it and set its

location stakes and constructed its railway line in the street: *Clark v. Seattle*, 71 Wash. 316, 128 Pac. 670.

A county road is opened for public use, within the meaning of this section, relating to abandonment by nonuser, where the line of travel generally followed the dedicated way, although frequently in order to avoid hills and ravines, it departed from the road for short distances and again entered it: *Clark v. Seattle*, 71 Wash. 316, 128 Pac. 670.

Under this section, providing for the vacation of any county road which remains unopened for public use for five years after its authorization as a public highway, the five year period begins to run from the date of the filing of a dedicated plat, and not from the date of its execution: *Clark v. Seattle*, 71 Wash. 316, 128 Pac. 670.

As to extinguishment of highway or street by nonuser or adverse possession, see note in 14 Am. St. Rep. 278.

As to vacation or abandonment of highway, see note in 101 Am. St. Rep. 117.

CHAPTER XIII.

BRIDGES ON COUNTY ROADS AND NAVIGABLE STREAMS.

§ 5680.

The operation of this section is not affected by the subsequent federal acts providing that navigable streams shall not be bridged except by consent of Congress and upon executive approval of the plans, as this but imposes an additional burden upon the county: *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226.

As to bridges over navigable streams constructed under state authority, see note in 2 L. R. A. 540.

This section was not superseded by the act of 1893 (section 5575), a general act, not complete in itself, relating to county road and bridge work, and containing no specific provisions relating to contracts for bridge construction across navigable streams; nor was it superseded by the act of 1903 (section 5585), relating to the letting of contracts where the estimated cost exceeds one hundred and fifty dollars, since the latter is merely supplemental to and not conflicting with the earlier act, which relates chiefly to steps preliminary to the letting:

Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226.

County commissioners in letting a bridge contract must strictly comply with the law, or it is not binding and money paid thereon can be recovered: Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226.

Money donated to a county to induce the construction of a county bridge, belongs to the county, and may be recovered by the county if it has been wrongfully paid out under an unauthorized contract: Green v.

Okanogan County, 60 Wash. 309, 111 Pac. 226.

Where a county has accepted and is using a county bridge, constructed under a contract let without complying with the law, but which the county could have entered into if it had conformed to the statutory requirements, it is liable for its reasonable value, and can only recover any excess wrongfully paid out: Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226.

As to illegal contracts of county boards, see note in 137 Am. St. Rep. 365.

CHAPTER XIII-A.

BRIDGES ON INTERSTATE OR INTERCOMMUNITY ROADS.

§ 5686-1. Power to Construct.

The state of Washington and all counties, cities or towns within the state are hereby authorized and empowered to join with each other or to aid the state of Washington, the federal government, or any adjoining county, city or town in this state, or to jointly or separately join with any adjoining state, county, city or town in the purchase, construction, control, operation and maintenance of any bridge or bridges over or across any river, stream or body of water being within or constituting the boundary line of the state or of any county therein. [L. '13, p. 168, § 1.]

§ 5686-2. Highway Board to Represent State—Joint Control.

Whenever the legislature of the state of Washington shall have made provision for the purchase or construction of a bridge or bridges, jointly with counties, cities or towns in this or adjoining states, the state highway board is hereby authorized and empowered to represent and act for and on behalf of the state of Washington for the purpose of carrying into effect the provisions of this act, and any other act making an appropriation for the purchase or the construction of a bridge or bridges, which come under the provisions of this act, and when the state of Washington joins in the purchase or construction of a bridge jointly with adjoining states or with the counties, cities, or towns of any adjoining states, or jointly with counties, cities, or towns in this state, the purchase or construction of such bridge or bridges shall be under the direction, control and management of the state highway board acting jointly with the public authority legally authorized to represent and act for such adjoining state, county or city, and when counties or cities in this state shall join with the state for the purchase or construction of a bridge built or to be built in this state, or on the boundaries thereof, the money or funds furnished or provided by such county or city shall be expended under the direction, supervision and control of the state highway board, and under the provisions of this act. [L. '13, p. 168, § 2.]

§ 5686-3. Maps and Plans—Bids.

Whenever provision is made for the purchase or construction of a bridge, which comes under the provisions of this act, the state highway commissioner, upon being directed by the state highway board, shall confer with the legally authorized public authorities of any adjoining state or city or

county or cities within this state, and acting jointly with such authorities make or cause designs, maps, plans, specifications, drawings, details, estimates, and all other requirements for full information with reference to the location and construction of such bridge to be made and shall determine the kind, character and dimensions of the bridge to be constructed, subject to the approval of the state highway board. That after the plans and specifications have been agreed upon by the public authorities, representing the respective states, counties, cities or towns interested, bids shall be advertised by giving such notice as the parties interested shall agree upon, Provided, That in no event shall less than thirty (30) days' notice be given. The notice shall provide that the contract shall be let to the lowest responsible bidder, and that the authorities acting jointly in giving the notice reserve the right to reject any and all bids, and the notice shall state the proportion of the total amount to be paid by each. [L. '13, p. 169, § 3.]

§ 5686-4. Contract for Construction.

Upon the final acceptance of the bid for the construction of a bridge, under the provisions of this act, the state highway board, acting jointly with the public authorities of any other state, county, or city, or county or city in this state, shall enter into a contract for the construction of the bridge and shall require the contractor to furnish a surety bond for the faithful performance of the contract, in such sum as shall be fixed by such joint authorities, and shall also require the contractor to furnish an additional bond in the sum to be fixed by the state highway board of Washington, conditioned as is provided in sections 1159 to 1161, inclusive, of Remington & Ballinger's Annotated Codes and Statutes of Washington, and shall file said last-mentioned bond with the auditor of the state of Washington, which bond shall be approved by the attorney general. [L. '13, p. 169, § 4.]

§ 5686-5. Clerical Assistance — Supervising Engineer — Payments, How Made.

The highway commissioner, when directed by the highway board, is hereby authorized to rent office rooms, purchase the necessary supplies and to employ clerical and engineering assistants necessary in making the preliminary arrangements, and during the construction of the bridge; the compensation of such employees to be fixed by the state highway board. The state highway board shall have authority to act jointly with the other public authorities interested in the construction of such bridge, to employ a supervising engineer to be in charge of the work of the construction of the bridge, whose compensation shall be fixed by the state highway board, and the public authorities of any adjoining state, county or city, joining in the construction of the bridge. The payment of salaries of employees and all other expenses shall be deemed a part of the construction work, and shall, including payments on contract, be made only on vouchers approved by the state highway commissioner, and payable only out of funds provided therefor. [L. '13, p. 170, § 5.]

§ 5686-6. County Indebtedness—Bonds.

Whenever the board of county commissioners of any of the counties in this state shall deem it for the interest of the county to engage in or to aid in the

purchase or construction of any bridge or bridges, under the provisions of this act, and to incur indebtedness to meet the cost thereof and expenses connected therewith, and issue bonds of the county for the payment of such indebtedness or any thereof, such county is hereby authorized and empowered, by and through its county commissioners, to engage in or aid in any such work as aforesaid, and to incur indebtedness for such purpose or purposes to an amount which, together with the then existing indebtedness of such county, shall not exceed five (5) per centum of the taxable value of the taxable property in said county, as shown by the last previous assessment-roll thereof for state and county purposes, and to issue negotiable bonds of the county for all or any such indebtedness, and for the payment thereof, in the manner and form and as is provided in sections 5094 to 5101, inclusive, of Remington & Ballinger's Annotated Codes and Statutes of Washington, and other laws of this state which shall then be in force, and to make part or all of such payment in bonds or moneys derived from sale or sales thereof, or partly in such bonds and partly in such money, provided that said commissioners shall have first submitted the question of incurring such indebtedness to the voters of the county at a general or special election, and three-fifths of the voters voting upon the question shall have voted in favor of incurring the same. [L. '13, p. 170, § 6.]

§ 5686-7. Bonds are for County Purposes.

Any and every such purpose as is mentioned in the foregoing section is hereby declared to be a county purpose, and the bonds or the money derived from the sale of the same shall be deposited with the proper state authorities, as directed by the state highway board, and expended under the provisions of this act, provided that any bonds or funds so deposited and not used for such purpose shall be returned to the county making the deposit. [L. '13, p. 171, § 7.]

§ 5686-8. City Assistance—Indebtedness—Bonds.

That whenever the city council of any incorporated city or town in this state shall deem it advisable to join with or aid in the purchase or construction of any bridge or bridges within or partly within the corporate limits of such city or town, under the provisions of this act, and to contract indebtedness to meet the cost thereof and expense connected therewith, and to issue negotiable bonds of the city or town for the payment of such indebtedness or any part thereof, said city or town by and through its council is hereby authorized and empowered to engage or aid in the purchase or construction of such bridge or bridges or public work, as aforesaid, and to incur indebtedness for such purpose or purposes to an amount which together with the then existing indebtedness of such city or town shall not exceed five (5) per centum of the taxable value of the taxable property of such city or town, to be ascertained by the last assessment of such city or town for city or town purposes, previous to the incurring of such indebtedness, and to issue negotiable bonds of such city or town for all or any such indebtedness, and for the payment thereof in the manner and form, as is provided in section 8041 to 8049, inclusive, of Remington & Ballinger's Annotated Codes and Statutes of Washington, and other laws of this state which shall then be in force, and to make a part or all of such payments in bonds or money derived from

sale or sales thereof, or partly in such bonds and partly in such moneys, provided that the council of said city or town shall have first submitted the question of incurring such indebtedness to the voters of said city or town at a special election held according to law, and three-fifths of the legal ballots cast on said question shall be in favor of incurring such indebtedness. [L. '13, p. 171, § 8.]

§ 5686-9. Bonds are for Municipal Purposes.

That any and every such purpose as is mentioned in the last preceding section is hereby declared to be a strictly municipal purpose, and that the bonds, or the money derived from the sale of the same, shall be deposited with the proper state authorities, as directed by the state highway board, and expended under the provisions of this act, provided that any funds or bonds so deposited and not used for the purpose for which they were deposited shall be returned to the city or town so depositing the same. [L. '13, p. 172, § 9.]

§ 5686-10. State to Own Bridge.

That upon the purchase or construction of any bridge jointly or with any adjoining state, county or city, the same shall be accepted by the state highway board acting in conjunction with such public authorities of any adjoining state, county or city, joining in its construction, and the state shall own one-half of such bridge, and the same shall become the exclusive property of the state of Washington, and under the control and management of the state highway board. [L. '13, p. 172, § 10.]

§ 5686-11. City and County may Join—Bonds.

That whenever it is deemed advisable by the common council of any city or town and the county commissioners of any county in this state to purchase or construct a bridge within or partly within such city or town, the council and commissioners are authorized and empowered to enter into an agreement for the construction of such bridge, upon such terms as may be mutually agreed upon, each contributing such sum toward the purchase or construction of the same as may be determined to be just and proper, and enter into contract for the construction of such bridge and to spend public funds thereon, and if deemed necessary may bond the county or city or town in the manner herein specified. The contracts for letting the same and notice given to bidders, and all other matters pertaining to the construction shall be governed by the laws in force governing the construction of bridges by county commissioners in the state of Washington, provided the payments to be made on the contract by the respective municipal corporations be made direct to the contractor. [L. '13, p. 173, § 11.]

§ 5686-12. Franchises—Powers of Public Service Commission.

The state highway board is authorized and empowered, acting jointly with any legally authorized body or public authority of any adjoining state, county or city joining in the construction of such bridge, to grant franchises for laying rails and the operation of electric street and suburban railways, and other public utilities, except steam railroads, and for the laying thereon and suspending therefrom pipes for the carrying of water, gas and

other substance, and wires and cables for the conducting of electricity for telegraph, telephone, lighting, heating, power and other purposes, provided that no exclusive franchise shall be granted or given any person, firm or corporation for any use or purpose, but such bridge shall be for common use for all public service corporations or individuals, upon such terms as may be prescribed. That in the granting of any right, privilege or franchise to any person, firm or corporation for the use of said bridge for any purpose, the state highway board shall fix and prescribe the compensation to be paid for the use of such bridge, subject to the approval of the public service commission: Provided, That the rates, sums or amounts which shall be fixed in the franchise, granted to any person, firm or corporation shall be subject to change, raised or lowered, at any time by the public service commission, or any other body possessing the same powers as is now possessed by the public service commission of the state of Washington, and new or different rates or charges fixed by the public service commission, acting jointly with the other public authorities herein mentioned: Provided further, That the powers and duties given to the public service commission by the laws of the state of Washington are extended to include any bridge which may have been built by the aid of the state of Washington, and which has become the property of the state of Washington under the provisions of this act. [L. '13, p. 173, § 12.]

§ 5686-13. Proceeds from Franchise Rights.

All moneys derived from any source from the use of such bridge by any persons, firm or corporation shall be paid into the public highway fund of the state of Washington. [L. '13, p. 174, § 13.]

§ 5686-14. Powers of Highway Board.

That the state highway board is hereby given power and authority to do all acts and things necessary to carry out the provisions of this act, whether mentioned herein or not, and to construct, complete and maintain any bridge which may be authorized to be constructed under the provisions of this act. [L. '13, p. 174, § 14.]

§ 5686-15. Definitions.

The meaning of words and phrases used in this act shall, unless inconsistent with the context, be as follows: "Bridge" shall include public road, and shall include bridge, bridge approach, culvert or viaduct over the state boundary line, or over a stream, river or body of water within, at, or constituting the boundary line of the state or county. "Construct" shall include to build, repair, maintain, improve, or other like work. "Construction" shall include repair, maintenance, improvement, or other like work. "Public authorities" shall mean the county commissioners of the county or the constituted authorities of any county having control of roads and bridge construction or the council, when cities or towns are referred to. Words importing the plural number may be applied in the singular, and words importing the singular may be applied in the plural. [L. '13, p. 174, § 15.]

CHAPTER XVI.

ROADS OWNED BY PRIVATE CORPORATIONS.

§ 5717.

This section and section 5718 do not authorize a railroad company to appropriate a part of a city street; but the sections apply only to road and toll companies occupying the street with the public in view of section 5719, which provides that where such highways are taken by agreement with the local

authorities the corporation may place gates thereon and receive such tolls as the local authorities consent to, and if appropriated without such agreement, no gates or other obstructions shall be placed on the public roads or tolls charged: State ex rel. Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.

CHAPTER XX-A.

ARTERIAL STREETS.

§ 5856-1. "Arterial" Streets Defined.

Whenever any street, avenue or highway within any city or town shall connect at or near the corporate limits of such city or town with any public road or highway not less than two miles in length, and constructed along a main line of travel being uniformly graded to a width of not less than sixteen feet, and having proper bridges, drains and culverts, and surfaced with macadam, stone, compacted gravel, or other material equally as permanent and durable, not less than twelve feet in width, such street, avenue or highway may be improved by grading or regrading, planking or replanking, paving or repaving, macadamizing or remacadamizing, graveling or regravelling, bridging or rebridging, surfacing or resurfacing, from the point of connection with such road or highway to the business center of such city or town, or to a connection with a permanently surfaced street leading thereto, under the provisions of this act. Streets improved under the provisions of this act shall be known as "arterial streets." [L. '13, p. 142, § 1.]

§ 5856-2. Resolution to Improve Arterial Street.

Whenever the city council or other governing body of any city or town shall desire to improve any arterial street under the provisions of this act it shall adopt a resolution designating the street or streets to be improved, the general character of the improvement to be made, the estimated cost thereof and the amount of such cost which will be of special benefit to the property, a certified copy of which resolution shall be forthwith transmitted to the board of county commissioners. If the board of county commissioners shall approve such resolution the city council or other governing body of such city or town shall thereupon be empowered to and shall improve such arterial street as above provided and to enter into contracts therefor. [L. '13, p. 143, § 2.]

§ 5856-3. Local Improvement District—Limit of Assessments.

So much of the cost of such improvement as shall be of special benefit to property within such city or town shall be a charge upon such property, and the city council or other governing body shall cause to be created in the manner provided by law a local improvement district for the purpose of defraying so much of the cost as shall benefit property therein. The provisions of law with reference to the creation of local improvement districts

for the improvement of streets shall, so far as the same are applicable, apply to arterial streets improved under the provisions of this act: Provided, however, That nothing in this act shall be construed to prevent any property included in such improvement district from being charged under this act with any amount not exceeding fifty per cent of the valuation thereof, as last placed upon it for the purpose of general taxation, exclusive of improvements thereon. So much of the cost of such improvement as shall not be charged to property within the improvement district above provided for shall be paid equally by the county and the city or town. The board of county commissioners of any county is authorized and empowered to pay the portion of the cost chargeable to such county for the improvement of any arterial street under the provisions of this act from the general road and bridge fund of the county, or from the district road and bridge fund of the district with which such arterial street connects. The city council or other governing body of any city or town is authorized to pay the part of the cost of improving any arterial street under the provisions of this act, which shall be a charge against such city or town from the general fund of such city or town or from any special fund which shall be available for that purpose. [L. '13, p. 143, § 3.]

§ 5856-4. Limitation of Act.

This act shall not be construed as providing for the maintenance of said arterial highways within the limits of any municipality. [L. '13, p. 143, § 4.]

CHAPTER XXI.

PRIVATE WAYS OF NECESSITY.

§ 5857-1. Eminent Domain—What Included.

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried. [L. '13, p. 412, § 1.]

§ 5857-2. Procedure for Condemnation.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this act shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid

as provided in the case of condemnation by railroad companies. [L. '13, p. 412, § 2.]

§ 5857-3. Logging Road to Carry Products.

Any person or corporation availing themselves of the provisions of this act for the purpose of acquiring a right of way for a logging road, as a condition precedent, [shall] contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired at any and all times, so long as said road is maintained and operated, and at reasonable prices; and a failure so to do shall terminate such right of way. The reasonableness of the rate shall be subject to determination, by the public service commission. [L. '13, p. 412, § 3.]

CHAPTER XXII.

STATE HIGHWAY COMMISSIONER AND BOARD.

§ 5867. Board and Commissioner—Appointment, Qualifications.

There is hereby created the office of state highway commissioner and a state highway board. The said state highway commissioner shall be appointed by the governor and shall hold his office for four years unless sooner removed for cause; and shall receive an annual compensation of five thousand dollars a year, and shall be allowed his actual traveling expenses while officially employed, and shall be allowed his office expenses.

He shall take oath of office and shall give a bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties; the said highway board shall be composed of the governor, state auditor, the state treasurer, the state highway commissioner and a member of the railroad commission of Washington, to be named by the governor. Each shall be allowed his actual traveling expenses while engaged in official duties as member of such highway board. [L. '11, p. 156, § 1.]

§ 5869-1. Construction of State Roads—Labor.

The state highway board may in its discretion cause any state road to be constructed, either under contract as now provided by law or by force account. In case the construction is done by force account, the work thereon shall be done by convict labor to the extent that the same may be available and advantageously used, and such free labor may be employed as may be necessary to successfully carry on the work. If free labor is employed the state highway board shall by resolution entered on its records state the reasons therefor. [L. '13, p. 411, § 1.]

§ 5869-2. Purchase of Machinery.

Whenever any money shall be appropriated for any state road or roads, and the state highway board shall have determined to construct the same by convict labor and free labor as aforesaid, the state highway board may in its discretion purchase road-making machinery to be used in such construction work. The board shall, prior to entering upon any such construction work determine what roads shall be improved by force account, and estimate the amount and cost of machinery that can be used in the construction

of all of the roads, to the end that the machinery may be used on different roads. When the board has decided how much machinery can be so used, it may purchase the same and pay for it from the appropriation made for different roads, in proportion to the amount of use that will be made of it on each road. [L. '13, p. 411, § 2.]

§ 5871-1. Assistant and Chief Clerk.

The highway commissioner may appoint an assistant who shall act as chief clerk in his office, and such assistant shall have power to perform any act or duty relating to the office of highway commissioner that the commissioner has, and, in case of vacancy by death or resignation of the highway commissioner, said assistant shall perform the duties of said office until the vacancy is filled. Such assistant shall subscribe, take and file the oath of office provided by law for other state officers before entering upon the performance of his duties. The principal shall be responsible under his official bond for all of the official acts of the assistant, and may revoke such appointment at his pleasure, and may require his assistant to give him a bond in such sum as the principal may determine, which bond shall be made, executed, approved and filed as other state official bonds. [L. '13, p. 69, § 1.]

CHAPTER XXII-A.

CLASSIFICATION OF PUBLIC HIGHWAYS.

§ 5878-1. Classes.

The highways of the state of Washington shall be divided into two classes, called primary and secondary roads. [L. '13, p. 221, § 1.]

§ 5878-2. Primary Roads Specified.

The primary roads shall be as follows:

a. A highway starting at the international boundary line at Blaine, Washington; thence southerly by the most feasible route through the cities of Bellingham, Mount Vernon, Everett, Seattle, Renton, along the easterly side of the White River Valley through Kent, Auburn, Tacoma, Olympia, Tenino, Centralia, Chehalis, to the southern boundary line at the city of Vancouver, Washington, to be known as the Pacific Highway.

b. A highway starting from the Pacific Highway at Renton, Washington; thence over the most feasible route by the way of Snoqualmie Pass into the Yakima River Valley; thence by way of Wenatchee, over the most feasible route, through Waterville and Spokane, to the state boundary, which shall be known as the Sunset Highway.

c. A highway connecting with the Sunset Highway at or in the vicinity of the city of Ellensburg; thence by way of North Yakima, Kennewick, Pasco, Walla Walla, Dayton, crossing the Snake river at either Almota or Penawawa, Colfax, Rosalia, Spokane, Deer Park, Loon Lake, Colville, to the international line at boundary, which shall be known as the Inland Empire Highway.

d. A highway known as the eastern route of the Inland Empire Highway, shall commence at or in the vicinity of the town of Dayton, thence over the most feasible route, through the town of Pomeroy, to the Idaho and Washing-

ton state line where said line crosses the steel bridge known as the Lewiston and Clarkston bridge, and shall be known as the first division of the eastern route.

The second division of the eastern route, shall commence at a point on the Idaho and Washington line where the same crosses the public road known as the Lewiston and Uniontown road, thence over the most feasible route through Pullman, Palouse and Garfield, thence in a northerly direction, joining the Inland Empire Highway at the most practical point, to be determined by the highway commissioner.

e. A highway connecting with the Inland Empire Highway at Pasco, Washington; thence by the most feasible route through Connell, Ritzville, Sprague, and Cheney to Spokane, Washington, to be known as the Central Washington Highway.

f. A highway starting at a connection with the Pacific Highway at Auburn, Washington; thence along the most feasible route through Enumclaw, following the route of former State Road No. 1 to North Yakima, Washington.

At a point in Pierce county where said State Road No. 1 leaves the main channel of White River a branch shall take off which shall follow up the White River Valley to a connection at the most practicable point with the Rainier National Park.

Another branch shall take off where Road No. 1 leaves the American River and shall follow said American river by the most feasible route to a connection with the Rainier National Park, this highway and its branches to be known as the McClellan Pass Highway.

g. A highway starting from the Pacific Highway in the city of Tacoma; running thence southerly by the most feasible route, to or near the town of Elbe, where it will branch, one section connecting with the government road in Rainier National Park, at or near Ashford, Pierce county, and the other by the most feasible route through Mineral, Morton, Klickitat Prairie, Forest, Chehalis, Pe Ell, South Bend, to the ocean beach at Holman, in Pacific county, which shall be known as the National Park Highway.

h. A highway starting from the Pacific Highway in Olympia, Washington, combining roads numbers nine (9) and fourteen (14), and completely circling the Olympic peninsula, through the cities of Shelton, Hoodspoint, Duckabush, Quilcene, Port Angeles, Hoquiam, Montesano, Elma, and McCleary, reuniting with the Pacific Highway at Olympia, which shall be known as the Olympic Highway. [L. '13, p. 221, § 2.]

§ 5878-3. Secondary Roads.

All other state highways heretofore or hereafter established that are not designated to be primary highways, shall be classed as secondary highways. [L. '13, p. 223, § 3.]

§ 5878-4. Maintenance of Primary Highways.

All primary highways when constructed shall be maintained at the expense of the public highway fund of the state, and shall be under the immediate supervision and control, both for construction and maintenance of the state highway department. [L. '13, p. 223, § 4.]

§ 5878-5. Maintenance of Secondary Highways.

All secondary highways when constructed shall be maintained by the counties in which they are located, and in the event that any county does not desire to maintain such secondary highway it shall so indicate to the highway department of the state by the passage of a formal resolution to that effect spread upon the records of said board of county commissioners, a copy of which shall be forwarded to the office of highway commissioner; whereupon, said highway, unless it is a way of necessity whereby certain persons residing thereon are connected with the county highway, the same shall be abandoned as a public highway, and the right of way revert to the abutting property.

In the event that it is a private way of necessity the maintenance and upkeep of said highway shall devolve upon the persons whom it serves. [L. '13, p. 223, § 5.]

§ 5878-6. County and City Expenditure on State Roads.

Nothing in this act shall be construed to prevent the authorities of any county or road district from expending the road funds of such county or road district upon primary or secondary highways either for construction, maintenance or right of way, and they are hereby empowered so to do, the only exception being that when any section of the primary highway has been constructed by the state any expenditures made upon said portion of said primary highway shall be under the direction of the state highway commissioner. [L. '13, p. 223, § 6.]

§ 5878-7. Routes.

In determining the question of whether or not any particular route is the most feasible, no attention need be paid to routes heretofore selected for state highways. [L. '13, p. 224, § 7.]

§ 5878-8. Width of Highway.

All primary highways when graded shall be graded so that they shall have a running surface of not less than sixteen (16) feet in width. [L. '13, p. 224, § 9.]

§ 5878-9. Transfer of Fund.

Hereafter the state treasurer shall transfer from the public highway fund to the permanent highway fund all taxes levied in counties composed entirely of islands respectively, for the public highway fund, and place to the credit of each of said counties the amount of said levy, which shall be expended on permanent highways under the provisions of chapter XXII-B. [L. '13, p. 304, § 1.]

CHAPTER XXII-B.**PERMANENT HIGHWAYS.****§ 5879-1. Permanent Highway.**

The term "permanent highway," when used in this act, shall be construed to mean an improved public road constructed along a main line of travel, either beginning at some trade center or an extension of an existing road of like character beginning at some trade center. Every permanent

highway shall be uniformly graded to a width of not less than sixteen feet, shall have proper bridges, drains and culverts, and shall be surfaced with macadam, stone, gravel or other material equally as permanent and durable not less than twelve feet in width. No such highway shall be constructed with a grade exceeding five per cent, except where, by reason of physical conditions, it is not feasible or practicable to obtain such grade, but in no case shall any such highway be constructed with a grade greater than ten per cent. [L. '11, p. 118, § 1.]

§ 5879-2. Owners' Petition.

The owners of two-thirds of the lineal feet of lands, other than lands of the state or the United States, fronting upon any public highway or section thereof in any county may present to the board of county commissioners a petition setting forth that the petitioners are such owners, and that they desire that such highway or section thereof be improved under the provisions of this act.

The board of supervisors of any township, in any county having township organization, or a majority of them, may, when authorized at a general election, or a special election called for the purpose, sign a petition for the improvement of any public highway within such township, in whole or in part. [L. '11, p. 118, § 2; L. '13, p. 484, § 1.]

§ 5879-3. Resolution to Improve.

The board of county commissioners in any county, upon the receipt of a petition as provided in the preceding section, or upon its own motion, may pass a resolution for the improvement of any public road or highway or section thereof described in such resolution, under the provisions of this act, and within ten days after the passage of any such resolution shall transmit a certified copy of the same to the state highway commissioner.

Said board shall have no power to provide for the improvement of any portion of a highway within the corporate limits of any city or town. [L. '11, p. 119, § 3.]

§ 5879-4. Highway Commissioner's Duty.

Such highway commissioner, upon receipt of such resolution, shall investigate and determine whether the highway or section thereof sought to be improved is of sufficient public importance to merit improvement under the provisions of this act, taking into consideration the use, location and value of such highway or section thereof for the purpose of common traffic and travel, and after such investigation shall certify his approval or disapproval of such resolution, and if he shall disapprove such resolution he shall state his reasons therefor.

All expenses incurred by the state highway commissioner under the provisions of this act shall be paid from the public highway fund. [L. '11, p. 119, § 4.]

§ 5879-5. County Engineer.

The board of county commissioners may require the county engineer to perform all engineering in connection with and to supervise any improvement work contemplated or prosecuted under the provisions of this

act, or may in its discretion employ a construction engineer for that purpose and fix his compensation, such compensation to be paid by the county. [L. '11, p. 119, § 5.]

§ 5879-6. Surveys.

Whenever the board of county commissioners shall have passed a resolution for the improvement of any public highway under the provisions of this act, and the same shall have received the approval of the state highway commissioner, a certified copy thereof shall be transmitted to the county engineer, or construction engineer appointed as aforesaid, who shall thereupon make the necessary surveys and prepare profiles, maps, plans and specifications, and an estimate of the cost of construction or improvement of the highway or section thereof described in the resolution; making such recommendations concerning deviation from existing lines as he shall deem of advantage to obtain a shorter and more direct route, or to lessen gradients, or to otherwise improve such highway. [L. '11, p. 119, § 6.]

§ 5879-7. Recommendation—Record.

Upon the completion of such profiles, maps, plans, specifications and estimate, a copy thereof shall be transmitted to the state highway commissioner, who shall thereupon examine the same and return them to the board of county commissioners, making such changes therein or recommendations with reference thereto as he may deem advisable, and certifying his approval thereof.

Upon receipt of such profiles, maps, plans, specifications and estimate, the board of county commissioners may pass a resolution adopting the same, and that such highway or section thereof shall be improved under the provisions of this act. No resolution thereafter adopted by said board shall have the effect of rescinding or annulling the resolution so adopting such profiles, maps, plans, specifications and estimate, unless the same shall be approved by the state highway commissioner. The profiles, maps, plans, specifications and estimate as finally adopted by the board of county commissioners shall be filed in its office and become a permanent record of the board, and certified copies thereof shall be transmitted to the state highway commissioner and to the county engineer. [L. '11, p. 120, § 7; L. '13, p. 484, § 2.]

§ 5879-8. Board may Condemn.

Whenever the board of county commissioners shall find it necessary for the purpose of straightening any permanent highway, lessening the gradients thereof, or otherwise improving the same, to acquire or appropriate lands, real estate, or other property, and are unable to agree with the owners thereof, upon the reasonable and fair value of such lands, real estate, or other property, such board is hereby authorized to acquire the same by condemnation proceedings in the manner provided by law for the appropriation of lands, real estate or other property by private corporations authorized to exercise the right of eminent domain. [L. '11, p. 120, § 8.]

§ 5879-9. Advertise for Bids—Surety Bond—Final Payment.

When the board of county commissioners shall have finally adopted the profiles, maps, plans and specifications for the improvement of any per-

manent highway under the provisions of this act, said board shall advertise for bids for three successive weeks in a newspaper published at the county seat of such county, and if they deem advisable, in such other newspaper as it shall determine, for the construction and improvement of such permanent highway, or section thereof, according to such profiles, maps, plans and specifications, and shall award the contract to the lowest responsible bidder, save that the board shall have the right to reject any and all bids. All contracts shall be let on the lump sum basis. Before entering into any contract for such construction or improvement, it shall require a corporate surety bond in the full amount of the contracts, conditioned that the party thereto will perform the work upon the terms, within the time, and in accordance with the contract, profiles, maps, plans and specifications, and that such party will indemnify the county against any direct or indirect damages that shall be suffered or claimed for injuries to persons or property during the construction and improvement of such highway and until the same is accepted. Each bid shall be accompanied by a certified check in a sum equal to one-tenth of the amount of such bid, payable to the county, which shall be forfeited to the county upon the failure of the party, for a period of twenty days after any contract is awarded to any such party, to enter into a proper contract and furnish satisfactory bonds as required by this act. Monthly partial payments shall be provided for in the contract and paid in the manner therein provided, when certified by the county engineer or construction engineer employed, as the case may be, to an amount equal to eighty per centum of the value of the work done during the preceding month. Twenty per centum of the contract price shall be retained until the entire work has been accepted and no final payment shall be made until the state highway commissioner shall have examined the work or caused the same to be examined and certify to the state auditor that such work has been fully completed in accordance with the contract and the profiles, maps, plans and specifications governing such work. All payments to be made by the state upon contracts entered into in accordance with the provisions of this act shall be made by the state treasurer from the permanent highway fund hereinafter created, upon the warrant of the state auditor issued upon the presentation of proper vouchers by the person entitled thereto, said vouchers to be approved by the board of county commissioners, and the state highway commissioner, and, in case of final payment, to be accompanied by the certificate of the state highway commissioner as aforesaid. The state auditor shall issue no warrant for any purpose against the permanent highway fund hereinafter provided for unless there be sufficient money to pay such warrant in such fund to the credit of the county affected. No payment shall be made for any incidental changes during the progress of the work, unless the same shall have been approved by the board of county commissioners by resolution, and a copy of said resolution shall have been transmitted to the state highway commissioner. The board of county commissioners shall let no contract for the improvement of any permanent highway or section thereof less than one mile in length. Whenever any permanent highway shall be improved or constructed pursuant to a petition as provided for in section 5879-2, the proportion of the cost of such improvement chargeable to the property within the improvement district shall be paid out of the general

road and bridge fund of the county, and all taxes assessed against abutting property under the provisions of the following section, and all moneys payable by any township, shall, when collected, be paid into said general road and bridge fund. All payments made from the general road and bridge fund upon contracts entered into in accordance with the provisions of this act, shall be made by the county treasurer upon warrants of the county auditor, issued upon the presentation of proper vouchers, approved by the board of county commissioners and the state highway commissioner. [L. '11, p. 121, § 9; L. '13, p. 485, § 3.]

§ 5879-10. Fifteen Per Cent Tax—Divisions—List—Roll—Assessment.

The county engineer of any county in which any highway or section thereof has been improved or constructed pursuant to a petition as provided in section 5879-2, shall have the power and it shall be his duty upon receiving notice from the board of county commissioners of the county in which said highway is located, of the cost of construction or improvement of such highway or section thereof, to prepare, verify and file with the county auditor an assessment-roll of the assessments and shall assess upon the lands benefited thereby, and situated within the boundaries of an improvement district, to be established, fifteen per cent or such greater per cent as may be stated in such petition, of said total cost. Such improvement district shall be constituted, and the boundaries thereof fixed, as follows: The highway coterminous with the improvement shall be the central line through the district, and the bordering lands on each side and within a distance of not less than six hundred and sixty feet, and not more than three miles, such width to be fixed by the board of county commissioners, from the center line of said highway and coterminous with the construction work or improvement shall be included in and constitute the body of the improvement district and shall be subject to assessment to the extent above provided. For the purpose of making an equitable apportionment of the assessment, such improvement district shall be divided longitudinally on each side of the center line of such highway, into three parts of equal width, which, beginning with the part abutting upon the highway, shall be known as the first, second and third subdivisions, respectively, of such improvement district. In case the petition shall call for the payment of fifteen per cent each separate tract or parcel of land in said first subdivision shall be assessed and be subject to a charge for a proportional part of seven per cent of the whole cost of the construction work or improvement of said highway, and it shall be subject to a lien therefor until it shall be paid; each separate tract or parcel of land within said second subdivision shall be assessed and subject to a charge for a proportional part of five per cent of the whole cost of such construction work or improvement and be subject to a lien therefor until it shall be paid; each separate tract or parcel of land in said third subdivision shall be assessed and subject to a charge for a proportional part of three per cent of the whole cost of such construction work or improvement and be subject to a lien therefor until it shall be paid. If the per cent of cost to be paid by such owners shall be greater than fifteen per cent the excess shall be assessed to the property in each subdivision upon the same ratio as such fifteen per cent. The charge upon the several separate tracts or parcels of lands in each subdivision shall be assessed ratably on the basis of the special

benefits according to the actual area within such subdivision; that is to say, the area within the first subdivision shall be assessed seven-fifteenths, the area within the second subdivision shall be assessed five-fifteenths, and the area within the third subdivision shall be assessed three-fifteenths of the proportionate part of the cost assessed to the property in the assessment district. Each tract or parcel of land shall be assessed according to the relation of the area thereof to the total area within the subdivision wherein it is situated. The county engineer shall file such assessment-roll, as aforesaid, with the auditor of the county at least thirty days prior to the date prescribed by law for the first annual meeting of the county board of equalization after such list shall have been completed, and at said meeting, or an adjourned meeting, said board shall hear all objections to the assessments and determine the same, and correct all errors which may be found in such list; and after the same shall have been examined, compared and corrected by the county board of equalization, the assessment-roll shall be filed with the county treasurer, and the amount charged against the several lots, tracts or parcels of land within such improvement district shall be a lien upon such land, and shall be collected in the same manner as the general taxes of such county are collected, and shall become delinquent at the same time as general taxes, and after becoming delinquent shall be increased by the same percentage of penalty, and shall bear interest at the same rate as other delinquent state and county taxes: Provided, That the county commissioners may in their discretion by resolution duly certified to the county treasurer permit the payment of such taxes in ten equal annual installments, in which event each installment shall become delinquent as general taxes, and after becoming delinquent shall bear the same rate of interest as other delinquent state and county taxes: Provided, further, That the owner may pay all or any number of such installments at any time, and all deferred payments shall bear interest at the rate of six per cent per annum from the 31st day of May of the year following the filing of the assessment-roll with the county treasurer: And provided further, That whenever the county commissioners shall have provided for the payment of said taxes in installments as aforesaid it may, if it shall deem necessary or proper, issue bonds of the county payable from the general road and bridge fund ten years after the date of the issuance thereof with such option to redeem as shall be considered advisable, in an amount not exceeding the proportion of the cost of such highway which shall be a charge against the abutting property, and that such bonds shall bear interest at a rate not greater than six per cent per annum and shall be sold at not less than par by the board of county commissioners in such manner as they shall deem advisable. A notice directed to all owners of property affected by such assessment, whether known or unknown, to appear before said county board of equalization on a day to be therein specified to make their objections, if they have any, to such assessments, shall be published by the county auditor in a newspaper of general circulation in the county in at least three issues on different days of said newspaper, the first of which shall be at least twenty days prior to the specified date for appearances, and said notice shall contain a description of the highway, for the construction or improvement of which the assessment is made, and enumerate the several sections of land, according to

the United States surveys, which shall be wholly or partially included within the special improvement district. If any such assessment shall be deemed invalid by the county board of equalization or adjudged to be invalid by any court of competent jurisdiction, a reassessment of the land within an improvement district with proper boundaries shall be made and collected in the manner herein prescribed. The county boards of equalization may hold adjourned or special sessions whenever it may be necessary to do so for the purpose of hearing objections to, and completing assessment lists required by this act.

All persons owning property abutting on such highway so improved, or residing thereon shall thereafter pay all highway taxes assessed against them in money, and in the manner now provided by law.

Where the petition for the improvement or construction of any permanent highway shall be signed by the board of supervisors of any township, or a majority of them, under the provisions of section 5879-2, the proportion of the assessment of abutting property shall, as to property within such township, be a charge upon such township and shall be paid by such township from the moneys raised for the purpose of constructing and improving roads therein into the general road and bridge fund of the county on or before the date of the approval of such construction or improvement work by the state highway commissioner. [L. '11, p. 122, § 10; L. '13, p. 487, § 4.]

§ 5879-11. Construction and Closing of Highway.

Whenever a contract has been let for the improvement or construction of any such highway in accordance with the provisions of this act, the contractors may and are hereby authorized to, whenever the engineer in charge of the work shall certify to the necessity therefor in writing, close any such highway or section thereof to the public by putting up a sufficient obstruction and notice to the effect that such highway is so closed. When such highway shall have been so closed to the public any person disregarding such obstruction and driving, riding or walking over any portion of such highways so inclosed, shall be deemed guilty of a misdemeanor. Nothing herein contained, however, shall relieve the contractors of the burden of keeping highways under construction at all times open to the public until the engineer in charge of the work shall have certified to the necessity for closing such highway and shall have filed such certificate in the office of the county auditor of the county within which such highway or section thereof is located. [L. '11, p. 125, § 11.]

§ 5879-12. Maintenance.

Whenever the improvement of any permanent highway shall have been completed and accepted under the provisions of this act, the same shall be maintained in the same manner as is provided by law for the maintenance of other public highways and roads. [L. '11, p. 126, § 12.]

§ 5879-13. Draining.

Whenever during the construction of any such highway, or after its completion, it may be necessary for the proper construction or maintenance thereof to open or maintain ditches or drains for the purpose of properly draining such highway, the county commissioners of the county within

which such highway or section thereof is situated, shall have the right to enter upon the lands adjacent thereto and to open any existing ditch or drain or dig a new ditch or drain for the free passage of water for the purpose of draining such highway. Said county commissioners shall also be empowered to agree with the owner of any such lands upon the amount of damages, if any, sustained by him in consequence of such entry upon his lands and performance of the work hereby authorized, and the amount of damages so agreed upon shall be the road district charge and shall be audited and paid the same as other road district charges. If the county commissioners are unable to agree with such owner upon the amount of damages thus sustained, the amount thereof shall be ascertained and determined and paid in the same manner as damages are so ascertained, determined and paid where new highways are laid out and opened and the county commissioners and land owners are unable to agree upon the amount thereof. [L. '11, p. 126, § 13.]

§ 5879-14. Providing Revenue.

For the purpose of raising revenues for the improvement and maintenance of permanent highways under the provisions of this act, the proper state officers shall levy and collect a tax of one and one-half mills upon all property in the state subject to taxation for the year 1913, and for each year thereafter. All moneys derived from such tax shall be paid into the state treasury and credited to a fund to be known as the "Permanent Highway Fund." The amounts received from each county shall be credited to the county paying the same, until such time as the same shall be expended on contracts for permanent highways within such county or for the maintenance of the same under the provisions of this act. Five per cent of all moneys credited to each county under this act and which shall be derived from taxes levied for the year 1912 and subsequent years shall be set aside and expended by the board of county commissioners, upon vouchers approved by such board, for maintaining and repairing roads constructed under the provisions of this act and other roads of like character, and no part of such five per cent shall be expended for any other purpose. [L. '11, p. 126, § 14; L. '13, p. 491, § 5.]

§ 5879-15. Transfer Fund.

Upon the taking effect of this act, the state treasurer shall transfer from the public highway fund to the permanent highway fund hereby created, and placed to the credit of each county, a sum equal to one-half of all taxes levied in such county for said public highway fund for the years 1907, 1908, 1909 and 1910, first deducting therefrom all sums expended from the public highway fund for state aid road purposes in such county under the provisions of chapter 150 of the Session Laws of 1907 prior to such transfer. All payments on contracts executed prior to the passage of this act for state aid roads shall, from and after the date of its passage, be paid out of the permanent highway fund and charged to the county in which such state aid road is situated: Provided, That if any county shall not have sufficient money to its credit in the permanent highway fund to carry out any such contract or contracts, then and in that event the state treasurer shall transfer to the credit of such county from the public highway fund to the permanent highway

fund sufficient money to complete the existing contracts for state aid roads. For the purpose of making the transfers from the public highway fund to the permanent highway fund, as provided in this section, there is hereby appropriated out of the public highway fund the sum of five hundred and eighty thousand dollars, or so much thereof as may be necessary. [L. '11, p. 127, § 15.]

§ 5879-16. No Railroads on Highway.

No railroad or street railroad, by whatsoever power operated, shall be constructed upon any permanent highway or section thereof which may be improved under the provisions of this act, and the acts amendatory thereof and supplemental thereto, nor shall any such railroad or street railroad be constructed upon any public highway or section thereof of which such permanent highway is a continuation. [L. '11, p. 127, § 16.]

§ 5879-17. Bonds for Improvements Heretofore Made.

Where any assessment for the improvement of any permanent highway pursuant to petition has heretofore been made and extended upon the tax-rolls of any county and said assessment has not been paid, the county commissioners may provide for the payment of the same in installments, and may issue bonds of the county to an amount not exceeding such unpaid assessment in the manner provided in section 5879-10. [L. '13, p. 491, § 6.]

§ 5879-18. County Roads Through Fourth Class Cities.

Each and every county of this state is hereby authorized to build, construct and improve any permanent highway as same is defined by this chapter, through the corporate limits of any city of the third or fourth class, upon such streets or other rights of way connecting with such permanent highway in the corporate limits of such municipality as may be provided for such purpose by the municipal authorities, of sufficient width and appropriate for said purpose. [L. '13, p. 384, § 1.]

§ 5879-19. Eminent Domain—County may Pay Damages.

Where such city or town is unable to pay for the condemnation of such rights of way, the county may pay or aid such municipality to pay for the same. All expenses herein authorized shall be disbursed and all such construction, improvement and repair herein contemplated shall be disbursed under, and be controlled wholly, by the provisions of this chapter, or law amending or superseding the same. [L. '13, p. 384, § 2.]

CHAPTER XXIII.

STATE AID ROADS.

§§ 5879-5896.

Repealed. See L. '11, p. 128, § 17.

§ 5880.

The provision of the constitution vesting in counties the right of local self-govern-

ment is not violated by this act, authorizing the construction of state aid roads under the direction of the state highway commissioner, upon plans adopted by the county commissioners, the expense to be paid in part by the county and the local road district: *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835.

The constitutional provisions requiring uniformity in taxation and the proper application of taxes are not violated by this section, since the cost is paid by the state, county and district respectively benefited and taxed for moneys expended in their own territory: *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835..

CHAPTER XXIV.

STATE ROADS.

§ 5898. State Tax Levy for Highways and Bridges.

For the purpose of raising revenue to construct and repair highways and bridges, the proper state officers shall levy and collect a tax of one and one-fourth mills upon all of the property in the state subject to taxation for the fiscal year beginning March 1, 1913, and for each fiscal year thereafter shall levy and collect a tax of one mill. The fund provided by such levy shall be placed in said public highway fund: Provided, however, That nothing in this act contained shall have the effect or be construed to alter or modify in any particular any tax levy made or proceeding had or to be had for the collection of any tax heretofore levied or imposed under or pursuant to the provisions of any former or existing laws: And provided further, That five per centum of the taxes collected as herein authorized shall be set aside by the state treasurer and used exclusively under the direction of the highway commissioner for the repair and maintenance of state roads that shall have been established and constructed. [L. '11, p. 303, § 1; L. '13, p. 220, § 1.]

CHAPTER XXV.

ACQUISITION OF QUARRIES AND ROAD MATERIAL BY STATE.

§ 5910. Building for Convicts—Rock-crushers and Machinery.

Whenever under the provisions of this chapter any site and quarry is procured, the state highway commissioner shall take possession thereof, and may forthwith erect and construct at and upon the same such stockades, buildings and structures as may be necessary, suitable and adequate for the safe confinement and comfortable housing of such convicts as may from time to time be confined or worked therein, and may likewise purchase and install therein such suitable and proper rock-crushing plants, machinery, appliances and tools, and with such capacity as in the judgment of the highway commissioner may be necessary and adequate to keep continuously employed and occupied such force of convicts as may from time to time be worked therein. [L. '11, p. 517, § 1.]

§ 5911. Employment of Convicts.

It shall be the duty of the state highway commissioner to keep and employ in the several quarry sites so established and equipped as aforesaid, under charge of the superintendent of the penitentiary, and with his permission and that of the state board of control, in charge of such other persons in the employ of the state as the board of control shall direct, a sufficient number of able-bodied convicts when available to keep and maintain said plant therein installed in continuous operation to its full capacity, for which purpose said convicts may be transferred from the penitentiary at Walla Walla. [L. '11, p. 517, § 1.]

§ 5912. Output for State Roads—Surplus—Free Labor.

All convicts maintained at said quarry sites shall, when physically able and so long as there is a demand for the output of such quarry, be kept and employed continuously (except Sundays and legal holidays) in the quarrying, crushing, preparation and handling of rock or other materials for roads or streets. All rocks so crushed shall be, upon the request of the state highway commissioner, loaded upon the car or vessel and there delivered to said state highway commissioner, who shall use the same in the construction or maintenance of state roads or state aid roads: Provided, however, That so much of said materials as the state highway commissioner may not at any time require for use on state roads or state aid roads shall be by said highway commissioner disposed of at not less than ten per cent above estimated cost f. o. b. the car, scow or boat at the place of production, to counties, cities or towns within the state in the order of application therefor, excepting in cases where the demands of such counties, cities and towns may be in excess of the supply, in which case the state highway commissioner shall apportion, deliver and distribute such material among the several counties, cities and towns applying, in such proportion as in his judgment may seem fair and equitable: Provided, further, That all materials used by the state highway commissioner on any state road shall be paid for out of the appropriation, apportionment or fund for the construction or improvement of the particular road upon which it is used, and all material sold to the state highway commissioner or to any county, city, town or other municipality, shall be at not less than ten per cent above the estimated cost of production at the place of delivery: Provided further, That when the quantity of material on hand is in excess of the amount demanded by the state highway commissioner for use upon state roads, or state aid roads, or for disposition to the counties, cities and towns as herein provided, then the same may be disposed of by the state highway commissioner, at such prices, not less than the cost of production, as said commissioner may deem most advantageous for the state, giving prior right of purchase to citizens of the state of Washington before applicants from another state: And provided further, That nothing in this act shall be so construed as to prohibit the state highway commissioner from employing within said stockades, or at said quarry sites, in the production of said material and in the operation of said quarry, such free labor as the commissioner may deem necessary or proper. [L. '11, p. 517, § 1.]

§ 5914. Appropriations—Application—Good Roads Fund.

All moneys received from the sale of products of the state quarries and all moneys that may be received on account of fire insurance and settlement of fire losses at such quarries shall be paid into the state treasury and shall be kept in a fund to be known as the "Quarries Rotary Fund." Such fund shall be used for the purpose of maintaining such rock quarries and all necessary expenses in connection therewith, including the repayment as herein provided, and the cost and expenses of transporting to and from, keeping and guarding the convicts working therein, the payment of the fire insurance premiums and for making such permanent improvements as the state highway commissioner shall deem necessary to be expended on the order of the state highway commissioner: Provided, however, No warrant shall be issued against

said fund in excess of the amount remaining in such fund at the time of the issuance of the warrant. All warrants drawn against this fund shall be paid in the same manner as the state's general fund warrants are paid. All moneys heretofore paid out of the state general fund and the public highway fund for the purchasing and installing of crushing machinery, appliances, tools and cars for the maintenance of the state quarries, shall be repaid to the respective funds from which used, whenever the state highway commissioner shall deem sufficient funds have been received from the sale of the product of such quarries over and above the amount required for the operation of such plants. To secure the efficient, economical and satisfactory administration and maintenance of the several rock quarries under the jurisdiction of the state highway commissioner, the state highway commissioner is hereby authorized to appoint a superintendent of quarries who shall have and exercise such powers and perform such duties in connection with the various rock quarries of the state as shall be from time to time prescribed by the state highway commissioner. He shall receive an annual salary of not more than two thousand dollars and his necessary traveling expenses, to be paid out of the quarries rotary fund herein established, and in case there is insufficient in that fund he shall be paid out of the state highway fund. He shall be subject at all times to the jurisdiction, control and direction of the highway commissioner, and shall appoint such assistants with such compensation as shall be determined by the state highway commissioner. [L. '13, p. 556, § 1; Cf. L. '11, p. 517, § 1.]

TITLE XLII.

HUSBAND AND WIFE.

§ 5915.

Under sections 5915-5917, a homestead acquired from the federal government by a married man during the lifetime of his wife is community property; and the state has the sovereign power to fix its character irrespective of federal statutes: *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367.

As to land granted by the government and whether it is separate or community property, see note in 94 Am. St. Rep. 916.

It sufficiently appears that property sold by a husband and wife, and later conveyed to the husband, became his separate property, where the wife produced no evidence to contradict the husband's statement that he paid for it out of his separate estate, and from her testimony the conveyance would appear to have been without consideration and a gift to the husband: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 648.

§ 5916.

Under our community property laws, authorizing every married woman to hold and dispose of her separate estate as if she were unmarried, any profit made by a married woman upon selling a contract for the purchase of land, prior to payment of the last two installments, is her separate estate and not community property, where she entered into the contract to purchase in her own name, her husband not joining, making the first payment out of separate estate, and giving her personal notes for five subsequent annual installments, and she then had separate moneys sufficient to make all the payments, and made two subsequent payments out of her separate estate, it appearing that she was dealing with her separate estate and that there was no intent to involve the community property: *United States Fidelity & Guaranty Co. v. Lee*, 58 Wash. 16, 107 Pac. 870.

The wife's separate estate is liable for the funeral expenses of her husband, he having left no property, where the services were rendered with her knowledge and consent: *Butterworth & Sons v. Teale*, 54 Wash. 14, 18 Ann. Cas. 854, 102 Pac. 768.

As to liability of wife for husband's funeral expenses, see note in 18 Ann. Cas. 856.

As to liability of separate estate of wife for her funeral expenses, see note in 37 L. R. A., N. S., 754. And see note in 33 L. R. A. 662, as to the liability of the estate of each for the funeral expenses of the other.

As to liability of wife for medical attendance upon husband, see note in 5 Ann. Cas. 832.

The fact that the husband joined in a note and mortgage upon real estate purchased and mostly paid for by the wife before marriage does not make the property or the proceeds therefrom community property: *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088.

Assumption by a wife of mortgage indebtedness upon real estate purchased with her separate funds does not create a community obligation or make the property community property: *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088.

As to the theory and tests of community property, see note in 126 Am. St. Rep. 100.

In an action by a wife for conversion of stock held in trust for her by defendant, the stock is sufficiently shown to be separate property where she so testified, and all of the dealings of the trustee had been with her individually: *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363.

Real estate conveyed to the husband is sufficiently shown to be the separate property of the wife and held in trust for her, so that it would not be subject to a subsequent judgment recovered against the husband, where it appears that, at the time the property was purchased, the wife was possessed of separate real and personal property of considerable value, that she paid for the property by giving her personal check and satisfying a loan she had made derived from her separate estate, and from the same source paid for improvements on the property, and the husband admitted the trusteeship, no credit was given him by virtue of his holding the title, and the property was conveyed before execution sale: *Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137.

Judgment recovered in another state against the husband alone, on a contract relating to his separate estate, in an action wherein the wife appeared and her demurrer to the complaint was sustained, is the separate debt of the husband, and a judgment thereon in this state, against the husband alone, cannot be enforced against the wife's separate property: *Bramel v. Ratliff*, 54 Wash. 581, 103 Pac. 817.

As to the right of husband's creditors to attack marriage settlements, see note in 90 Am. St. Rep. 509.

As to right of husband's creditors to reach points of his management of or services in connection with wife's separate

estate or business, see note in 23 L. R. A., N. S., 1124.

The title to land agreed to be conveyed to a builder in part consideration of his work does not pass to the community consisting of himself and wife before deed; and being held in trust, the deed of the trustee at request of the husband passes title without any conveyance by the wife: *Empire State Surety Co. v. Ballou*, 66 Wash. 76, 118 Pac. 923.

As to theory and tests of community property, see note in 126 Am. St. Rep. 100.

Where the husband had charge of a transaction whereby property was conveyed to the wife, as and for her sole and separate property, the form of the deed is binding upon him, and the property becomes her separate property: In re *Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034.

As to employment by husband to manage wife's separate estate, see note in 58 Am. St. Rep. 496.

§ 5917.

See notes to § 1540.

The law of domicile controls personalty acquired during coverture: *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

Where a husband and wife, married in Arizona seventeen years ago, were keeping house at Nome, Alaska, where his earnings were his separate property, and there was nothing to show whether Nome was their domicile or merely their temporary abode, it will be presumed that the domiciliary law was the same as our own, and that the property was community property: *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

As to conflict of laws in respect to matrimonial property, see note in 29 L. R. A., N. S., 781. And see note in 85 Am. St. Rep. 556, as to law of the domicile.

The common property act of 1871, providing that the income or proceeds of the separate property of both husband and wife accruing during marriage shall be common property, did not impress separate property with a trust in favor of the common use of both, in view of other provisions of the act giving each the sole control, management, and power of disposition of their separate estates; but simply provides that the income thereof, when it comes into existence, shall be common property: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

The common property act of 1871, having provided that the income of separate property should be common property, the legislature would not have power by a subsequent act to declare income already accrued to be separate property, but it could so provide as to future income: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

The provision in the common property act of 1871, relating to both personal and real property, that the rents, profits, "interest" and income of separate property shall be common property, means only that the entire income thereof shall be common property, "interest" not having any further significance: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

As to power of legislature to change increment or income of separate property from community property to separate property, or vice versa, see note in 36 L. R. A., N. S., 1040.

While the laws of the United States control the ownership until title passes, after the patent to government land is issued, it becomes subject to state legislation, and the state, in passing the community property law and providing the rule of descent, is not acting in contravention of the laws of the United States: *Kreig v. Lewis*, 56 Wash. 196, 26 L. R. A., N. S., 1117, 105 Pac. 483.

Lands acquired under coal land entries by a husband are his separate property, in view of the act providing that each spouse may make an entry and acquire title, that the entryman must swear that the entry is made for his own benefit and not directly or indirectly for the benefit of any other person, and requiring no residence on the land: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

Mining claims acquired by a husband are his separate property, in view of the act permitting either spouse to make entry and acquire full title from the United States without the aid or intervention of the other: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

As to applicability of state community property laws to real property acquired from the United States, see note in 96 Am. St. Rep. 916. And see note in 26 L. R. A., N. S., 1117.

A chattel mortgage by a husband upon exempt personal property is valid without being signed by the wife, and a waiver of the exemption: *First Nat. Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038.

As to right of husband, as against wife, to dispose of his personalty during coverture, see note in 10 Ann. Cas. 1053.

Land settled upon by a husband and wife who were trespassers and without claim of right or title or any equity is not their community property by reason of pending negotiations for its purchase and improvements placed thereon by them; and where, after a decree of divorce which did not mention the property, the land was purchased by the husband, who had remained in possession, the same is his separate property, notwithstanding the purchase was made on the terms of the negotiations pending before divorce, and notwithstanding that, in an ejectment suit, the husband by his answer had made a

claim of right antedating the divorce decree: *Wingard v. Wingard*, 56 Wash. 389, 25 L. R. A., N. S., 453, 105 Pac. 834.

The wife, having no equity, could not avail herself of any admissions by the husband in the ejectment suit: *Wingard v. Wingard*, 56 Wash. 389, 25 L. R. A., N. S., 453, 105 Pac. 834.

Upon the granting of a divorce without making any disposition of property, the community is dissolved and the parties become tenants in common of the community property: *Barkley v. American Sav. Bank Trust Co.*, 61 Wash. 415, 112 Pac. 495.

After a divorce, whereby a husband's control over community property ceased and his interest became that of a tenant in common by operation of law, he can recover for a conversion prior to the divorce no more than the value of his half interest: *Barkley v. American Sav. Bank & Trust Co.*, 61 Wash. 415, 112 Pac. 495.

As to effect of divorce upon tenancy by entireties, see note in 10 L. R. A., N. S., 463.

As to effect of divorce upon community property in the absence of adjudication, see note in 11 L. R. A., N. S., 103.

Upon the death of the wife, leaving children, a deed by the surviving husband purporting to convey the entire community property, which descended one-half to him and one-half to the children, is not void, but is effectual to convey his one undivided one-half interest, which on the wife's death became his separate property: *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 Pac. 357, 109 Pac. 305.

As to the validity of contract of husband alone with reference to homestead, see note in 9 L. R. A. 804.

A homestead, patent for which was issued to a married man, is community property, and upon the subsequent death of the wife, leaving one child, an undivided one-half interest descends to the child: *Krieg v. Lewis*, 56 Wash. 196, 26 L. R. A., N. S., 1117, 105 Pac. 483.

As to the law of community property as applied to land acquired from the government, see note in 126 Am. St. Rep. 116.

As to right of children, as against surviving husband, to homestead of parent, see note in 56 L. R. A. 70.

Under this section and section 4621, making one-half of the community property subject to the testamentary disposition of each spouse, the testator has the power to name the executor to administer the estate, which necessarily carries with it the administration of all community property for such length of time as necessary to pay debts and speedily close the estate: *In re Güye's Estate*, 54 Wash. 264, 132 Am. St. Rep. 1111, 103 Pac. 25.

The natural enhancement in value during marriage of the separate property of the spouses is not property acquired during marriage, within the spirit of the com-

munity property statutes, which provides that property acquired before marriage and in certain ways, together with the rents, issues, and profits thereof, shall be the separate property of the spouse acquiring it; and that all other property acquired after marriage shall be community property: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

Where the husband purchased land, took possession, made improvements, and paid at least part of the purchase price before marriage, it is his separate property, although he received the deed after marriage, in the absence of a showing that community funds entered into the purchase: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

Where the husband has separate income, it cannot be presumed that the taxes on his separate property during marriage were paid with community funds: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

It will be presumed that property once shown to be separate property continued to be such until the contrary is made to appear: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

The joinder of a husband and wife in a mortgage of real estate is not evidence that the property was community property: *Guye v. Guye*, 63 Wash. 340, 37 L. R. A., N. S., 186, 115 Pac. 731.

As to the character of property, in respect of being or not being community, where title is initiated before but not completed until after death of one spouse, see note in 17 L. R. A., N. S., 154.

Lots purchased by a husband with money received from his father, as an advance from his father's estate, are his separate property, even if he procured a loan to pay a very small portion of the purchase price, where such portion was too small to notice: *Worthington v. Crasper*, 63 Wash. 380, 115 Pac. 849.

The husband's petition for letters testamentary on the estate of his wife is not an admission that certain lots which she attempted to dispose of by her will were community property, where she had other property, and the lots in fact belonged to his separate estate: *Worthington v. Crasper*, 63 Wash. 380, 115 Pac. 849.

Where parties cohabited as husband and wife, without any marriage, there can be no community property or presumptions attending the marriage state; and the burden of proof is upon the one claiming an interest in property the title to which is vested in the other: *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

As to the right of common-law wife to dower, see note in Ann. Cas. 1912A, 78.

Under the presumption that property acquired after marriage is community property, and in the absence of evidence that personal property was the separate

property of the wife, her bill of sale thereof is a nullity, under this section: *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183.

§ 5918.

The execution of a deed by the wife, within the time required by a contract of sale made by the husband alone, ratifies the contract and renders it binding on the vendee: *Heinemann v. Sullivan*, 57 Wash. 346, 106 Pac. 911.

A trade of separate property of two wives, arranged by their husbands, is ratified by the wives by their joining in deeds of the property: *Coonrod v. Studebaker*, 53 Wash. 32, 101 Pac. 489.

The presumption that property acquired by purchase by the wife during marriage is community property can only be overcome by clear and satisfactory evidence: *Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137.

A homestead upon which final proof was made before the death of the homesteader's wife is community property, although patent was issued to the husband, after the wife's death: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

As to whether or not property is of the community sort when the title, though initiated before, was not completed until after the death of one spouse, see note in 17 L. R. A., N. S., 154.

Where a trustee held the title to community property, who, at the husband's request, executed a deed to the wife, the husband's community interest is not divested by his subsequent delivery of the deed to the wife with intent to invest her with a separate estate, since that could only be done by his deed: *Carpenter v. Brackett*, 57 Wash. 460, 107 Pac. 359.

A contract for the sale of community land not executed by the wife of the vendor is not void, but only voidable: *Koth v. Kessler*, 59 Wash. 641, 110 Pac. 540.

Where community real property, record title to which was in the wife, is attached in a suit for a community debt, brought against the husband alone, the attachment is not notice to a subsequent bona fide purchaser from the wife, and such purchaser is not bound to take notice of the attachment lien indexed in the name of the husband and not shown in an abstract of title: *Anders v. Bouska*, 61 Wash. 393, 112 Pac. 523.

A promise by a husband to pay rent is not an encumbrance of community real estate, within this section, providing that the husband cannot encumber the same without the wife's consent: *Monroe v. Stayt*, 57 Wash. 592, 30 L. R. A., N. S., 1102, 107 Pac. 517.

As to lease as encumbrance or conveyance within statute requiring joinder or consent of spouse, see note in 39 L. R. A., N. S., 675.

Bona fide purchasers from a married man, describing himself in the deed as single and unmarried, are not charged with notice that it was community property, although some of his associates knew that he was married, and diligent inquiry might have disclosed the fact, where for several years the grantor had lived in this state separate and apart from his family in a distant state, the community had never occupied the land or made conveyances, and there was no fact or circumstance which would raise a duty in the grantee to inquire: *Daly v. Rizzutto*, 59 Wash. 62, 29 L. R. A., N. S., 467, 109 Pac. 276.

As to right of one spouse, living apart from the other, to claim community rights in property as against persons ignorant of the relationship, see note in 29 L. R. A., N. S., 468.

A husband, to whom a loan of seven hundred dollars was made, secured by a note and mortgage upon community property executed by the wife alone, is not estopped to question the validity of the mortgage lien by the fact that he consented to the execution and delivered the mortgage, and that the community would be liable for money had and received: *Olson v. Springer*, 60 Wash. 77, 110 Pac. 807.

Where community property is acquired and sold in this state in defiance of the community rights of the wife in a distant state, proof that the grantee was a purchaser for value and that the title was clear makes out a prima facie case of bona fides and puts the burden upon the wife to prove notice of her equity: *Daly v. Rizzutto*, 59 Wash. 62, 29 L. R. A., N. S., 467, 109 Pac. 276.

In the absence of fraud or deceit, a mortgage upon community property executed by the wife alone is void: *Olson v. Springer*, 60 Wash. 77, 110 Pac. 807.

The wife is liable, as a member of the community, upon the husband's contract to pay a commission for securing a loan which was a community debt contracted in the management of the community estate: *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610.

In an action against a husband and wife for attorneys' fees, instructions that, if the contract was made by the husband and the services were rendered, the defendants were liable, are proper; and it is proper to instruct that the contract was presumptively for the benefit of the community, which presumption was conclusive, there being no evidence to overcome it: *Peacock v. Ratliff*, 62 Wash. 653, 114 Pac. 507.

TORTS.—Where a married man, engaged in the real estate business, acted as plaintiff's agent in the purchase of property, and misrepresented the price paid, thereby wrongfully making a profit over and above his commissions, the principal may recover a

community judgment against the agent and his wife for the difference between the price actually paid by the agent and the amount represented by him as paid, since the wrongful profit made by the agent would be community property: *McGregor v. Johnson*, 58 Wash. 78, 27 L. R. A., N. S., 1022, 107 Pac. 1049.

In an action upon a note executed by the husband alone, personal judgment against the wife is unauthorized, the plaintiffs being confined to establishing the community character of the indebtedness: *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777.

A judgment against L. R. and the community composed of L. R. and E. R., husband and wife, merely establishes the community character of the debt, and is not a personal judgment against the wife: *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502.

The fact that an action in tort was prosecuted to judgment against a husband alone for his negligent acts in the conduct of the community business does not preclude the judgment creditor from asserting that the judgment was a community debt, in a subsequent action brought against the husband and wife to subject community property to the judgment: *Woste v. Ruge*, 68 Wash. 90, 122 Pac. 988.

A marriage between parties prohibited from contracting the marriage is void ab initio, and property acquired cannot be community property: *Sortore v. Sortore*, 70 Wash. 410, 126 Pac. 915.

In an action against a husband on a promissory note in which the wife was joined with a view of establishing the debt as their community debt, a judgment against the husband alone reciting that it is enforceable out of the separate and community property of the husband is not a judgment against the wife's community interest, or against the community: *Alaska Banking & Safe Deposit Co. v. Simmons*, 67 Wash. 673, 122 Pac. 319.

The community is liable to a passenger for the tort of the husband in negligently driving an automobile for hire, where the automobile was operated for the benefit of the community: *Milne v. Kane*, 64 Wash. 254, Ann. Cas. 1913A, 318, 36 L. R. A., N. S., 88, 116 Pac. 659.

§ 5919.

The evidence sufficiently shows that an agreement between husband and wife that her personal earnings after marriage should be her separate property, where it appears that the money earned by her in teaching during four years after marriage was applied in completing the purchase and improving property purchased and partly paid for by her before marriage, that the proceeds of such property were thereafter

invested and reinvested by her, the husband having nothing to do with the same, under a general understanding between them at all times that it and all her earnings were her separate property: *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088.

As to the earnings of either party to a marriage in respect of whether or not community property, see note in 126 Am. St. Rep. 115.

A separation agreement, whereby the husband agreed to pay the wife three thousand dollars in monthly installments for the support, maintenance and education of their two children upon condition that the children be kept in school and continue their education during said period, and in the event of their failing to continue their attendance at school, the payments to cease, should be construed to require attendance at school only until their education, as contemplated by the parties at the time, is completed; and where they graduated from college before the end of the period, the wife is entitled to recover the whole sum, without further attendance in school by the children: *Titus v. Titus*, 66 Wash. 345, Ann. Cas. 1913C, 343, 119 Pac. 813.

As to the validity of separation agreements between husband and wife, see note in 83 Am. St. Rep. 859.

An agreement between husband and wife that the earnings of each while living together shall be the separate property of each cannot affect existing creditors of the community: *Marsh v. Fisher*, 69 Wash. 570, 125 Pac. 951.

§ 5921.

A wife's personal earnings are her separate property only where she is living separate and apart from her husband, in the absence of any agreement between husband and wife with respect thereto: *Marsh v. Fisher*, 69 Wash. 570, 125 Pac. 951.

§ 5926.

This section was not intended to authorize a wife to establish a domicile for herself, irrespective of her husband's domicile, during the existence of the marital relation: *Buchholz v. Buchholz*, 63 Wash. 213, Ann. Cas. 1912D, 395, 115 Pac. 88.

As to right of wife to acquire a separate domicile after abandonment of marriage relation, see note in Ann. Cas. 1912D, 397.

This section, abolishing all laws which impose any disability upon a wife which are not imposed upon a husband, does not authorize the wife to sue the husband for a tort committed upon her person during coverture, since at common law the husband has no such right of action against the wife: *Schultz v. Christopher*, 65 Wash. 496, 38 L. R. A., N. S., 780, 118 Pac. 629.

As to right of persons who have intermarried to sue each other after severance of the relation, see note in 73 Am. St. Rep. 238.

§ 5931.

This section raises a joint and several obligation therefor; and a divorced wife, who thereafter maintained a child awarded to her without provision for its support, is entitled only to contribution from the husband, and cannot recover from him the

whole of the sums expended by her: *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13.

As to burden of children's support when divorce decree silent on subject, see note in 114 Am. St. Rep. 700.

§ 5932.

See notes to § 3909.

§ 5933.

Repealed. See L. '13, p. 73, § 2.

§ 5933-1. Family Desertion.

Every person who,

1st: Having any child under the age of sixteen years dependent upon him or her for care, education or support, deserts such child in any manner whatever, with intent to abandon it;

2d: Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children or ward or wards;

3d: Having sufficient ability to provide for his wife's support, or who is able to earn the means for such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter, or medical attendance, unless by her misconduct he is justified in abandoning her.

Shall be guilty of a gross misdemeanor. [L. '13, p. 71, § 1.]

§ 5933-2. Punishment—Payment to Family—Suspension of Judgment—Working Prisoners.

In any case enumerated in the previous section, the court may render one of the following orders:

1st: Should a fine be imposed it may be directed by the court to be paid in whole or in part to the wife, or to the guardian, or to the custodian of the child or children, or to an individual appointed by the court as trustee.

2d: Before trial, or after conviction, with the consent of the defendant, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly during such time as the court may direct, to the wife or to the guardian, or custodian of the minor child or children, or to an individual appointed by the court, and to release the defendant from custody or probation during such time as the court may direct, upon his or her entering into a recognizance, with or without sureties, in such sum as the court may direct. The condition of the recognizance to be such that if the defendant shall make his or her appearance in court whenever ordered to do so, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise to remain in full force and effect.

3d: Where conviction is had and sentence to imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon the public roads or highways, or any other public work, in the county where such conviction is had, during the time of such sen-

tence. And it shall be the duty of the board of county commissioners of the county where such conviction and sentence is had, and where such work is performed by persons under sentence to the county jail, to allow and order the payment, out of the current fund, to the wife, or to the guardian, or the custodian of the child or children, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, child, or children, ward or wards, a sum not to exceed one and fifty one-hundredths dollars for each day's work of such person. [L. '13, p. 71, § 2.]

§ 5933-3. Prima Facie Proof.

Proof of the abandonment or nonsupport of a wife, or the desertion of a child or children, ward or wards, or the omission to furnish necessary food, clothing, shelter, or medical attendance for a child or children, ward or wards, is prima facie evidence that such abandonment or nonsupport, or omission to furnish food, clothing, shelter, or medical attendance is willful. The provisions of sections of section 5933-1 are applicable whether the parents of such child or children are married or divorced and regardless of any decree made in said divorce action relative to alimony or to the support of the wife or child or children. [L. '13, p. 72, § 3.]

TITLE XLIV.

INSPECTION.

CHAPTER I.

INSPECTION OF GRAIN AND HAY AND REGULATION OF WAREHOUSES.

§ 5980.

The grain inspection law, entitled an act for the regulation of public warehouses, relating to the shipping, grading and inspection of grain, and defining the duties of railroads, warehousemen, etc., was designed to protect the owner or shipper of grain from frauds practiced by public warehousemen, and is not broad enough to cover the inspection of grain shipped by an owner to himself, the same not being stored in a public warehouse: *Puget Sound Warehouse Co. v. Northern Pac. R. Co.*, 58 Wash. 322, 108 Pac. 955.

A tax for the inspection of grain shipped by the owner to himself cannot be sustained by reference to the police power, where the same was not to go through a public warehouse: *Puget Sound Warehouse Co. v. Northern Pac. R. Co.*, 58 Wash. 322, 108 Pac. 955.

As to laws for protection of goods after receipt in warehouse, see note in 136 Am. St. Rep. 212.

§§ 5980-6010.

Repealed. See L. '11, p. 412, § 34.

§ 5980-1. Terms Defined.

The term public warehouse when used in this act, includes any elevator, mill, warehouse or structure in which grain or hay is received from the public for storage, shipment or handling, whenever such grain or hay is carried or intended to be carried to or from such warehouse, elevator, mill or structure by a common carrier.

The term terminal warehouse, when used in this act includes any public warehouse situate in Seattle, Tacoma, Spokane or other cities in the state which may be hereafter designated as inspection points.

The term warehouseman when used in this act includes any firm, person, company, corporation or association of persons owning, operating or controlling any public warehouse.

The term "commission" when used in this act means the railroad commission of Washington. [L. '11, p. 398, § 1.]

§ 5980-2. Investigation of Complaints.

The commission shall exercise general supervision over the handling, weighing, inspecting and storage of grain and hay, and the management of public and terminal warehouses. Such commission shall investigate all complaints of fraud or injustice in the grain and hay trade, fix the charges of public and terminal warehouses, and make all necessary rules and regulations for carrying out and enforcing the provisions of this act, and of all laws of the state relating to the subject. [L. '11, p. 398, § 2.]

§ 5980-3. Chief Inspector.

The commission, with the approval of the governor, shall appoint a chief inspector, who shall be thoroughly familiar with the grains of Washington, and shall have had at least five years experience in handling said grain and hay. He shall, before entering upon the duties of his office, give a surety bond (the cost of said bond to be paid by the state) to the state of Washington in

the sum of ten thousand dollars, to be approved by the commission and the attorney general, and conditioned upon the faithful discharge of his duties, and take the usual oath required of state officers. He shall receive a salary of two thousand dollars per annum, and necessary traveling expenses, and shall reside at Tacoma. [L. '11, p. 399, § 3.]

§ 5980-4. Appointment of Deputies—Bonds.

The chief inspector, with the approval of the commission, shall appoint such number of deputies, inspectors, samplers and weighers as may be necessary to properly and thoroughly inspect and weigh grain and hay received and exported and to carry out the provisions of this act. One of such inspectors in each of the cities of Seattle, Tacoma, Spokane, and such other cities as may be designated by the commission, shall be styled chief deputy inspector. Such chief deputy inspectors shall be expert grain and hay men with at least three years' experience in handling grain and hay in Washington. The chief deputy inspectors shall each give a surety bond (the cost of said bonds to be paid by the state) to the state of Washington in the sum of five thousand dollars, to be approved by the commission and the attorney general, conditioned upon the faithful discharge of their duties. Such chief deputies shall receive a salary of fifteen hundred dollars per annum, and necessary traveling expenses. All other inspectors, samplers and weighers shall give bond (the cost of said bonds to be paid by the state) to the state of Washington in the sum of three thousand dollars, to be approved by the commission and the attorney general, conditioned upon the faithful discharge of his duties; the salaries of such inspectors, samplers and weighers shall not exceed one hundred dollars per month. The chief deputy inspector, inspectors, samplers and weighers shall be required to take an oath to faithfully perform their duties; the duties of inspectors, samplers and weighers may be interchangeable. [L. '11, p. 399, § 4.]

§ 5980-5. Bonds Filed.

The bonds of the chief inspector, his deputies, samplers and weighers, and all warehousemen, shall be filed in the office of the secretary of state of Washington, and any person injured by any official act or the neglect of duty of any such inspector, sampler or weigher, or by reason of neglect or failure of such inspector, sampler, weigher or warehouseman to comply with the provisions of this act or of the rules and regulations of the commission shall have a right of action upon such official bond for the recovery of all damages suffered thereby. [L. '11, p. 400, § 5.]

§ 5980-6. Interest of Officers.

No chief inspector, deputy inspector, sampler or weigher, shall during his term of office, be interested directly or indirectly in the handling, storing, shipping, purchasing or selling of grain or hay. [L. '11, p. 400, § 6.]

§ 5980-7. Neglect of Duty—Penalty.

Any inspector, sampler or weigher of grain or hay who shall be guilty of any neglect of duty, or who shall knowingly or carelessly inspect, sample or weigh any grain or hay improperly, or who shall directly or indirectly accept any money or other consideration for any neglect of duty or any

improper performance of duty as such inspector, sampler or weigher of grain or hay, or any person, persons, corporation or agent who shall improperly influence or attempt to improperly influence any inspector, sampler or weigher of grain or hay, in the performance of his duties as such inspector, sampler or weigher, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail not less than six months, nor more than one year, or by both such fine and imprisonment, in the discretion of the court. [L. '11, p. 400, § 7.]

§ 5980-8. Inspection Points.

The cities of Seattle, Tacoma and Spokane shall be provided with state inspection and weighing under this act. Such other cities and towns where grain and hay is received in carload lots or by water craft, and the shipments are such as would reasonably justify and render necessary the inspection of grain or hay, may be designated by the commission as inspection points and be provided with state inspection and weighing: Provided, That the expenditure for the inspection and weighing at the points designated by the commission shall not exceed the receipts of fees at such place or places. [L. '11, p. 400, § 8.]

§ 5980-9. Employees of Commission.

The chief inspector, his deputies, samplers and weighers, shall be employees of the commission and may be removed at any time by the commission. They shall be paid in the same manner as other employees of said commission. [L. '11, p. 401, § 9.]

§ 5980-10. Regulating Charges.

All charges made by any public warehouseman subject to the provisions of this act for the handling or storage of grain and hay shall be just, fair and reasonable; and the commission is hereby vested with power and authority upon the complaint of any person interested or by inquiry upon its own motion, after a full hearing, to declare any existing charge for the handling or storage of grain or hay, or any regulation whatsoever affecting such charge, or the receipt, handling or storage, to be unreasonable or unjust, and to declare and order what shall be a just and reasonable charge or regulation to be imposed or enforced in place of that found to be unreasonable or unjust. [L. '11, p. 401, § 10.]

§ 5980-11. Commissioners' Authority.

All provisions of law relating to the method of procedure by the commission in fixing the rates to be charged by railroad companies for the transportation of freight and passengers, or the promulgation or issuance of rules and regulations, and the review of the acts or orders of such commission with reference thereto, and the enforcement of such orders, shall, so far as the same are applicable, govern the procedure of such commission in regulating public or terminal warehouses, and the review and enforcement of the acts and orders of the commission under the provisions of this act. [L. '11, p. 401, § 11.]

§ 5980-12. Commission to Fix Grades—Witnesses' Salary—Placards.

The commission shall, on or before the first day of July, 1911, fix standard grades to apply to all grain and hay thereafter bought or handled by public or terminal warehouses in this state. Such grades shall be known as Washington grades and shall continue until changed by the commission after notice as provided for the establishment of such grades. Such grades shall be fixed only after a public hearing, notice thereof to be given by two weeks' publication in three principal daily newspapers of the state, one of which, at least, shall be in eastern Washington. All persons desiring to be heard shall have a right to be heard and give such testimony as they may desire to offer. Such witness may be subpoenaed as the commission may deem necessary. The persons subpoenaed by the commission as witnesses shall receive five dollars per diem for the time they are actually employed and necessary traveling expenses. The commission shall at such time, after such hearing, make and issue reasonable rules and regulations governing the dockage which shall be made on inferior grades of grain or hay and in all executory contracts thereafter entered into for the sale of grain or hay where the price or amount to be paid therefor depends upon terminal weight or grade, such rules and regulations shall control the dockage in so far as the same affects the price to be paid, and such rules and regulations shall become part of the contract of sale unless expressly agreed to the contrary in such executory contract.

It shall be the duty of the chief grain inspector immediately after the establishment of such grades and the promulgation of rules and regulations fixing dockage as herein provided, to supply all public and terminal warehousemen which the records in his office show are then or thereafter engaged in operating such warehouses, with a placard copy of such grades, rules and regulations. It shall be the duty of every public or terminal warehouseman to keep such placard posted in a conspicuous place in such warehouse, and if an office is conducted in connection with such warehouse, a copy shall be posted in a conspicuous place in such office. [L. '11, p. 401, § 12.]

§ 5980-13. Commission to Adjust Fees.

The commission shall fix the fees for inspection and weighing of grain and hay, such fees to be a lien upon such grain and hay and to be paid by the carrier transporting the same and treated by it as advanced charges, except when the bill of lading contains the notation "Not for terminal weight and grade" and the grain or hay is not unloaded at a terminal warehouse. The commission shall so adjust the fees to be collected under this act as to meet the expenses necessary to carry out the provisions thereof, provided that the fees fixed for inspection and weighing shall in no case exceed five cents per ton for sacked grain; three cents per ton for bulk grain, and eight cents per ton for hay. All moneys collected under the provisions of this act and all fines and penalties for violation thereof shall be paid into the state treasury. [L. '11, p. 402, § 13.]

§ 5980-14. Record of Cargoes and Grades—Certificate.

The chief inspector, his deputies and weighers, shall at the places provided for state inspection under this act have exclusive control of the weighing and grading of grain and hay which shall be inspected under the provi-

sions of this act and the action and certificate of such inspectors and weighers in the discharge of their duties shall be conclusive upon all parties interested: Provided, however, An appeal may be taken to the commission whose decision shall be final. Suitable books and records shall be kept in which shall be entered a faithful and true record of every car or cargo or part of cargo of grain or hay inspected or weighed by them, showing the number or initial or other designation of such car or cargo or part of cargo, its weight, the kind of grain, or hay and its grade, and if graded below standard No. 1 grade, the reason for such grade, if of inferior grade the amount of such dockage, the amount of fees and forfeitures and disposition of same, and for each car, or cargo or part of cargo of grain or hay inspected they shall give a certificate of inspection showing the kind and grade of the same and the reason for all grades below No. 1, the amount to be allowed for dockage, if any, the number of sacks if sacked grain, or bales of hay, with the grade or grades and weight of same, if requested to do so by consignor or consignee. They shall also furnish the agent of the railroad company or other carrier over which grain was shipped or carried, a certificate showing the weight of the grain or hay, if requested to do so. They shall also keep a true record of all appeals, decisions and a complete record of every official act, which books and records shall be open to inspection by any party in interest. [L. '11, p. 403, § 14.]

§ 5980-15. Misconduct.

Upon written complaint filed with the commission charging any inspector, sampler or weigher with official misconduct, inefficiency, incompetency or neglect of duty, the commission shall investigate such charge, and if it be found sustained, shall remove such officer. [L. '11, p. 404, § 15.]

§ 5980-16. Appeal from Grading.

In case any owner, consignee or shipper of grain, or his agent or broker, or any public or terminal warehouseman shall be aggrieved at the grading of his grain or hay, such aggrieved person may appeal to the commission from such decision within thirty days from the date of certificate, and paying a fee to be fixed by the commission, which shall be refunded if the decision appealed is sustained. Such notice of appeal may be taken by a letter or notice to the commission that it appeals from the decision of the inspector. It shall be the duty of the commission upon receiving such notice to immediately notify the parties interested of the time and place designated by it for a hearing and at such time and place, which shall be within twenty days from the date of receiving such notice hold a hearing and inquire into the reasonableness and correctness of such original grading and such evidence shall be received as the parties thereto may desire to offer. After such hearing the commission shall make such order affirming or modifying the grade so established by the inspector as the facts and evidence may justify. [L. '11, p. 404, § 16.]

§ 5980-17. Fee Fixed by Commission.

All grain and hay received at terminal warehouses shall be inspected and weighed by a state inspector and when exported shall if requested be reinspected and graded in like manner and a certificate of grade issued, a

reasonable fee to be charged for such reinspection, said fee to be fixed by the commission. All other grain and hay received in carload lots or, when shipped by water in lots containing more than thirty tons of grain or twelve tons of hay at inspection points, not unloaded at a terminal warehouse, shall be weighed, inspected and graded, unless the bill of lading contains a notation "not subject to inspection or terminal weight or grade." [L. '11, p. 404, § 17.]

§ 5980-18. To Procure License.

Any person, firm, company, corporation or association of persons owning or operating any public or terminal warehouse or warehouses in this state, shall on or before June 30th of each year, procure from the commission, a license for each such warehouse so owned or operated for the ensuing year before transacting business at such public warehouse or warehouses. Such license shall be posted in a conspicuous place in the office of each warehouse. The fee for such license shall be one dollar for each public warehouse, and the commission may revoke any such license for cause, upon notice and hearing. Any person, corporation or association operating any public or terminal warehouse in this state without a license shall forfeit to the state for each day's operation fifty dollars, and such operation may be enjoined upon complaint of the commission. [L. '11, p. 405, § 18.]

§ 5980-19. Post Schedule.

Every such warehouseman shall annually, during the first week in July, publish by posting in a conspicuous place in his warehouse, a schedule of storage rates for the ensuing year, which schedule shall be kept posted in a conspicuous place in said warehouse, and said rates shall not be increased during such year, and no discrimination in rates shall be made by any such warehouseman. [L. '11, p. 405, § 19.]

§ 5980-20. Privilege of Examining.

Every person having an interest in any grain or hay stored in any such warehouse, and every state grain inspector, shall have the right to examine at all times during ordinary business hours any grain or hay so stored, and all parts of such warehouse; and every warehouseman, his agents and servants shall furnish proper facilities for such examination. [L. '11, p. 405, § 20.]

§ 5980-21. Rebate.

If any public or terminal warehouseman subject to the provisions of this act shall, directly or indirectly, by any special charge, rebate, drawback or other device demand, collect or receive from any person or persons a greater or lesser compensation for any service rendered or to be rendered in the handling or storage of grain or hay than he demands, collects or receives from any other person or persons for doing for him or for them a like and contemporaneous service in the handling or storage of grain or hay under substantially similar circumstances or conditions, or if any such public or terminal warehouseman shall make or give any undue or unreasonable preference or advantage to any person, company, firm or corporation in any respect whatsoever, or shall subject any particular person, company, firm or cor-

poration to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such warehouseman shall be subject to a penalty as hereinafter provided. [L. '11, p. 405, § 21.]

§ 5980-22. Receipt—Failure to Issue.

Every public warehouseman shall receive for storage and shipment, so far as the capacity of his warehouse will permit, all grain and hay in a warehouse used for this purpose, in suitable condition for storage, tendered him in the usual course of business, without discrimination of any kind. A warehouse receipt in form prescribed by the commission, consecutively numbered, shall be issued and delivered to the owner or his representative immediately upon receipt of each load or parcel of grain or hay, or as he may demand, giving the true and correct grade and weight thereof: Provided, That upon request of the owner, grain or hay may be put in a special pile without grading, and if grain or hay has been wet or damaged it shall be received and piled in a special pile, marked with a distinguishing mark, which shall be shown on the receipt for the same and given for the number of sacks only, or bales. The failure to issue, when requested, said receipt, or some slip, memoranda or other form of receipt shall be subject to a penalty as hereinafter provided. [L. '11, p. 406, § 22.]

§ 5980-23. Deliver on Payment of Charges.

Upon the return of the receipt to the proper warehouseman, properly indorsed, and upon payment or tender of all advances and legal charges, grain or hay of the grade and quantity named therein shall be delivered to the holder of such receipt, within forty-eight hours after the facilities for receiving the same have been provided. If such warehouseman shall fail so to deliver it, he shall be liable to the owner in damages at the rate of one cent a bushel for each day's delay, unless he shall deliver the property to the several owners in the order of demand as rapidly as it can be done by ordinary diligence. If upon such demand and tender the warehouseman shall fail so to deliver such grain or hay, the person entitled thereto may recover the same by action; and such warehouseman or person or agent in charge thereof shall be subject to a penalty as hereinafter provided. [L. '11, p. 406, § 23.]

§ 5980-24. Annual Report—Warehouse Inspection.

On June 30th of each year every warehouseman shall make report under oath to the commission on blanks or forms prepared by it showing the total number of sacks and weight of each kind of grain and bales and weight of hay, received and shipped from each warehouse licensed under this act, and also the amount of outstanding storage receipts on said date, and a statement of the amount of grain and hay on hand to cover the same. The commission may also require special reports from such warehouseman at such times as the commission may deem expedient. The commission may cause every such warehouse and business thereof and the mode of conducting the same to be inspected by one or more of its members or by its authorized agent whenever deemed proper, and the property, books, records, accounts, papers and proceedings of every such warehouseman shall at all times during business hours be subject to such inspection. Each person,

firm, corporation or association of persons operating any public warehouse or warehouses subject to the provisions of this act shall, on or before the first day of July of each year, give a bond in good and sufficient surety to the state of Washington, in such sum as the commission may require, to be approved by such commission and the attorney general, conditioned upon the faithful performance of the acts and duties enjoined upon them by law. [L. '11, p. 407, § 24.]

§ 5980-25. Railroad Facilities.

Whenever required by the commission every railroad company shall construct and maintain at each station and siding in this state suitable facilities for the purpose of loading bulk grain direct from wagons into cars for shipment. The commission may require an increase in such facilities or additional facilities whenever it deems it necessary for the purpose of loading. [L. '11, p. 407, § 25.]

§ 5980-26. Inspected on Call.

In case grain or hay is sold for delivery on Washington grade to be shipped from places not provided with state inspection under this act, the buyer, seller or persons making the delivery may have it inspected out by notifying the chief inspector or a chief deputy, whose duty it shall be to have such grain inspected, and after it is inspected to issue to the buyer, seller or person delivering it on request, an inspector's certificate showing the grade of such grain. The person or persons calling for such inspection shall pay for such inspection a reasonable fee to be fixed by the commission. [L. '11, p. 408, § 26.]

§ 5980-27. Samples.

It shall be the duty of the chief inspector to transmit samples of grain showing the standards thereof adopted, to such foreign chambers of commerce, boards of trade, exporters and persons, firms, corporations or associations handling and dealing in Washington grain, as the commission may designate, and upon request he shall furnish such samples to similar parties in this state or the United States under such reasonable rules and regulations as the commission may prescribe. [L. '11, p. 408, § 27.]

§ 5980-28. Examination of Cars.

The chief inspector or any deputy inspector, sampler or weigher serving under him before opening the doors of any car containing grain or hay upon arrival at any of the places designated herein for inspection shall first ascertain the condition of such cars and determine whether any leakages have occurred while said cars were in transit, whether or not the doors were properly secured and sealed at point of shipment, and shall make a record of such facts in all cases, giving seal and plug numbers. After such examinations have been made and recorded, and the inspection of such grain or hay has been made, the said officials shall securely close and reseal such doors as have been opened by them, using the special seal of the said state grain inspection department for the purpose. A record of all original seals broken by said officials, and the date when broken, and also a record of all state seals substituted therefor, and the date and number of said seals shall

be made by said officials. The chief inspector, his deputies, weighers or samplers shall break the seal, weigh and superintend the unloading of all cars of grain or hay subject to inspection, and any other person or persons breaking the seal or weighing such cars of grain or hay shall be guilty of a misdemeanor. [L. '11, p. 408, § 28.]

§ 5980-29. Sidetracks—Cars—Annual Scale Test.

Any railroad delivering grain or hay in cars at any of the places provided with state inspection under this act shall provide convenient and suitable sidetracks at such places as the commission may designate, on which all cars of grain or hay delivered by them shall, upon arrival, be set and arranged convenient for inspection, and after inspection such railroad company shall promptly distribute all such cars of grain and hay and set them at the proper place or places to be unloaded as designated by the consignor or consignee. Such railroad company shall provide at such place or places as the commission may designate suitable track scales for weighing cars of grain or hay. Such scales shall be under the control of the chief inspector and his deputies. It shall be the duty of the chief inspector or his deputies to require the railroad company to correct all scales so provided as often as may be necessary to insure the correct weighing of grain or hay. Whenever scales have been installed by any railroad company as above provided, it shall be the duty of the chief inspector or his deputies to use such scales in weighing all grain or hay received over the line of such railway: Provided, That if any terminal warehouse in inspection cities are provided with proper scales and weighing facilities, the chief inspector or his deputies may weigh the grain upon the scales so provided. The chief inspector or one of his deputies shall, at least once each year, examine, test and require to be corrected all scales used in weighing grain or hay in any of the cities designated as inspection points in this act, or such places as may be hereafter designated, and after such scale is tested, if found to be correct and in good condition, to seal the weights with a seal provided for that purpose and issue to the owner or proprietor a certificate authorizing the use of such scales for weighing grain or hay for the ensuing year, unless sooner revoked by the chief inspector or his deputy. If such scales be found to be inaccurate or unfit for use, the chief inspector or his deputy shall notify the party operating or using them, and the party thus notified shall, at his own expense, thoroughly repair the same before attempting to use them, and until thus repaired to the satisfaction of the inspector or his deputy, the certificate of such party shall be suspended or revoked, in the discretion of the inspector or his deputy. The party receiving such certificate shall pay to the chief inspector or his deputy a reasonable fee for such inspection and certificate to be fixed by the commission, which sum shall be paid into the state treasury. It shall be the duty of the said commission to see that the provisions of this section are strictly enforced. [L. '11, p. 409, § 29.]

§ 5980-30. Police Protection.

All railroad companies and warehousemen operating in the cities provided for inspection by this act, shall furnish ample and sufficient police protection at all their several terminal yards and terminal tracks to securely protect all cars containing grain or hay, while the same are in their pos-

session. They shall prohibit and restrain all unauthorized persons, whether under the guise of sweepers, or under any other pretext whatever, from entering or loitering in or about their railroad yards or tracks and from entering any car of grain or hay under their control, or removing hay or grain therefrom, and shall employ and detail such number of watchmen as may be necessary for the purpose of carrying out the provisions of this section. [L. '11, p. 410, § 30.]

§ 5980-31. Violation and Penalty.

Any railroad company or common carrier, or other corporation, and any warehouseman, which shall violate or fail to comply with any provision of this act; or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission made under the provisions of this act, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense, and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

Every officer, agent or employee of any railroad company or common carrier, or other corporation, or any warehouseman, which shall violate or fail to comply with, or who procures, aids or abets any violation by any such railroad company or common carrier, or other corporation or warehouseman, of any provision of this act, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission; or who procures, aids or abets any such railroad company or common carrier, or other corporation, or any warehouseman, in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor.

Every person either individually or acting as an official or agent of any corporation other than a railroad company, common carrier or warehouseman, who shall violate any provision of this act, or fail to observe or comply with any order made by the commission under this act, so long as the same shall be or remain in force; or shall procure, aid or abet any such corporation in its violation of this act, or in its failure to obey, observe or comply with any such order, shall be guilty of a gross misdemeanor. [L. '11, p. 410, § 31.]

§ 5980-32. Constitutionality.

If any section or part of a section of this act shall be for any cause held to be unconstitutional, such fact shall not affect the remainder of this act. [L. '11, p. 411, § 32.]

CHAPTER IV.

HOTELS.

§ 6028½.

A contract requiring leased premises to be completely equipped for a restaurant kitchen is presumed to be made in contemplation of this section: *Manvell v. Weaver*, 53 Wash. 408, 102 Pac. 36.

§ 6030.

This act does not provide an unreasonable classification and does not violate the constitutional prohibitions against class legislation, the deprivation of privileges, or of property without due process of law, the

delegation of legislative powers, or the invasion of private rights: *State v. McFarland*, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792.

§ 6046.

This section violates constitution, article 1, section 17, forbidding imprisonment for debt: *State v. McFarland*, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792.

The unconstitutionality of this section, providing imprisonment for failure to pay the hotel inspection fee, does not affect the validity of the balance of the act providing for the inspection of inns and hotels: *State v. McFarland*, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792.

As to the validity and construction of statute providing for official inspection of inns or hotels, see note in *Ann. Cas.* 1913B, 827.

CHAPTER V.

OILS.

§ 6050.

Repealed. See L. '13, p. 201, § 14.

TITLE XLV.

INSURANCE CODE.

§ 6059-1. Insurance Defined.

Within the intent of this act the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business.

Insurance is a contract whereby one party called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury. [L. '11, p. 161, § 1.]

§ 6059-2. Terms Defined.

The terms "Company," "Corporation," or "Insurance Company" or "Insurance Corporation," in this act, unless the context otherwise requires, includes all corporations, associations, partnerships, or individuals engaged as insurers in the business of insurance.

"Domestic" designates those companies incorporated or formed in this state. "Foreign" designates those companies incorporated or formed under the laws of the United States or any other state in the United States, and "Alien" designates those companies incorporated or formed under the laws of any country other than the United States.

"Admitted Company" designates companies duly qualified and licensed to transact business under the provisions of this act. "Nonadmitted Companies" designates companies not licensed to transact business in this state under the provisions of this act.

"Commissioner" or "Insurance Commissioner," where used in this act, shall mean the "State Insurance Commissioner."

"Unearned Premiums," and "Net Value of Policies," severally means the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by this act.

"Net Assets" means the property and funds of an insurance company available for the payment of its obligations; including uncollected premiums not more than three months past due on policies actually in force, and including in the case of a mutual company, its premiums, premium notes, and contingent liability of its policy-holders, after deducting from such funds all unpaid losses and claims and all other debts and liabilities except capital.

"Profits" of a mutual insurance company means that portion of its cash funds not required for payment of losses and expenses, nor set apart for any purpose allowed by law.

“Agent” or “Insurance Agent” is a person, copartnership, corporation, attorney, board or committee duly appointed and authorized by an insurance company, to solicit applications for insurance to be known as a soliciting agent, or to solicit applications and effect insurance in the name of the company, to be known as a recording or policy writing agent, and to discharge such other duties as may be vested in or required of the agent by the company.

“Solicitor” or “Insurance Solicitor” is a person duly appointed, authorized and employed by a duly commissioned agent to solicit, receive, and forward applications for insurance and to collect premiums for the agent.

“Broker” or “Insurance Broker” is any person, copartnership or corporation, who, for compensation, not being an appointed agent for the company in which insurance or reinsurance is effected, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a party other than himself or itself.

“Adjuster” or “Insurance Adjuster” is a person, copartnership or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against.

“Surveyor” or “Insurance Surveyor” is a person, committee, board, bureau, copartnership, or corporation resident within the state, who, in person or by deputy, inspects and surveys the various municipalities and fire hazards in this state, and the means and facilities for preventing, confining and extinguishing fires, and for the purpose of estimating fair and equitable rates for insurance; who furnishes to municipalities and owners of property information and advice as to the measures to be adopted for the reduction of fire hazards on property in this state and lessening the cost of insurance thereon; and, as relating to marine insurance, who inspects vessels and reports on their seaworthiness.

“Director” within the intent of this act means trustee.

“Insurable Interest” is every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured. “Insured Interest” in the matter of life and health insurance exists when the beneficiary, because of relationship, either pecuniary or from ties of blood or marriage, has reason to expect some benefit from the continuance of the life of the insured.

“Bottomry” is a contract by which a ship or freight is hypothecated as security for a loan which is to be repaid only in case the ship survives a particular risk, voyage or period.

“Double Insurance” exists where the same party is insured by several insurers separately, in respect to the same subject and interest.

“Over-insurance” exists where a party having an insurable interest in property has insurance thereon against the same hazard or peril in excess of the actual value of his interest therein.

“Reinsurance” means a contract by which an insurer procures a third party to insure it against loss or liability by reason of such original insurance. [L. '11, p. 161, § 2.]

§ 6059-3. State Insurance Commissioner.

There shall be an insurance commissioner of this state, who shall be elected at the same time and in the same manner as other state officers are elected. The insurance commissioner in office at the time of the taking effect of this act shall continue as such insurance commissioner until the expiration of the term for which he was elected and until his successor is duly elected and qualified. [L. '11, p. 164, § 3.]

§ 6059-4. Term of Office—Salary.

The term of office of the state insurance commissioner shall begin on the second Monday in January next after he is elected. The state insurance commissioner shall receive a salary of three thousand dollars per year, which shall be in full for all services performed by him. [L. '11, p. 164, § 4.]

§ 6059-5. Bond.

The state insurance commissioner shall have his office at the state capitol; and before entering upon his duties shall execute a bond to the state in the sum of twenty-five thousand dollars, to be approved by the state treasurer and the attorney general, conditioned upon the faithful performance of the duties of his office, and he shall take and subscribe the oath of office as required by law. His bond, upon its approval, together with his oath of office, shall be filed in the office of the secretary of state. [L. '11, p. 164, § 5.]

§ 6059-6. Deputy Commissioner—Actuary—Examiner—Salaries.

The state insurance commissioner may appoint a deputy insurance commissioner, who shall take and subscribe the same oath of office as the state insurance commissioner, which oath shall be indorsed upon the certificate of his appointment and filed in the office of the secretary of state. Said appointment may be revoked at the will of the commissioner, who shall be held responsible for all official acts of his said deputy. The deputy insurance commissioner shall receive a salary of two thousand four hundred dollars per year. The commissioner may also appoint an actuary or examiner, who shall receive a salary of two thousand dollars per year. The commissioner may employ a chief clerk at a salary of not to exceed twelve hundred dollars per year, a stenographer at a salary not to exceed seventy-five dollars per month, and such additional clerks and stenographers as the public business in his office may require, at an expense not exceeding the amount appropriated by the legislature.

Neither the commissioner nor any deputy, nor any employee in his office, shall be directly or indirectly interested in any insurance company, except as an ordinary policy-holder. [L. '11, p. 165, § 6.]

§ 6059-7. Certificate of Authority—License—Examination.

The commissioner shall see that all laws respecting insurance companies are faithfully executed. He shall issue all certificates and licenses under the seal of his office provided for by the terms of this act. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, the commissioner shall be satisfied by such examination as he may make, or such evidence as he may require, that

such company is otherwise duly qualified under the laws of this state to transact business herein. He shall require every domestic insurance company to keep its books, records, accounts and vouchers in such manner that he or his authorized representatives may readily verify its annual statements and ascertain whether the company is solvent and has complied with the provisions of law.

At least once each year, and whenever he determines it to be prudent to do so, he shall personally or by his deputy or examiner visit the home office of each domestic insurance company transacting insurance business and thoroughly inspect and examine its affairs to ascertain its true financial condition, its ability to meet and fulfill its obligations; whether it has complied with the provisions of law; and all other facts that he may require relating to its business methods and management, and its dealings with its policy-holders. Whenever he deems it advisable he shall cause a complete audit of the books and accounts of the company to be made by a disinterested expert accountant.

When he determines it to be prudent for the protection of policy-holders in this state, he shall in like manner visit and examine or cause to be visited and examined by some competent person or persons whom he may appoint for that purpose, any insurance company incorporated or organized in any other state, territory, district, or country, applying for admission or already admitted to do business in this state. For the purpose aforesaid, the commissioner, his deputy, or examiner making the examination shall have free access to all the books, records, accounts, vouchers, papers and files of an insurance company which relate to its business, and to books, records, accounts, vouchers, papers, and files kept by any of its agents, and for any of said purposes the commissioner, his deputy, or examiner conducting such investigation and examination shall have power to subpoena and administer the oath to, and examine as witnesses, the trustees, directors, officers, agents, servants and employees of any such company and any other persons relative to its affairs, transactions and conditions. Said subpoena shall have the same force and effect and shall be served in the same manner as if issued from a court of record. Any person who shall fail, neglect, or refuse to obey such subpoena, or, having obeyed such subpoena, shall refuse to be examined as a witness and give evidence concerning any and all matters relating to such investigation when so required, shall be liable to the same penalties as though such subpoena had been issued by, or such person had refused to give evidence in, a court having jurisdiction in equity and common law. Whenever any person shall fail, refuse or neglect to obey such subpoena, or shall refuse to give evidence concerning any and all matters pertaining to such investigation or examination, the commissioner, his deputy, or examiner having charge of such investigation or examination may forthwith report in writing such disobedience, and file such report and such subpoena with proof of service thereof in a court having said jurisdiction in session in the county where such investigation is being had, and if no court is in session, then with any judge of such court; thereupon such court or judge shall forthwith cause such person so subpoenaed or refusing to give evidence in such investigation to be brought before such court or judge, and such court or judge shall thereupon administer and impose like terms and

penalties as though such person had been subpoenaed or had refused to testify or give evidence in any proceedings before such court.

Witness fees and mileage, if claimed, shall be allowed the same as to witnesses testifying in court, which witness fees and mileage with the actual expense, if any, necessarily incurred in securing the attendance of witnesses and their testimony, shall be itemized and charged against and be paid by the company so being examined. Every person shall be obliged to attend as a witness at the place of such investigation or examination when subpoenaed anywhere within this state. [L. '11, p. 165, § 7.]

§ 6059-8. Revocation of Certificate or License—Court Review.

If the commissioner is of the opinion upon examination or other evidence that any insurance company is in an unsound condition, or that it has failed to comply with the law or with the provisions of its charter or articles of incorporation or association, or that its condition is such as to render its proceedings hazardous to the public or to its policy-holders, or that its actual assets exclusive of its capital are less than its liabilities, or if its trustees, directors, officers, or agents refuse to submit to examination or to produce its books, records, accounts, and papers in its or their possession or control relating to its business or affairs, for examination and inspection of the commissioner, his deputy or examiner, when required, or shall refuse to perform any legal obligation relative to such examination, the commissioner shall revoke or suspend all certificates of authority and licenses granted to such insurance company, its officers or agents, and shall cause notice thereof to be given to such company and to each agent of such company in this state, and no new business shall thereafter be done by such company or for such company by its agents, in this state, while such revocation, suspension, or disability continues, nor until its authority to do business is restored by the commissioner.

Unless ground for revocation or suspension relates only to the financial condition or soundness of the company or to the deficiency in its assets, the commissioner shall notify such company not less than ten days before revoking its authority to do business in this state; and he shall specify in such notice the particulars of the alleged violation of law or of its charter or articles of incorporation or association, or grounds for revocation. The superior court, upon petition of such company, brought within twenty days, shall summarily hear and determine the question whether such violation has been committed, or whether it is solvent or in an unsound condition or has exceeded its powers or has failed to comply with any provisions of the law or of its charter or articles of incorporation or association, or that its condition is such as to render its further proceedings hazardous to the public and to its policy-holders, and the court upon such hearing and determination shall make and enter such order or decree as may be proper in the premises. If the order or decree be adverse to the petitioning company and an appeal therefrom is taken to the supreme court, such appeal shall be advanced upon the trial calendar of the supreme court and be heard at as early a date as it can conveniently be tried. In the case of such appeal, the commissioner may revoke the right of said petitioning company to do business in this state until the final determination of the appeal by the supreme court. [L. '11, p. 167, § 8.]

§ 6059-9. Impairment—Notice and Requisition.

Whenever it appears to the commissioner from any showing or statement made to him or from any examination made by him, his deputy, or examiner, that the capital stock of any domestic insurance company is impaired, or that its assets are insufficient to justify its continuance in business, he shall at once determine the amount of such impairment or deficiency and thereupon issue his written notice and requisition to the company to require its stockholders to make good the amount of the impairment or deficiency with cash or investments authorized by this act, or reduction of its capital stock, not below statutory requirements, within ninety days from the service of the notice and requisition. If the amount of any such impairment or deficiency shall not be made good within the time specified in such notice and requisition and proof thereof filed in the office of the commissioner, the company shall be deemed insolvent and shall be proceeded against as an insolvent company by the attorney general in the manner authorized by this act. If the capital stock of any foreign or alien insurance company doing business in this state is found so impaired, the commissioner shall revoke the certificate of authority issued to such company and licenses issued to its agents, and shall give due notice thereof to such company and each of its agents, and thereupon such company and its agents shall discontinue the issuing of any new policies or contracts of insurance within this state. [L. '11, p. 169, § 9.]

§ 6059-10. Impairment — Mutual Company — Notice and Requisition — Director's Liability.

Whenever it appears to the commissioner from any statement or showing made to him or from an examination made by him, his deputy, or examiner, that the assets and resources of any mutual insurance company are insufficient to justify its continuance in business, he shall promptly determine the amount of such deficiency and thereupon issue his written notice and requisition to the trustees, directors and officers of such company requiring them to make good the amount of such deficiency within ninety days from the service of such notice and requisition. Such notice and requisition may be served by registered letter having affixed proper postage and directed to the company at its principal place of business in this state specified in its articles of incorporation or association. Upon the service of such notice and requisition, the trustees, directors and officers of such company shall forthwith cause such deficiency to be made good, and proof to be filed in the office of the commissioner within the time specified in the notice and requisition that the same has been made good.

For any losses accruing upon new risks taken after the expiration of such time, and before such deficiency shall have been made good, the trustees, directors and officers of the company shall jointly and severally be personally liable therefor. If such deficiency shall not be made good within the time specified in said notice and requisition and satisfactory proof thereof filed with the commissioner, he shall revoke the certificate of authority issued to such company and the license issued to each agent of said company and shall give due notice thereof by registered mail to such company and to each of its agents, and such company shall be deemed insolvent and may

be proceeded against by the attorney general as an insolvent corporation in the manner authorized by this act. [L. '11, p. 169, § 10.]

§ 6059-11. Delinquent Insurance Company—Proceedings—Liquidation.

This section shall apply to all domestic companies, societies and orders to which any article of this act is applicable, and the word "company" as herein used shall also include all such associations, societies and orders.

(1) Whenever any such company is insolvent; or has refused to submit its books, papers, accounts or affairs to the reasonable inspection and examination of the commissioner, his deputy, or examiner; or has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law, any deficiency, whenever the capital of a stock company, or the reserve or assets of a mutual company, shall have become impaired; or it has by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other company without first having obtained the written approval of the commissioner; or if found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy-holders, or to its creditors, or to its stockholders, or to the public; or has willfully violated its articles of incorporation or association or any law of the state; or whenever any trustee, director, manager, or officer thereof has refused to be examined under oath touching its affairs, the commissioner may, the attorney general representing him, apply to the superior court or any judge thereof, in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the commissioner should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy-holders, creditors, stockholders or the public may require.

(2) On such application, or at any time thereafter such court or judge may, in its discretion issue an order restraining such company from the transaction of its business or disposition of its property, records and effects until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the commissioner forthwith to take possession of the property, records and effects, and conduct the business of such company and retain such possession and conduct the business until, on the application of the commissioner, the attorney general representing him, or of such company, it shall, after a like hearing, appear to the court that the cause for such order directing the commissioner to take possession has been removed and that the company can properly resume possession of its property, records, and effects, and the conduct of the business.

(3) If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the commissioner, who may deal with the property, records, effects and business of such company in his own name as commissioner, or in the name of the company as the court may direct, and he shall be vested by the operation of

law with title to all the property, effects, contracts, and rights of action of such company as of the date of the order so directing him to liquidate. The filing or recording of such order in the office of the auditor in any county where property is located in the state shall impart the same notice that a deed, bill of sale, or other evidence of title duly filed or recorded by such company would have imparted.

(4) For the purpose of this section, the commissioner shall have power to appoint, under his hand and official seal, one or more special deputy commissioners, as his assistant or assistants, and to employ such counsel, clerk and other assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider proper. The compensation of such special deputy commissioners, counsel, clerks and assistants, and all expenses of taking possession of and conducting the business of liquidating any such company shall be fixed by the commissioner, subject to the approval of the court, and shall, on certificate of the commissioner, be paid out of the funds or assets of such company.

(5) For the purpose of this section, the commissioner shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper.

(6) The commissioner shall transmit to the legislature, in his annual report, the names of the companies so taken possession of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policy-holders, creditors, stockholders and the public with his proceedings under this section; and, to that end, the special deputy commissioner in charge of any such company shall file annually with the commissioner a report of the affairs of such company.

(7) At any time after the court shall order the liquidation of the business of any such company, as provided in paragraph 3 of this section, the commissioner may apply for the dissolution of such company, and the same, after due notice and hearing and such other procedure as to the court shall seem proper, shall be dissolved. [L. '11, p. 170, § 11.]

§ 6059-12. Increase or Decrease of Capital.

The commissioner shall in person, or by his deputy, or examiner, examine the proceedings of every domestic insurance company to increase or reduce its capital stock, or to change its articles of incorporation or association, and, if found conformable to law, shall issue certificate of authority to such company to transact business upon such increased or reduced capital, or change in its articles of incorporation or association. [L. '11, p. 173, § 12.]

§ 6059-13. Foreign or Alien Company—Appointment of Attorney—Service of Process.

The commissioner shall not issue a certificate of authority to transact any business of insurance in this state to any foreign or alien insurance company until it has executed and filed in his office a written appointment of the insurance commissioner to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceedings against such company commenced in any county in this state may be served with the same effect as if it were a domestic company

having its principal office in such county. The service upon such attorney shall thereafter be deemed service upon the company.

Service of process against any such insurance company may be had by serving duplicate copies upon the commissioner through the mail by a registered letter, or by an officer or person competent to serve a summons. Upon such service being made, the commissioner shall forthwith mail one of such duplicate copies of such process to such company at its home office or general agency, or in the case of an alien company, to the resident manager, if any, in this country.

In all cases of service of process against such insurance company by serving its said attorney, the commissioner shall collect two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by plaintiff as part of the taxable cost if he prevail in the suit.

The commissioner shall keep a record of all such processes which shall show the day and hour of service: Provided, That in such case no proceedings shall be had within forty days after the date of such service upon the commissioner. [L. '11, p. 173, § 13.]

§ 6059-13½. Venue of Action on Insurance Policy.

Any insurance company may be sued upon a policy of insurance in any county within this state where the cause of action arose, by serving the summons and a copy of the complaint upon the company, if a domestic company, or upon the commissioner, as attorney in fact of the company, if an alien or foreign company, or upon any duly licensed agent of the company residing in the county where the cause of action arose. [L. '11, p. 174, § 13½.]

§ 6059-14. Annual Statement Blanks.

The commissioner shall annually, in December, furnish to each insurance company authorized to do business in this state, two or more blank forms on which to make its annual statement. [L. '11, p. 174, § 14.]

§ 6059-15. Records of Commissioner—Certified Copy—Evidence.

The commissioner shall preserve in a permanent form a record of his proceedings, including a concise statement of the result of all investigations or examinations of insurance companies.

The commissioner shall furnish, when required for evidence in court, certificate under seal of the department relative to the authority of the company, agent or broker to transact business in this state upon any particular date, and such certificates shall be received by the court in lieu of the testimony of the commissioner, his deputy, or chief clerk. [L. '11, p. 175, § 15.]

§ 6059-16. Commissioner's Report—Contents and Printing.

The commissioner shall transmit to the legislature at the opening of its session, or as early thereafter, as is consistent with full and accurate preparation, a report of his official transactions and a report containing in a condensed form statements made to the commissioner by every insurance company authorized to do business in this state pursuant to the provisions of this act, and such statements and reports shall be audited and corrected

by him, all arranged in tabular form or in abstracts, which report shall also contain:

(1) A statement of all insurance companies authorized to do business in this state during the year ending the thirty-first day of December next preceding, with their names, locations, amounts of capital, dates of incorporation and of the commencement of business, and kinds of insurance in which they are engaged respectively.

(2) A statement of the insurance companies whose business has been closed since making his last report and the reasons for closing the same, with the amount of their assets and liabilities so far as the same are known or can be ascertained by him.

(3) The names and compensation of the clerks employed by him and the whole amount, itemized, of the expenses of the department during such period.

(4) Any amendments to this act which in his judgment may be desirable.

In addition to two hundred fifty copies of the insurance report for the use of the legislature, there shall be printed and bound by the state printer the necessary number of copies of such report for the use of the insurance department.

The commissioner shall furnish each of the county clerks of this state, quarterly, a certified list of all insurance companies doing business in this state under and by authority of this act, and such certificates shall be posted in the office of the county clerk for the inspection of the public.

The commissioner shall compile and have printed at the expense of the state, all books, blanks, insurance laws in pamphlet form for distribution, and other matters necessary for the proper administration of the department. [L. '11, p. 175, § 16.]

§ 6059-17. Fees and Licenses.

The commissioner shall require in advance the following fees and licenses:

For filing articles of incorporation or charter, or certified copy of articles or charter, by-laws or other record of organization required to be filed in his office.....	\$25.00
For filing amended articles of incorporation or charter, or certified copy thereof	10.00
For issuing certificate of authority.....	10.00
For each renewal certificate of authority.....	10.00
For filing annual statement of condition and report of Washington business	20.00
For filing other miscellaneous papers.....	1.00
For copy of papers filed in his office, per folio.....	.20
For certificate under seal	1.00
For each agent's license.....	2.00
For each solicitor's license.....	2.00
For each broker's license	100.00
For each agent's license for unauthorized companies.....	100.00

and such other fees as may be provided in this act.

All fees so collected shall be paid to the state treasurer, not later than the first business day following the receipt of such fees, and be placed to the credit of the general fund.

All agents', solicitors' and brokers' licenses to be transferable upon approval of the commissioner. Licenses issued to copartnerships or corporations to act as insurance agents or brokers shall permit each member of the copartnership or officer of the corporation to solicit or effect insurance, and the names of such members or officers shall be specified and appear in the license. [L. '11, p. 176, § 17.]

§ 6059-18. Application of General Laws.

The general provisions of law relating to the powers, duties and liabilities of corporations shall apply to all incorporated insurance companies, so far as such provisions are pertinent to and not in conflict with other provisions of law relating to such companies. [L. '11, p. 177, § 18.]

§ 6059-19. Name of Company to Appear on Policy.

Every insurance company shall conduct its business in this state in its own name, and the policies and contracts of insurance issued by it shall be headed or entitled by such name: Provided, That this limitation shall not apply to any insurance company admitted to this state and issuing an underwriter's policy, prior to January 1, 1911; two or more companies may jointly issue an underwriters' policy upon which must appear the names of the companies guaranteeing the same and such companies shall be jointly and severally liable thereon. [L. '11, p. 177, § 19.]

§ 6059-20. Companies—Agent—Broker—Surveyor—Adjuster—Governed.

All domestic insurance companies, now or hereafter formed under the laws of this state, and every insurance agent, solicitor, broker, surveyor, or adjuster, doing business in this state, and all insurance business transacted in whole or in part within or outside of this state, the subject matter of which insurance is located wholly or in part in this state, and any marine insurance made, effected, or placed by any company through any agent or broker in this state, unless otherwise provided, shall be subject to and be governed by this act; and the records of each insurance company, agent, solicitor, broker, surveyor or adjuster doing business in this state shall be subject to the inspection and examination of the commissioner, his deputy, or examiner. [L. '11, p. 177, § 20.]

See notes to § 6059-235.

§ 6059-21. Preliminary Requirements—Papers to be Filed.

Every insurance company before engaging in the business of insurance in this state must file in the office of the insurance commissioner a legally authenticated duplicate or copy of its charter, articles of incorporation or association, or record of its organization and by-laws, as follows:

First. If a domestic company, a copy of its articles of incorporation or association, together with any amendments or alterations made therein.

Second. If a foreign or alien company, a copy of its articles of incorporation, charter, and by-laws, including all amendments or alterations made therein, with a certificate duly certified by the officer having custody of such articles or charter, under his seal of office, that such company is duly authorized under the laws of such state or country to do business therein, and a

certificate showing the amount of capital stock and assets as required by this act.

Third. If not incorporated under the laws of this or any other state or country, a copy of the record of its organization, and a certificate setting forth the nature and character of the business, the location of the principal office, the name and address of persons composing the company, the amount of the capital therein employed, and the names and addresses of the officers of the company, and if such company be formed outside of the United States, the certificate must contain the name of the chief executive officer or manager in the United States, together with the trustees or directors appointed by the company to manage its affairs in the United States, and the certificates may be made by such manager: Provided, further, That such company must furnish a legally authenticated copy of the laws of the country of its organization applicable to its business and affairs, which laws shall be filed in the office of the insurance commissioner, and a certified copy thereof, under the seal of the commissioner, may be received in evidence in any cause or proceeding had in the courts of the state. [L. '11, p. 178, § 21.]

§ 6059-22. Capital and Assets Required—Deposits.

Every insurance company, except ocean marine insurance, before transacting any business of insurance in this state, must own, have and possess in its own exclusive name and right, paid-up, unimpaired capital, if a stock company; or must own, have and possess, in its own exclusive name and right, net assets unimpaired, of the kind required by this act, if it be a mutual company, fully equal to the minimum amount paid up in cash or assets required by the provisions of this act to entitle any insurance company to be authorized to transact like business. No part of said capital or assets shall consist of the capital stock, investments, property or assets of any other insurance company or organization, nor shall said capital or assets include any sum or thing of value not acquired, produced, earned, and owned exclusively by such company in its own right: Provided:

First. That each alien insurance company admitted to do business in this state, shall not transact any business of insurance in this state, unless it shall have within the United States deposited with insurance departments, or held in trust as hereinafter provided, not less than two hundred thousand dollars invested in like manner as the capital of a similar domestic insurance company is required to be invested;

Second. The capital of such alien insurance company admitted to do business in this state shall, for the purposes of this act, be the aggregate value of such sums or securities as such company shall have on deposit in the department of this state, and of the other states of the United States, for the benefit of policy-holders in the United States, excepting therefrom such sums as are held by other states for the special protection of policy-holders in such states, and of all bonds and mortgages for money loaned on real estate in this state, or in any state of the United States, if such loan shall be made in conformity with the laws of such state providing for the incorporation of insurance companies therein and the investment of their capital; and of all other assets and property in the United States, in which insurance companies may invest under provisions of this act, if such bonds and mortgages, assets and property shall be held in the United States

by trustees who are citizens of the United States, approved by the commissioner, or deposited with a trust company to be approved by him for the general benefit and security of all its policy-holders in the United States; after making the same deductions from such aggregate value for losses, debts, and liabilities, in this and the other states of the United States, and for premiums upon risks therein not yet expired, as is authorized or required by the laws of this state, or the regulation of its insurance department with respect to insurance companies organized under the laws of this state;

Third. In addition to the reports required by law of any such alien insurance company, it shall annually, in the month of February, render to the commissioner a detailed statement of the items making up such capital, and the deductions to be made therefrom, signed and verified by the manager and a majority of the trustees, or, if a trust company, by the proper officers thereof, of the company residing in the United States, and the commissioner shall, thereupon, and from such examinations as he may make of the affairs of the company, determine the amount of such capital as of the first day of January, and issue to such company a certificate of the amount of its capital so determined; and, if it shall at any time appear that the net capital for which the last certificate shall be outstanding has been materially reduced, the commissioner may call in such certificate and issue another, reciting such reduced capital: Provided, The capital is not reduced below the sum of two hundred thousand dollars;

Fourth. When any part of its capital is held by trustees or by a trust company, pursuant to the provisions of this section, such trustees or trust company shall be appointed by the board of managers or directors of such alien insurance company, and a duly certified copy of the vote or resolution creating the trust shall, with a certified copy of such trust deed, be filed in the office of the insurance commissioner; and the commissioner may examine such trustees or the agent or attorney of the company in the same manner as he is authorized by this act to examine the affairs and funds of any domestic insurance company; but the commissioner shall, upon the written request of any such alien insurance company, transfer to trustees duly appointed by it, under the provisions of this section any excess of securities which it shall have deposited with him above the sum of two hundred thousand dollars;

Fifth. The deposit required of such company shall be reckoned and considered as the sum of two hundred thousand dollars, which shall be in approved securities, and deposited in the manner authorized by law. The commissioner may also allow such additional deposits as said alien company shall make, but any additional amounts now on deposit, or which may hereafter be deposited, shall be received and held as a voluntary deposit, in trust for all the policy-holders of said company in the United States, and any securities in excess of said two hundred thousand dollars as aforesaid shall, on the written request of said company, be transferred to the trustees appointed by said company, as by this section provided: Provided, further:

Sixth. That no alien company, except co-operative life and fraternal beneficiary insurance companies, shall transact any business of insurance in this state, unless, if it transact fire insurance in this state, it has deposited with the proper insurance department or legal custodian of such deposit in this or any other state or states or district of the United States, for the

benefit and security of its policy-holders in the United States, a sum not less than two hundred thousand dollars, invested as in this act required; or if it transact in this state one or more of the other kinds of insurance business permitted by the provisions of this act to be transacted by any such company, it has deposited with the insurance department or legal custodian for like purposes, such amount as may be required of domestic insurance companies doing the same kind of business. Any alien company authorized to transact the business of fire insurance in this state may be authorized to transact the business of ocean marine insurance: Provided, That it has an additional capital of one hundred thousand dollars, and file with the insurance department annually a separate financial statement of each class of business. [L. '11, p. 179, § 22.]

§ 6059-23. Authorized Investment.

The capital stock of every domestic insurance company required to have a capital to the extent of the minimum capital required by law, shall be invested and kept invested as follows:

First. In the legally issued bonds, warrants, and securities of the United States, or the District of Columbia, or of any state of the United States, not estimated above their current market value; or,

Second. In the legally issued bonds, warrants, and securities, of any county, incorporated city, or incorporated school district in this state, which has not defaulted in the payment of interest on any of its bonds, warrants, or securities within three years, and which shall not be estimated above their par value, nor their current market value; or,

Third. In the legally issued bonds and mortgages on improved unencumbered real property in this state: Provided, That such encumbrance does not exceed fifty per centum of the reasonable cash market value of such real property at the time of said loan; and where buildings or other improvements constitute a material part of the value of the mortgaged premises, they shall be kept insured against loss or damage by fire in a reasonable amount for the benefit of the mortgagee.

Fourth. The capital of every foreign or alien insurance company to the extent of the minimum capital required of a like domestic corporation shall be invested and kept invested in the same class of securities specified for domestic insurance corporations, except that securities of the home state, or country, of such company may be recognized as legal investments for an amount of the minimum capital required by this act.

Fifth. The residue of the capital and the surplus money and funds of every domestic insurance company over and above the amount of the minimum capital and the deposit it is required to make through the office of the insurance commissioner with the state treasurer, may be invested in or loaned on the pledge of any of the securities in which such deposits are required to be invested:

Provided, That the amount loaned on mortgages or improved unencumbered real property does not exceed fifty per centum of the reasonable cash market value of such real property; and, when authorized and directed by a majority vote of all of the directors or trustees of the company, taken and recorded as an aye and nay vote in a board meeting duly called and convened, whereof each director or trustee must be given not less than one

day's notice, may be invested in or loaned upon the legally issued bonds or warrants of, or local improvement bonds in any solvent municipal corporation, or in the legally issued bonds or securities of any solvent corporation incorporated under the laws of the United States or of any state thereof: Provided, That no investment or loan shall be made in or upon the stocks or bonds of any corporation unless the entire issue of its capital stock has been fully paid in in cash or property actually necessary for its use having a reasonable cash market value fully equal to the amount at which it is accepted by said corporation; and, when so authorized and directed by a majority vote of all of the directors or trustees of the company, may be invested in or loaned upon the legally issued bonds of any solvent irrigation district created as by law provided in this state or in any other state of the United States, whose water rights shall have been legally acquired and finally determined and shall be fully adequate to supply sufficient water to properly irrigate all lands within such district, and whose storage reservoirs, canals, ditches, flumes, feeders, machinery, equipment, and other works and improvements shall have been acquired, owned, and constructed and be unencumbered except as to such bond issue, and shall be reasonably adequate to fully supply and properly serve such district, and shall have been so far constructed and completed as to be in regular operation and use and adequately irrigating not less than thirty per centum of the lands within such irrigation district; and, may be loaned on mortgages on improved unencumbered real property in any state in the United States: Provided, The amount of such loan does not exceed fifty per centum of the reasonable cash market value of such real property at the time of such loan, and where buildings constitute a material part of the value of such mortgaged premises, they shall be kept insured against loss or damage by fire, lightning, windstorms and cyclones in a reasonable amount for the benefit of the mortgagee.

The capital and funds of a domestic insurance company shall not be invested in or loaned upon its own stock or the stock of any other insurance company, or the stock of any oil or mining company, or the stock of any fish, fruit, or vegetable canning company, nor shall they be invested in the stock of any corporation whose stockholders may be legally liable in excess of the par value of the stock for assessment to raise funds to pay the indebtedness of such corporation. Neither shall they be invested in or loaned upon the stock of any corporation in which any officer, director, or trustee of such insurance company is a stockholder or has any direct or indirect or contingent interest in such proposed investment or loan; but when authorized by the aye and nay vote of the majority of all the directors or trustees of such insurance company having no such interest, taken and recorded at a board meeting duly called and convened to pass upon such proposed investment or loan, whereof each director or trustee must be given not less than one day's notice, such funds may be loaned to any officer, director, or trustee of such insurance company or to any company or corporation in which either of them may be interested, upon any other securities authorized by this section.

Sixth. Every domestic company organized to make insurance against loss and damage by reason of defective titles to property or encumbrance thereon, and to guarantee the validity and legality of bonds or other evidence of indebtedness issued by any state, city, county, town, school dis-

strict, municipality, or by any private or public corporation, or to guarantee or indemnify merchants or others engaged in business and giving credit, from loss and damage by reason of giving and extending credit to their customers, shall invest its capital and funds not required and permitted by this act to be invested in its plant, in the same kind of securities as the funds of a domestic insurance company are required by this section to be invested.

Seventh. Every domestic company doing business in other states of the United States or in foreign countries, may invest the funds required to meet its obligations, incurred in such other state or foreign country, and in conformity to the laws thereof, in the same kind of securities of such other state or foreign country that such company is by law allowed to invest in this state.

Eighth. Any life insurance company may lend a sum not exceeding the legal reserve which it owes, upon any policy upon the pledge to it of said policy and its accumulations as collateral security, but nothing in this section shall be held to authorize one insurance company to obtain by purchase or otherwise, the control of any other insurance company.

Ninth. A domestic insurance company may invest in such real property as shall be requisite for its home offices in the transaction of its business and may rent space therein not immediately required for its own use: Provided, That no such investment shall be made that will reduce the amount of the surplus assets, exclusive of such investment, to less than fifty per centum of the minimum capital required by law, of such company: Provided, further, That no such investment shall be made by a domestic mutual insurance company that will reduce the amount of the surplus assets, exclusive of such investment, of such company to less than fifty thousand dollars.

Tenth. No domestic insurance company shall make any investments or loan of its capital, surplus, or reserve to any one person, firm or corporation in excess of ten per centum of the amount of its paid-up capital and surplus, and no loan shall be made for a longer period than one year, which, upon proper showing and security, may be extended not to exceed one year, except that loans upon improved unencumbered real property may be made for any term, not exceeding ten years:.

Provided, That all investments and loans of the capital and funds of any domestic insurance company, except as provided in paragraph 9 of this section, shall be made and kept invested in and loaned on interest or dividend bearing securities, whereon default for interest has not been made during three years next prior to the making of such loan, and the regular annual dividends, in the case of investments in stocks, shall have been actually earned and paid out of the net profit, of not less than four per centum, of the par value of such stock during each of the five years next preceding the time of such investment: And,

Provided, further, That all property, securities, investments, and loans held by any domestic insurance company when this act takes effect, which investments in or loans on such property or securities are prohibited by or contrary to the provisions of this section, shall be sold and disposed of and the proceeds thereof invested as provided by this section, within two years from the time when this act shall take effect, and such property, securities,

investments, or loans shall not be held for a longer period unless, owing to general financial and business depression, such investments may not be readily converted into funds and reinvested as by this section provided without material sacrifice, in which event, upon a proper showing and application made to the commissioner, he may extend the said period for a reasonable time, not exceeding two years.

With each investment or loan made of the capital and funds of any domestic insurance company shall be made and signed a written report by the officer, director, trustee, or acting chairman of the committee of directors or trustees making or authorizing such investment or loan on the part of such company, stating the amount so invested or loaned, a brief description of the securities or property in which such investment or loan is made, the reasonable cash market value thereof, and in case of a loan, the rate of interest, and amount of insurance carried to protect the mortgagee, and in case of an investment, the rate of interest or annual dividend earned and paid during the five years next preceding; whether any officer, director, or trustee of such insurance company has any direct, indirect, or contingent interest in the securities in which such investment, or on which such loan is made, or in the assets of the business, person, copartnership, or corporation in whose behalf such loan or investment is made, and if so, the name of the officer, director, or trustee, and the character and extent of such interest, the name of the attorney who passes upon such transaction and the substance of his report; the amount of the expense and commission, if any, on such investment or loan, by whom paid and to whom paid, which report shall be recorded in a book to be kept by the company known as "Reports on Loans and Investments," which shall be at all times open to the inspection of the commissioner or his deputy, and any stockholder of such company.

All investments, loans and deposits of the funds and securities of each domestic insurance company, and all purchases on behalf of every domestic insurance company, and all sales made of the property and effects of such company, shall be made in its corporate name, and no officer, director, or trustee thereof, and no agent, attorney, or member of a committee having any authority in the investment or disposition of its funds, shall accept, except for the company, or be the beneficiary of, either directly or remotely, any fee, brokerage, commission, gift, or other consideration for or on account of any loan, deposit, purchase, sale, payment or exchange made by or on behalf of such company, or be pecuniarily interested in any such purchase, sale, loan, or investment, either as borrower, principal, coprincipal, agent, attorney, or beneficiary, except that he may procure a loan from such company direct, as provided in paragraph 5 of this section, and if a policyholder, he shall be entitled to all the benefits accruing under the terms of his contract.

No investment, sale, or loan, except loans on its own policies, shall be made which has not first been authorized by the board of directors, or by a committee thereof charged with the duty of investing or loaning the funds of the company, nor shall any deposit be made in a bank or banking institution, unless such bank has first been approved as a bank of deposit by the board of directors or said committee thereof, and unless a vote authorizing

such investment, sale, or loan, or approval of the place of deposit, has been duly recorded in the books of the company.

Every domestic insurance company shall have the right to acquire title to any property under the conditions of any mortgage owned by it, or by purchase or setoff on execution upon judgment for debts due it previously contracted in the course of its business, or by any process in settlement for debts; if such company acquires title to or lien upon any property or securities which it may not otherwise invest in, or loan its funds upon, under the provisions of this section, such company shall dispose of all such personal property within one year, and real property within three years, from the time of acquiring same, and the commissioner, upon proper showing and application, may extend such period a reasonable time, not exceeding two years. [L. '11, p. 182, § 23.]

§ 6059-24. Deposit of Securities.

Every foreign insurance company doing business in this state and required by this act to have a cash capital, shall deposit and keep on deposit with the state treasurer, through the office of the insurance commissioner of this state, the same amount and character of securities which a like domestic company is required to deposit with the depository for securities of insurance companies of the state by which laws such insurance company is incorporated.

When any state shall require insurance companies of other states to deposit with some officer of such other state securities in trust for policyholders of such company as a prerequisite to their transacting business in such state, the treasurer of this state shall receive on deposit from any domestic insurance company the securities required by the laws of such other state.

Every domestic insurance company required by this act to deposit securities to the amount as provided by this act shall deposit such securities with the state treasurer, and any domestic insurance company may deposit such securities with the state treasurer for the protection of all policyholders of such company. Every domestic insurance company hereafter organized shall deposit with the state treasurer authorized securities in the sum of fifty thousand dollars at or prior to the time it receives a certificate of authority to commence effecting insurance, and the commissioner shall within one year thereafter require such company to make further deposits of such securities sufficient to equal in the aggregate the amount of the minimum capital required by this act of such company.

Every insurance company, required by this act to have a cash capital, shall, on or before the first day of January, nineteen hundred and twelve, deposit and keep on deposit, with the state treasurer through the office of the commissioner, its funds and securities equal in amount and value to the minimum cash capital required by this act of such company, and which deposits shall be exchanged for investments authorized as provided by this act.

The funds, securities, and investments so deposited and kept on deposit with the state treasurer, or any trust company designated by him as herein authorized, shall be held as security for the protection of all policyholders having policies duly issued by such company, or by any of its agents.

During the time such company continues solvent, and complies with the law, it shall be permitted to collect the interest and dividends accruing on

such securities, and such funds, securities, and investments so deposited, may be exchanged from time to time for other authorized securities of equal amount and value, at the election and upon the request of the company depositing the same: Providing, That if any such company now has on deposit, or shall hereafter deposit, with the proper insurance depositary, of similar securities in any other state, or district in the United States, or of the United States, in accordance with the laws thereof, the commissioner, upon proper showing and application, to be made by such company, may allow such company credit on account of the amount and value of the deposit required to be made by it in this state, to the amount and value of the securities so kept by it on deposit in such other state or district or government, and may allow such company to withdraw and transfer, of the securities deposited with the state treasurer, the amount so deposited, and kept on deposit in such other state, or district, or government.

The state treasurer may appoint and designate any solvent trust company organized under the laws of this state, and doing business in the city where the principal office of any domestic insurance company is located, the state treasurer's depositary, to receive and hold on deposit, any funds, securities and investments provided by this section to be deposited with the state treasurer. All funds, securities, and investments, deposited as provided by this act, shall be registered by the commissioner in accordance with such rules as he may promulgate. No transfer of securities, so held on deposit, shall be valid unless countersigned by the state treasurer, his deputy, or authorized agent.

The state treasurer shall keep in his office a book in which shall be entered the name of the company from whose account such transfer of securities is made, the name of the transferee, the par value of the securities transferred, and the amount for which every mortgage transfer is held. The state treasurer shall have access at all times, during office hours, to the books and records of the commissioner, for the purpose of ascertaining the correctness of the entries upon the same, of any transfer; and the commissioner shall have access, during office hours, to the books or records herein kept by the state treasurer, to ascertain the correctness of the entries upon the same. The state treasurer shall state in his report to the legislature, the total amount of such deposits held by him and of such transfers countersigned by him.

Whenever any insurance company making such deposit of its securities with the state treasurer, shall sustain losses in excess of its other resources, the commissioner, upon proper showing and application, may authorize and direct the state treasurer to turn over and deliver so much of the securities of such company, to the commissioner, or such insurance company, or such person as the superior court of this state may appoint for such purpose, as shall be necessary to provide funds sufficient to pay its losses, and such securities shall not be used for any other purpose. The commissioner may allow such insurance company a reasonable time, to be determined by the commissioner, upon proper showing and application, to be made by such company, in which to deposit with the state treasurer, securities authorized by law, equal in amount and value to the securities so withdrawn: And provided, That any company entering into a reinsurance contract, whereby its entire business is to be reinsured as provided in this act, the commissioner

may, upon application and proper showing, release the deposit securities held by the state treasurer to the credit of said company upon being satisfied that all outstanding obligations of said company have been paid or assumed by the reinsuring company. [L. '11, p. 188, § 24.]

§ 6059-25. State Responsible.

The state of Washington shall be responsible for the safekeeping and return of all securities deposited with it pursuant to the provisions of this act. [L. '11, p. 191, § 25.]

§ 6059-26. Annual Statement.

All insurance companies now doing business in this state, or that may hereafter do business in this state, unless otherwise provided in this act, must make and file with the commissioner annually, on or before the fifteenth day of February in each year, a statement under oath, upon a form to be prescribed and furnished by the commissioner, stating the amount of all premiums collected, or contracted for by the company making such statement, in this state, during the year ending December thirty-first, next preceding; the amounts actually paid policy-holders on losses; the amounts paid policy-holders as return premiums; the amounts paid policy-holders as dividends; the amount of insurance reinsured in other companies authorized to do business in this state, and the amount of premiums paid therefor; and the amount of insurance reinsured in companies, naming them, not authorized to do business in this state, and the amount of premiums paid therefor; and the amount of reinsurance accepted from admitted companies and the premiums received for such reinsurance on risks located in this state, with the name of the companies so reinsured.

The commissioner shall file a copy of such verified statement or schedule with the state treasurer, and said company shall pay to the state treasurer, through the insurance commissioner's office, a tax of two and one-quarter per centum on all premiums collected, or contracted for: Provided, That in the case of companies engaged in fire or marine insurance the tax shall be collected on such premiums, after deducting from the gross amount thereof the amounts paid to policy-holders as returned premiums and the amounts paid as premiums to admitted companies for reinsurance, and in the case of life insurance companies the tax shall be collected on the gross amount of premiums, after deducting therefrom the amounts paid as premiums to admitted companies for reinsurance: And provided, further, That if any such company, corporation or association shall have fifty per centum or more of its assets invested in any bonds or warrants of this state, or bonds or warrants of any county, city, or district within this state, or in taxable property within this state, or in first mortgages upon improved real estate within this state, then the tax shall be but one per centum on the amount so collected.

The taxes herein provided for shall be due and payable on the first day of March succeeding the filing of the statement provided for herein.

Any company, failing or refusing to render such statement and information, and to pay taxes herein specified, for more than thirty days after the time specified, shall be liable for a fine of twenty-five dollars for each additional day of delinquency, and such tax may be collected by distraint, and such fine may be recovered by an action, to be instituted by the commissioner,

in the name of the state, the attorney general representing him, in any court of competent jurisdiction. The amount of the fine collected shall be paid to the state treasurer and credited to the general fund; and the commissioner may revoke and annul the certificate of authority of such delinquent company, until such taxes and fine, should any be imposed, are fully paid.

The annual statement made to the commissioner, pursuant to this section, or other provisions of law, shall at least include the substance of that required by what is known as the "Convention Blank Form," adopted from year to year, by the National Convention of Insurance Commissioners, and shall also include such other information as may be required by the commissioner. [L. '11, p. 192, § 26.]

§ 6059-27. Salaries—Officers.

No domestic insurance company shall pay any salary, compensation, or emolument to any officer, trustee or director thereof, nor any salary, compensation, or emolument, amounting in any year to more than five thousand dollars, to any person, firm, or corporation, unless such payment be first authorized and directed by a vote of two-thirds of the board of directors of such company, duly taken and recorded in the minutes of a board meeting.

No such company shall make any agreement with any of its officers, trustees, or salaried employees, whereby it agrees that for any service rendered, or to be rendered, they shall receive any salary, compensation, or emolument that will extend beyond a period of five years from the date of such agreement; nor shall it pay any pension whatsoever. [L. '11, p. 193, § 27.]

§ 6059-28. Vouchers for Expenditures.

No domestic insurance company shall make any disbursement of twenty-five dollars or more, unless the sum be evidenced by a voucher, signed by or on behalf of the person, firm, or corporation receiving the money, and accordingly describing the consideration for the payment, if the same be for services and disbursements, setting forth the service rendered and an itemized statement of the disbursements made, and if it be in connection with any matter pending before any legislature or public body, or before any department, or officer of any government, accordingly describing in addition the nature of the matter, and of the interest of such corporation or organization therein, or, if such a voucher cannot be obtained by an affidavit stating the reason for not obtaining such voucher, and setting forth the particulars above mentioned. [L. '11, p. 194, § 28.]

§ 6059-29. Business Authorized.

No domestic insurance company shall transact any business other than that specified in its articles of incorporation, and no foreign or alien insurance company, admitted to transact business in this state under the provisions of this act, shall transact any other kind of business than that which it has been authorized to transact. [L. '11, p. 194, § 29.]

§ 6059-30. Policy Provisions Voided.

No domestic, foreign, or alien insurance company transacting business in this state, shall hereafter make, issue, or deliver herein, any policy or contract of insurance, except policies or contracts of ocean marine insur-

ance, containing any condition, stipulation, or agreement, requiring such contract of insurance to be construed according to the laws of any other state or country, or depriving the courts of this state of the jurisdiction of action against such company to a period of less than one year from the time when the cause of action accrues; and any such condition, stipulation, or agreement shall be void, and such policy shall be binding upon the company having issued it. [L. '11, p. 194, § 30.]

§ 6059-31. Policy—Application—Contract.

Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract. [L. '11, p. 195, § 31.]

§ 6059-32. Combination and Agreements Prohibited.

If any insurance company authorized to transact business in this state, or any agent or representative thereof, shall, either within or outside of this state, directly or indirectly, enter into any contract, understanding, or combination, with any other insurance company, or any agent or representatives thereof, for the purpose of controlling the rates to be charged for insuring any risk, or class or classes of risks, in this state, the commissioner shall forthwith revoke its license, and those of its agents, and no renewal of the licenses shall be granted until after the expiration of three years from the date of final revocation. [L. '11, p. 195, § 32.]

§ 6059-33. Rebates Prohibited.

No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, on any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy. The license of any insurance company, agent, solicitor, or broker who violates the provisions of this section shall be revoked and no license shall be issued to such company, agent, solicitor, or broker within one year from the date of the revocation of the license.

No insured person or party shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or agent's, solicitor's, or

broker's commission thereon payable on the policy, or on any policy of insurance, or any favor or advantage or share in the dividend or other benefits to accrue thereon, or any valuable consideration or inducement, not specified in the policy contract of insurance; the amount of the insurance whereon the insured has received or accepted, either directly or indirectly, any rebate of the premium or agent's, solicitor's, or broker's commission thereon, shall be reduced in such proportion as the amount or value of such rebate, commission, dividend, or other consideration so received by the insured, bears to the total premium on such policy, and any such insured shall be liable, in addition to having the insurance reduced, to a fine of not more than two hundred dollars. No person shall be excused from testifying, or from producing any books, papers, contracts, agreements, or documents at the trial of any person charged with violating any provision of this act, on the ground that such testimony or evidence may tend to incriminate himself, but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying. Rebates affecting life insurance shall be governed by section 180 of this act. [L. '11, p. 195, § 33.]

§ 6059-34. Warranty not to Avoid Policy Unless Deceptive.

No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss; anything in the policy or contract of insurance to the contrary notwithstanding. In case a loss occurs while a breach of warranty exists, if it contribute to the loss, the insured shall only be entitled to recover the amount of insurance the premium paid would purchase at the rate that would be charged without the warranty. This section shall be liberally construed. [L. '11, p. 197, § 34.]

§ 6059-35. Additional Information to Commissioner.

Every insurance company admitted to do business in this state shall at such time as the commissioner requires, in addition to all returns now by law required of it, or its agents or managers, make a return to the commissioner, in such form and detail as he may prescribe, of all reinsurance contracted for or effected by it, directly or indirectly, upon property located in this state, such return to be under oath of its president and secretary, if a foreign company, and if an alien company, under oath of the person, officer, or representative who verifies its annual statement.

If any insurance company refuse or neglect to make the returns required by this section, the commissioner may revoke its authority to transact business in this state, or report the facts to the attorney general to be dealt with as otherwise provided by this act. [L. '11, p. 197, § 35.]

§ 6059-36. Insurance to be Placed Through Agents.

It shall be unlawful for any insurance company admitted to do business in this state to write, place or cause to be written or placed, any policy of

insurance covering risks located in this state, except through or by a duly authorized licensed agent of such company residing and doing business in this state: Provided, That where the insured calls at the principal office of the company and requests a policy, the risk may be covered and the policy procured through the duly authorized agent in the territory wherein risk is located. [L. '11, p. 197, § 36.]

§ 6059-38. Political Contributions Forbidden.

No insurance company, including fraternal beneficiary associations, doing business in this state shall, directly or indirectly, pay, or use, or offer, consent or agree to pay, or use any money, property or other thing of value for or in aid of any political party, committee, or organization; nor for or in aid of any corporation, joint stock or any other association, organized or maintained for political purposes; nor for or in aid of any candidate for any political office, nor for the nomination for such office, nor for any other political purpose whatever, nor for the reimbursement or indemnification of any person or institution for money or property so used.

Any officer, director, stockholder, attorney, or agent of any insurance company which violates any of the provisions of this section, who participates in, aids, abets, advises, or consents to any such violation, and any person who solicits or knowingly receives any money, property or thing of value, in violation of this section, shall be guilty of a gross misdemeanor, and punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both, which fine, when collected, shall be paid to the state treasurer and credited to the general fund; and any officer, director, stockholder, attorney, or agent aiding or abetting in any contribution made in violation of this section, shall be liable to the insurance company for the amount so contributed. [L. '11, p. 198, § 38.]

§ 6059-39. Dividends to be Paid from Earnings.

It shall be unlawful for the officers, directors, trustees, or managers of any domestic insurance company to declare or pay any dividends, except from the surplus profits arising from its business, which shall be estimated and ascertained in accordance with the requirements and provisions of this act. [L. '11, p. 198, § 39.]

§ 6059-40. Company—Lien on Stock.

Every domestic insurance company shall have a lien on every share of capital stock issued by it and all profits and dividends accruing thereon, for any balance unpaid of the par value and surplus to be paid thereon in like amount as is paid or agreed to be paid on all other shares of capital stock in such company and also for any debt owing to such company for premiums by the holder of such stock. [L. '11, p. 199, § 40.]

§ 6059-41. Prohibiting Publicity of Unauthorized Statements.

No insurance company, or agent thereof, doing business in this state, shall anywhere publish, represent, or advertise assets except those actually owned and possessed by it in its own exclusive right, available for the payment of losses and claims, and held for the protection of its policy-holders and creditors. [L. '11, p. 199, § 41.]

§ 6059-42. Advertisement to Show Actual Paid-up Capital and Surplus.

Every advertisement or public announcement, and every sign, circular or card issued by any insurance company doing business in this state purporting to show its financial condition, shall correspond with or include its last verified statement made to the commissioner.

For violation of this or the preceding section by a company, it shall forfeit, for the first offense, to the people of the state, the sum of two hundred and fifty dollars, and for every subsequent offense the sum of five hundred dollars, which sums may be recovered by an action prosecuted by the commissioner, the attorney general representing him, and which sums when recovered shall be paid to the state treasurer and credited to the general fund. [L. '11, p. 199, § 42.]

§ 6059-43. Place of Business to be Designated.

Every agent of an insurance company doing business in this state shall, in his advertisements of that company, give the location of the company, the name of the state, and town in which it has its principal office, and the state or government under the laws of which it is organized. [L. '11, p. 199, § 43.]

§ 6059-44. Agents to Procure License must Act Only for Admitted Companies.

No person, firm, or corporation, shall act as agent for any insurance company, in the transaction of any business of insurance within this state, or negotiate for, or place risks for any such company, or in any way or manner aid such company in effecting insurance, or otherwise in this state, except as provided in section 6059-75, unless such company shall in all things have complied with the provisions of this act. Every insurance agent shall annually, on or before the first day of April, procure an agent's license from the commissioner, who shall make and keep a record thereof. [L. '11, p. 200, § 44.]

§ 6059-45. Application for License.

No license shall be issued to any applicant for an agent's, solicitor's, or broker's license until such applicant shall have first made and filed in the commissioner's office an application therefor upon a form to be prescribed and furnished by the commissioner, which must show the applicant's name, business and residence address, name of company to be represented, whether as solicitor, agent, or general agent; present occupation, occupation for last twelve months, portion of time to be devoted to the work, previous insurance experience, and name of employers during five years next preceding, and such other information as the commissioner may require. The statements and answers made in the application shall be warranted by the applicant and shall have the same force and effect as if such statements and answers had been made by the applicant as a sworn witness testifying in a superior court in this state. Such application must be approved by the company to be so represented; and in the case of an application for an insurance broker's license it must also show how long applicant has been engaged in the insurance business and in what branches, under whom applicant received his training, what income, if any, applicant has other than to be derived from

such business, and financial condition of applicant. It shall be the duty of the commissioner to withhold any license applied for, or revoke any license issued to any person or party, or to his or their employee, when he is satisfied that the principal use of such license is to effect insurance upon the property or liability of such person or party, or to circumvent the enforcement of the anti-rebate law: Provided, That each agent shall be required to file but one application, regardless of the number of companies he represents: And provided, further, That no person shall act as agent unless each company, corporation or association represented by such person shall have paid a license fee as provided in this act; and the agent's license fee provided for in section 6059-17, shall be paid by each company, corporation or association represented by him; and if in the agent's application the names of several companies appear, then and in that event, each company so represented must pay the agent's license fee provided for in this act. [L. '11, p. 200, § 45.]

§ 6059-46. Embezzlement by Agent—Solicitor—Broker.

All funds received by any agent, solicitor or broker, as premium or return premium on or under any policy of insurance, shall be received by such agent, solicitor, or broker in his fiduciary capacity, and any agent, solicitor, or broker who diverts or appropriates such funds to his own use shall be guilty of larceny by embezzlement and shall be punished as provided in the criminal statutes of this state. [L. '11, p. 201, § 46.]

§ 6059-47. Reciprocal Obligations.

If, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits, or other obligations or prohibitions, in the aggregate, additional to or in excess of those imposed by the laws of this state, upon foreign insurance companies and their agents and solicitors, are imposed on insurance companies of this state and their agents doing business in such state, like obligations and prohibitions shall be imposed upon all insurance companies of such state and their agents doing business in this state, so long as such laws remain in force. [L. '11, p. 201, § 47.]

§ 6059-48. "Lloyds."

Associations of individuals, citizens of the United States, whether organized within this state or elsewhere within the United States, formed upon the plan known as "Lloyds," whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by the group, may be authorized to transact insurance, other than life, in this state, in like manner and upon the same terms and conditions as insurance companies of other of the United States. [L. '11, p. 202, § 48.]

§ 6059-49. Licenses—Extension of.

All licenses and certificates of authority, in effect at the time of the passage of this act, shall continue in force until April first, nineteen hundred and twelve, unless sooner revoked for cause by the commissioner. [L. '11, p. 202, § 49.]

§ 6059-50. Frauds in Organization of Companies.

A person who:

First—Without authority, subscribes the name of another to, or inserts the name of another in any prospectus, circular or other advertisement of any domestic insurance company, existing or intended to be formed, with intention to permit the same to be published, and thereby lead persons to believe that the person whose name is so subscribed is an officer, agent, member, or promoter of such company; or,

Second—Signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed; or,

Third—Signs to any such subscription or agreement the name of any person, knowing, or having good reason to believe, that such person does not intend in good faith to comply with the terms thereof, or enter into any agreement or understanding, that the terms of such subscription or agreement are not to be complied with or enforced, shall be guilty of a misdemeanor. [L. '11, p. 202, § 50.]

§ 6059-51. Frauds in Procuring Organization of Companies.

Any officer, agent, or clerk of a company, or of persons proposing to organize a company, or to increase the capital stock of a company, who knowingly exhibits false, forged, or altered books, papers, vouchers, securities, or other instruments of evidence to any public officer or board authorized by law to examine the organization of such company, or to investigate its affairs or to allow the increase of capital, with intent to deceive such officer or board in respect thereto, shall be guilty of a felony. [L. '11, p. 203, § 51.]

§ 6059-52. Fraudulent Issue of Stocks and Bonds.

An officer, agent, or other person in the service of any company, formed or existing under the laws of this state, or of the United States, or of any state or territory thereof or of any foreign government or country, who willfully and knowingly with intent to defraud:

First—Sells, pledges, or issues, or causes to be sold, pledged, or issued; or signs or executes, or causes to be signed or executed with intent to sell, pledge, or issue, or causes to be sold, pledged, or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of said company, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company, without being first duly authorized by such company, or contrary to the articles of incorporation, charter or laws under which such company exists, or in excess of the power of such company, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or,

Second—Reissues, sells, pledges, or disposes of, or causes to be reissued, sold, pledged, or disposed of any surrendered or canceled certificates or other evidence of a transfer of ownership of any such share or shares, shall be guilty of a felony. [L. '11, p. 203, § 52.]

§ 6059-53. Misconduct of Directors of Stock Companies.

A director of a company, who concurs in any vote or act of the directors of such company, or any of them by which it is intended:

First—To make a dividend except from the surplus profits arising from the business of the company, and in the cases and manner allowed by law; or,

Second—To divide, withdraw, or in any manner pay to the stockholders, or to any of them, any part of the capital stock of the company, or to reduce such capital stock in any manner other than as authorized by law; or,

Third—To discount or receive any note, or other evidence of debt, in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

Fourth—To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

Fifth—To apply any portion of the funds of such company, except surplus profits, directly or indirectly, to the purchase of shares of its own stock, shall be guilty of a gross misdemeanor. [L. '11, p. 203, § 53.]

§ 6059-54. Misconduct of Officers and Directors of Stock Companies.

An officer or director of a stock company, who:

First—Issues, participates in issuing, or concurs in the vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

Second—Sells, or agrees to sell or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is either the actual owner, or the duly authorized agent for such purpose of the actual owner of such shares, shall be guilty of a gross misdemeanor. [L. '11, p. 204, § 54.]

§ 6059-55. Directors, Officers, Agents and Employees of Companies—Misconduct of.

A director, officer, agent, or employee of any company who:

First—Knowingly receives or possesses himself of any of its property, otherwise than in payment for a just demand, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in its books and accounts; or,

Second—Makes or concurs in making any false entry, or concurs in omitting to make any material entry, in its books or accounts; or,

Third—Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false, or omits or concurs in omitting any statement required by law to be contained therein; or,

Fourth—Having the custody or control of its books, willfully refuses or neglects to make any proper entry in the stock-book of such company, as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom; or,

Fifth—If a notice of an application for an injunction or other legal process affecting or involving the property or business of such company is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers, and managers thereof; or,

Sixth—Refuses or neglects to make any report or statement lawfully required by a public officer, shall be guilty of a misdemeanor. [L. '11, p. 204, § 55.]

§ 6059-56. Misconduct at Corporate Elections.

Any person who:

First—Being entitled to vote at a meeting of the stockholders of a stock company, sells his vote, or issues a proxy to vote, to a person for any sum of money or thing of value, except as expressly authorized by law; or,

Second—Acts as an inspector of election at any such meeting and violates an oath taken by him in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector, shall be guilty of a misdemeanor. [L. '11, p. 205, § 56.]

§ 6059-57. False Statement in Application for Insurance.

Any solicitor, agent, examining physician, or other person, who knowingly and willfully makes a false or fraudulent statement, or representation, in or relative to an application for life, accident or health insurance, or who makes any such statement for the purpose of obtaining a fee, commission, money, or benefit in a company transacting such business under the provisions of this act, shall be guilty of a misdemeanor. [L. '11, p. 206, § 57.]

§ 6059-58. Present False Proofs of Loss.

Any person, who, knowing it to be such:

First—Presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance; or,

Second—Prepares, makes, or subscribes false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that the same be presented or used in support of such a claim, shall be guilty of a gross misdemeanor. [L. '11, p. 206, § 58.]

§ 6059-59. Destroying Property Insured.

Any person, who, with intent to defraud or prejudice the insurer thereof, willfully burns, or in any manner injures or destroys property, which is insured at the time against loss or damage by fire or by any other casualty, under such circumstances not making the offense arson, is guilty of a gross misdemeanor. [L. '11, p. 206, § 59.]

§ 6059-60. Persons not Excused from Testifying.

No person shall be excused from attending and testifying or producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding, or trial, for the violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise required of him, may tend to convict him of crime or subject him to penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced

shall be received against him upon any criminal investigation or proceeding. [L. '11, p. 206, § 60.]

§ 6059-61. Presumption of Knowledge of Corporate Condition and Business, and of Assent Thereto by Directors—Definitions.

It is no defense to the prosecution for the violation of the provisions of sections 6059-50, 6059-51, 6059-52, 6059-53, 6059-54, 6059-55, 6059-56, 6059-57, 6059-58, 6059-59, and 6059-60, that the company is either an alien, a foreign, or a domestic company, if it carries on business or occupies offices therefor in this state.

A director of a company is deemed to have such knowledge of the affairs of the company as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of the provisions of either of said sections 6059-50 to 6059-60, inclusive. If present at a meeting of directors at which any act, proceeding, or omission of its directors is a violation of the provisions of said sections or either of them occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the company for six months thereafter without causing or in writing requiring his dissent from such violation to be entered upon such record or minutes. [L. '11, p. 207, § 61.]

§ 6059-62. Violations to be Reported.

Every insurance company, agent, solicitor, or broker, and every person or party having knowledge of a violation of this act, is required to promptly report the facts and circumstances pertaining thereto to the commissioner; which report and the name of the informant shall be held as confidential by the commissioner and shall not be made public. [L. '11, p. 207, § 62.]

§ 6059-63. Annual Meetings.

Every domestic company shall hold an annual meeting in the month of January or February, of its stockholders, if a stock company, or members, if a mutual company, for the purpose of receiving the report of its officers and trustees, and to elect trustees. Each share of stock in a stock company, and each policy-holder in a mutual company, shall be entitled to one vote in the election of trustees, and if unable to attend in person, may appoint any stockholder or member his proxy to vote his stock or policy, but no officer of said company shall be allowed to vote the proxy of any stockholder or member thereof: Providing, however, Officers of stock companies may so do when the majority of the trustees vote to permit such action. [L. '11, p. 208, § 63.]

§ 6059-64. Insurance Applied to Insured's Own Interest.

When the name of a party intended to be insured is specified in a policy, such insurance can be applied only to his own proper interest. [L. '11, p. 208, § 64.]

§ 6059-65. Insurance—To Agent or Trustee.

When insurance is issued to an agent or trustee the fact that his principal or beneficiary is the person really insured is sufficiently indicated by describing him as agent or trustee or by other general words in the policy. [L. '11, p. 208, § 65.]

§ 6059-66. Insurance Effected—Joint or Company Interest.

To render an insurance effected by one partner or part owner, applicable to the interest of his copartner or other part owner, it is necessary that the terms of the policy should be such as are applicable to the joint or company interest. [L. '11, p. 208, § 66.]

§ 6059-67. Insured Intended—Must Prove.

When the description of the insured in the policy is so general that it may comprehend any person or class of persons, he, only, can claim the benefit of the policy, who can show that it was intended to include him. [L. '11, p. 208, § 67.]

§ 6059-68. Policies Subject to Inspection of Commissioner.

The commissioner, his deputy, or examiner, shall have the right at any time to inspect any policy, covering any risk in this state, and every policyholder shall produce and exhibit any policy in his possession or control when required for the inspection of the commissioner, his deputy, or examiner. Any person who violates the provisions of this section shall be fined in any sum not exceeding one hundred dollars. [L. '11, p. 209, § 68.]

§ 6059-69. Policy Fee Forbidden.

It shall be unlawful hereafter for any insurance company or for any officer, manager, agent, or other representative of any such company, to include in the sum charged or designated in any policy as the consideration for insurance, any fee, compensation, charge, or perquisite whatsoever, not specified in the policy. When collected, the same shall be reported as premium. [L. '11, p. 209, § 69.]

§ 6059-70. Agent to Report Exact Consideration.

Every agent or other representative of any insurance company issuing a policy on its own behalf in this state, shall report to the company the exact consideration charged and written in the policy, as a premium for the risk assumed. [L. '11, p. 209, § 70.]

§ 6059-71. Penalty for Charging Policy Fee.

Any insurance company violating the provisions of section 6059-69, shall be guilty of a gross misdemeanor. [L. '11, p. 209, § 71.]

§ 6059-72. Penalty for Failure to Report.

Any officer, manager, agent, solicitor, or other representative of any insurance company violating the provisions of section 6059-70, shall be guilty of a misdemeanor. [L. '11, p. 209, § 72.]

§ 6059-73. Rating Schedules—Filing—Use.

Every fire insurance company before it shall receive a license to transact the business of making insurance as an insurer in this state, must file in the

office of the insurance commissioner a copy of its rating schedules. Every such company and its agents shall observe said rating schedules and shall not deviate therefrom in making insurance until amended or corrected rating schedules shall have been filed in the office of the insurance commissioner. Any company which shall make fire insurance in this state according to the advisory rates, or a stated deviation therefrom, furnished by a rating bureau as provided in the following section, may receive a license to transact the business of making fire insurance in this state, without filing a rating schedule, by filing written notice in the office of the insurance commissioner of its adoption of such advisory rates, stating the deviation therefrom, if any, at which it will make insurance, which deviation, if any, shall be uniformly applied to all purchasers of insurance from such company in this state. [L. '11, p. 209, § 73.]

§ 6059-74. Rating Bureau—Rates.

Any person or persons or copartnership, resident within this state, or a domestic corporation, may organize or maintain a rating bureau, for the purpose of inspecting and surveying the various municipalities and fire hazards in this state, and the means and facilities for preventing, confining, and extinguishing fires, for the purpose of estimating fair and equitable rates for insurance, and to furnish to municipalities, owners of property, insurance companies, agents, solicitors, or brokers information and advice as to measures to be adopted for the reduction of fire hazards on property within this state, and lessening the cost of insurance thereon. The business of conducting a rating bureau in this state is public service in character and shall be conducted without profit to any party, except that fair and reasonable compensation shall be paid for all services actually rendered, and necessary to the business. Every rating bureau shall, before publishing or furnishing any rates, file in the office of the insurance commissioner its rating schedules, and shall not deviate therefrom until amended or corrected rating schedules shall have been filed in the office of the insurance commissioner. The services of such rating bureau shall be available, equally and ratably in proportion to the service rendered, to any and all insurance companies, agents, brokers, and property owners.

Each rating bureau shall keep an accurate and complete record of all work performed by it, which record must show all receipts and disbursements, and be open at all times to the inspection and examination of the commissioner, his deputy, or examiner.

No rating bureau operating under the provisions of this act shall, directly or indirectly, examine, stamp, or pass upon any "daily report" of policies issued by any company on property located within this state.

Any person or party who knowingly violates any provision of this or the preceding section shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars. [L. '11, p. 210, § 74.]

§ 6059-75. Unauthorized Companies—Agents—Surplus Line—Service.

The commissioner, in consideration of the yearly payment of one hundred dollars, and the furnishing of a bond as hereinafter provided, may issue to any citizen in this state, not exceeding fifty in any one city, a license revocable at any time, permitting the party named in such license

to place or effect insurance upon risks located in this state with insurance companies not licensed to do business in this state. No person, firm, or corporation, shall place, procure or effect insurance upon any risk located in this state in any company not licensed to do business in this state, or place, procure, or effect insurance in any marine risk destined for or departing from any port in this state, until such person, firm, or corporation shall have first procured a license from the commissioner as provided in this section, and has furnished a bond to the state of Washington in the penal sum of not less than five hundred dollars nor more than two thousand dollars, the amount thereof to be fixed by the commissioner, with sureties thereon to be approved by the commissioner, conditioned that he or it will conduct such business in accordance with the provisions of this section, and will pay to the state treasurer through the insurance commissioner's office the taxes provided by this section. Every such agent must keep a true and complete record of the business transacted by him, showing: First, The exact amount of such insurance; second, the gross premiums charged therefor; third, the return premium paid thereon; fourth, the rate of premium charged for such insurance upon the different items of the property; fifth, the date of such insurance and terms thereof; sixth, the name and address of the company making such insurance; seventh, the name and address of the assured, and a brief and general description of the property insured, where located, and if a marine risk, the name of the ship, vessel, boat, or craft, and voyage covered by such insurance; and such other facts and information as the commissioner may direct and require; which record shall at all times be open and subject to the inspection and examination of the commissioner, his deputy, or examiner.

Every policy procured and delivered under the provisions of this section shall have stamped upon it and be initialed by the agent clearing the same in this state, the following: "This policy is registered and delivered at —, Washington, this — day of —, 19—, under the provisions of section seventy-five of chapter —, of the Session Laws of the State of Washington for nineteen hundred eleven."

Every agent who places, procures, effects, or delivers any insurance or insurance policy, as provided in this section, shall annually on or before the fifteenth day of February in each year, make and file with the commissioner a verified statement upon a form to be prescribed and furnished by the commissioner, which shall exhibit the true amount of all such business transacted by such agent during the year ending on the thirty-first day of December next preceding the making of such annual statement, showing the gross amount of each kind of insurance, the gross premiums charged for such insurance, the aggregate amount of returned premiums paid to the insured, the amount of the net premiums, and such other facts and information as the commissioner may prescribe and require.

The commissioner shall file a copy of such verified statement with the state treasurer, and the agent making such statement shall pay to the state treasurer, through the commissioner's office, the same tax that is required of admitted companies, which tax shall be due and payable on the first day of March succeeding the filing of such statement.

Before any insurance, except marine insurance, shall be procured or effected, under or by virtue of said license, there shall be executed by such

licensed agent and by the party or his authorized agent desiring insurance, an affidavit which shall be filed with the commissioner within thirty days after the procuring of such insurance. Such affidavit shall set forth that the party desiring insurance is, after diligent effort, unable to procure the insurance required to protect the property owned or controlled by him, from the companies licensed to transact business in this state. Every company making insurance under the provisions of this section, shall be deemed and held to be doing business in this state as an unlicensed company and may be sued upon any cause of action, arising under any policy of insurance so issued and delivered by it, in the superior court of the county where the agent who registered or delivered such policy resides, or transacts business, by the service of summons and complaint made upon such agent for such company. Any such agent, being served with summons and complaint in any such cause, shall forthwith mail such summons and complaint, or a true and complete copy thereof, by registered letter with proper postage affixed, properly addressed to the company sued, and such company shall have forty days from the date of the service of such summons and complaint upon said agent in which to plead, answer or defend any such cause; upon service of summons and complaint being had upon such agent for such company the court in which such action is begun shall be deemed to have duly acquired jurisdiction in personam of the defendant company so served.

Every such agent who fails or refuses to make and file said annual statement, and to pay the taxes required to be paid thereon, prior to the first day of April after such tax is due, shall be liable for a fine of twenty-five dollars for each day of said delinquency, beginning with the first day of April, and said tax may be collected by distraint, or such tax and such fine may be recovered by an action, to be instituted by the commissioner, in the name of the state, the attorney general representing him, in any court of competent jurisdiction, and the fine, when so collected, shall be paid to the state treasurer, and placed to the credit of the general fund. If any such agent shall fail to make and file said annual statement and pay the said taxes, or shall refuse to allow the commissioner to inspect and examine his records of the business transacted by him, pursuant to this section, or keep such records in manner as required by the commissioner, or shall refuse or neglect to immediately notify the insurance company for whom he has placed, registered, or delivered a policy, of the commencement of any action or proceeding in any court in this state against such company, the license of such agent shall be immediately revoked by the commissioner, and no license shall be issued to such agent within one year from the date of such revocation, nor until all taxes and fines are paid and the commissioner shall be satisfied that full compliance with the provisions of this section will be had. [L. '11, p. 211, § 75.]

§ 6059-76. Business to be Placed with Solvent Companies—Penalties.

Every agent, or broker, transacting business under the provisions of the preceding section shall ascertain the financial condition of each company before he procures a policy of insurance from or places any insurance with such company. Any such agent, or broker, who shall knowingly place any insurance except marine with, or procure any insurance from, any insurance company whose unimpaired capital and surplus assets, after providing a

reinsurance reserve on the pro rata basis, are less than two hundred thousand dollars, or from any insurance company, other than a stock company, whose cash assets are less than one hundred and fifty thousand dollars, of which amount not less than fifty thousand dollars must be net surplus, after providing for a reinsurance reserve on the pro rata basis, shall be fined in any sum not less than twenty-five dollars, nor more than two hundred and fifty dollars, and his license shall be immediately revoked by the commissioner, and no license shall be issued to such agent within two years from the date of revocation for such cause. [L. '11, p. 214, § 76.]

§ 6059-77. Examinations—Expense—How Paid.

The expense of every examination, or other investigation of the affairs of any insurance company, doing business in this state, which the commissioner is by law authorized or required to investigate or examine, shall be paid by the state out of the general fund. The commissioner, his deputy, or examiner, in making such investigation or examination, shall be allowed only his actual traveling and necessary expenses required by such examination, and shall not charge any fee, nor receive any compensation, for such examination other than the salary allowed by law. In cases where the examination is made by other than an employee of the department he shall be compensated for his services in addition to the expenses as stated herein. The commissioner, his deputy, or examiner, upon making such examination or investigation, shall prepare an itemized statement of the expenses involved in making such examination, and upon the presentation of such vouchers to the state auditor, properly signed by the person making such examination and countersigned by the commissioner, the state auditor is hereby authorized to draw his warrants against the general fund in the same manner in which warrants are drawn for the payment of other bills: Provided, That the provisions of this section shall apply to those companies only that are required to pay tax on their premium income.

Any company not required to pay taxes on its premium income shall pay the expense of any examination required by law. [L. '11, p. 215, § 77.]

§ 6059-78. Policies may be Issued in Other States.

Any domestic insurance company doing business in any other state may frame and issue policies in such other states in accordance with the laws thereof, anything in its articles of incorporation or by-laws to the contrary notwithstanding. [L. '11, p. 216, § 78.]

§ 6059-79. Existing Companies—Continue.

Every domestic insurance company previously organized, and licensed to transact insurance business in this state at the time this act goes into effect, is hereby recognized as an existing company, and shall have the right to continue such business under the provisions of this act: Provided, That such company whose capital does not meet the requirements of this act shall have four years from the first day of January, nineteen hundred and twelve, in which to conform to the requirements of this act relating thereto. [L. '11, p. 216, § 79; L. '13, p. 318, 1.]

See note to section 6059-84.

This section does not authorize a fire insurance company formerly doing also a plate glass insurance business, to continue issuing both fire and plate glass insurance in violation of the act, especially in view of

a further proviso expressly excepting pre-existing life companies from restrictions against issuing both life, accident, health and liability insurance, the specific exception in favor of life companies being an im-

plication against any other exception not expressed: State ex rel. North Coast Fire Ins. Co. v. Schively, 68 Wash. 148, 122 Pac. 1020.

§ 6059-80. Policy Requirements—In Effect—When.

Every insurance company admitted and doing business in this state, at the time this act goes into effect, shall have until the first day of January, nineteen hundred and twelve, in which to comply with the requirements of this act relating to policies or contracts of insurance. [L. '11, p. 216, § 80.]

§ 6059-81. Retiring Companies—Approval of Reinsurance.

No insurance company, impaired, insolvent, or retiring from business in this state, shall reinsure its business in this state until its plan to effect such reinsurance shall have been first submitted to the commissioner, and approved by him, and no such reinsurance shall be effected in a company not admitted to this state. In effecting such reinsurance, the reinsuring company shall become liable to the original insured, for any loss or damage occurring under the policies reinsured, and shall, within a reasonable time, replace such policies with its own, or by indorsement thereon acknowledge liability thereunder; and, in case of cancellation, shall be liable to the original insured for all return premiums. [L. '11, p. 217, § 81.]

§ 6059-82. Liability of Stockholders.

Each stockholder of a domestic insurance company shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such company accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. The assets of such company shall be first applied in the payment and discharge of the debts and liabilities of the company and the remainder thereof remaining unpaid shall be paid by the stockholders, equally and ratably, and not one for another. [L. '11, p. 217, § 82.]

§ 6059-83. Insurance Classified.

All insurance business in this state is hereby classified as follows:

(1) Fire and marine insurance, upon buildings and other property against loss or damage by fire, lightning, wind storms, cyclones, tornadoes, hail, or earthquakes, water from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires, and water-pipes; and against accidental injury to such sprinklers, pumps or other apparatus; and against loss or damage arising from the prevention or suspension of rent or use and occupation of any building, plant or manufacturing establishment due to the hazard or peril insured against; and upon vessels, boats, cargoes, goods, merchandise, freight and other property against loss or damage by the risks of lake, river, canal and inland transportation and navigation, including insurance upon automobiles, whether stationary or being operated under their own power, and reinsurance of any risks taken in this class; but not upon ocean marine risks, and other casualty insurance risks.

(2) Marine insurance, being ocean and inland risks, transportation and automobiles, but not including any other casualty insurance as hereinafter provided.

(3) Life insurance, being [including] endowments and annuities, but not including health, or accident or sickness insurance or any other casualty insurance as hereinafter provided.

(4) Accident insurance, and either sickness or health insurance being insurance against injury, disablement, or death resulting from travel or general accident, and against disablement resulting from sickness; and every insurance appertaining thereto.

(5) Fidelity and surety insurance, being the guaranteeing of persons holding the places of public or private trust; guaranteeing the performance of contracts other than insurance policies; or guaranteeing and executing all bonds, undertakings and contracts of suretyship.

(6) Liability insurance, being all insurance against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person and for which the insurer is liable.

(7) Plate-glass insurance, being all insurance against breakage of glass, whether local or in transit.

(8) Boiler and machinery insurance, being insurance upon steam boilers and upon pipes, engines and machinery connected therewith and operated thereby, against explosion and accident, and against loss or damage to life, person or property, resulting therefrom.

(9) Burglary insurance, being insurance against loss by burglary, house-breaking or theft.

(10) Sprinkler insurance, being insurance against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers or water-pipes.

(11) Credit insurance, being insurance, or guaranty either by agreement to purchase incollectible [uncollectable] debts, or otherwise to insure against loss or damage from the failure of persons indebted or to become indebted to the insured, or to meet existing or contemplated liabilities.

(12) Title insurance, insuring or guaranteeing owners of property or others interested therein, against loss by encumbrance, or defective titles, or adverse claim to title, either together with or without examination of title or furnishing information relative thereto.

(13) Team and vehicle insurance, being insurance against loss, damage or legal liability for loss, because of damage to property or persons caused by the use of teams or vehicles operated by power not generated in or upon the vehicle, whether by accident or collision, and including insurance against theft of the whole or any part of any vehicle. The term vehicle, as herein used, includes elevators and bicycles.

(13½) Motor vehicle insurance, being insurance on motor vehicles operated by power generated within or withon such vehicles, except those operating on water or on rails, against loss or damage or loss of use of or to the vehicle, furnishings, tools, appliances and equipment; or legal liability for loss or damage to persons or property resulting through the operation of the vehicle; caused by fire, self-ignition and explosion, theft, collision, or other insurable hazards, including all hazards incident to transporting such vehicle by land or by water.

(14) Miscellaneous insurance, being insurance upon any risk not included within or under either of the foregoing classes, and which is a proper sub-

ject of insurance, not prohibited by law or contrary to sound public policy. [L. '11, p. 217, § 83; L. '13, p. 318, § 2.]

A domestic fire insurance company has no right to issue plate glass insurance after the adoption of the insurance code, in view of this and the next section, dividing insurance companies into classes, and limiting fire insurance companies to other classes of insurance (marine and team and vehicle insurance): *State ex rel. North Coast Fire Ins. Co. v. Schively*, 68 Wash. 148, 122 Pac. 1020.

§ 6059-84. Class or Classes of Insurance Permitted.

Any insurance company having the required amount of capital, or assets, when permitted by its articles of incorporation or charter, may be authorized and licensed by the commissioner to make insurance in this state under one or more of the classes prescribed in the several paragraphs in section 6059-83, as follows:

(1) *Fire and Inland Marine Companies; Qualifications.*—No stock company shall make insurance in this state under class one of section 6059-83, without having capital stock of at least two hundred thousand dollars, of which not less than one-half must be paid in in cash or like securities authorized by this act, and the remainder, in cash or like securities, paid within one year after the company is incorporated, and a surplus of not less than fifty thousand dollars, nor shall such company make insurance in this state, in any other of said classes of insurance specified in said section, except in classes two, seven, ten and thirteen and one-half; and is not to make insurance in class two or thirteen and one-half without having additional capital of at least one hundred thousand dollars for each of said classes, and is not to make insurance in classes seven, ten and thirteen and one-half (excepting against the hazard of injury to persons) in addition to class one without having additional capital of at least fifty thousand dollars; or in addition to classes one and two without having a capital stock of at least three hundred and fifty thousand dollars.

(2) *Marine Insurance Company; Qualifications.*—No stock insurance company shall make insurance in this state under class two of section 6059-83 without having a capital stock of at least one hundred thousand dollars fully paid and a surplus of not less than fifty thousand dollars, nor shall such company make insurance in this state in any other of said classes of insurance excepting in classes one and thirteen and one-half (excepting against the hazard of injury to persons); nor make insurance in class one without having additional capital of at least one hundred thousand dollars; nor make insurance in class thirteen and one-half (excepting against the hazard of injury to persons) in addition to class two without having additional capital of at least fifty thousand dollars, nor in addition to classes one and two without having a capital stock of at least three hundred and fifty thousand dollars.

(3) *Life Insurance Companies; Qualifications.*—No stock insurance company shall make insurance in this state under class three of section 6059-83 without having a capital stock fully paid of at least one hundred thousand dollars with a surplus of not less than fifty thousand dollars, nor shall such company make insurance in this state in any other of said classes of insurance except in classes four and six; nor to make insurance in class four without having additional capital of at least fifty thousand dollars;

nor to make insurance in class six without having additional capital of at least two hundred thousand dollars; nor to make insurance in classes four and six without having additional capital of at least two hundred and fifty thousand dollars.

(4) *Title Insurance Companies; Qualifications.*—No company shall issue contract of guaranty or title insurance in this state, under class twelve of section 6059-83, until and unless it deposit and maintain on deposit through the office of the insurance commissioner, with the state treasurer, a guaranty fund in securities authorized by this act as legal investments for the capital or funds of insurance companies, in amounts as follows: (a) In counties having a population of five hundred thousand or more as evidenced by the last official census of the United States or of the state of Washington, the guaranty fund shall be not less than two hundred thousand dollars; (b) In counties having a population of not less than three hundred thousand nor more than five hundred thousand as evidenced by said census, the guaranty fund shall not be less than one hundred and fifty thousand dollars; (c) In counties having a population of not less than one hundred and fifty thousand nor more than three hundred thousand, as evidenced by said census, the guaranty fund shall not be less than one hundred thousand dollars; (d) In counties having a population of not less than one hundred thousand nor more than one hundred and fifty thousand, as evidenced by said census, the guaranty fund shall be not less than seventy-five thousand dollars; (e) In counties having a population of not less than sixty thousand nor more than one hundred thousand, as evidenced by said census, the guaranty fund shall be not less than fifty thousand dollars; (f) In counties having a population of not less than thirty-five thousand nor more than sixty thousand, as evidenced by said census, the guaranty fund shall be not less than twenty-five thousand dollars; (g) In counties having a population of not less than fifteen thousand nor more than thirty-five thousand, as evidenced by said census, the guaranty fund shall be not less than fifteen thousand dollars; (h) And in counties having a population of less than fifteen thousand, as evidenced by said census, the guaranty fund shall be not less than ten thousand dollars. Any company authorized to issue contracts of guaranty, or title insurance in any county of this state shall be permitted and authorized to issue contracts of guaranty and title insurance in one or more other counties of this state: Provided, Its guaranty fund on deposit with the state treasurer is equal to the maximum amount hereinbefore required of a company issuing contracts of guaranty or title insurance in any of such counties: Provided further, If any company shall have complied or shall thereafter comply with the provisions of this act for the county in which it has its principal place of business no other company authorized to issue contracts of guaranty or title insurance in any other county of this state shall be permitted to issue contracts of guaranty or title insurance therein after the expiration of its certificate of authority then held unless it has deposited or shall thereafter deposit with the state treasurer through the office of the insurance commissioner securities in addition to those then required of such company in the same amount as required for such county: Provided further, That when any company authorized to issue contracts of guaranty or title insurance in any county of the state shall have and maintain on deposit with the state treasurer a guaranty fund in securi-

ties authorized by this act in the total amount of two hundred thousand dollars, such company shall be permitted and authorized to issue contracts of guaranty and title insurance in all of the counties of this state: Provided further, That nothing herein contained shall prevent any company authorized to issue contracts of guaranty or title insurance in any county of this state from underwriting or reinsuring in whole or in part contracts of guaranty or title insurance by any other company. The provisions of this act shall in no wise be interpreted to apply to persons, copartnerships, or corporations engaged in the business of preparing and issuing abstracts of, but not guaranteeing or insuring, title to property and certifying to the correctness thereof.

(5) *Fidelity and Surety Insurance Companies; Qualifications.*—No stock insurance company shall make insurance in this state under class five of section 6059-83 without having a capital stock fully paid of at least two hundred thousand dollars and a surplus of not less than one hundred thousand dollars, nor shall such company make insurance in this state in any other of said classes of insurance specified in section 6059-83, excepting classes four, six, seven, eight, nine, ten, eleven, thirteen, thirteen and one-half, and fourteen; and it shall not make insurance in classes six or thirteen and one-half without having additional capital of at least one hundred thousand dollars for each of said classes; such company may make insurance in classes seven, eight, nine, ten, eleven, thirteen, thirteen and one-half (excepting against the perils of fire), and fourteen when it has additional capital of at least fifty thousand dollars.

(6) *Liability Insurance Companies; Qualifications.*—No stock insurance company shall make insurance in this state under class six of section 6059-83 without having a capital stock of at least two hundred thousand dollars fully paid and a surplus of not less than one hundred thousand dollars; nor shall such company make insurance in this state in any other of said classes of insurance specified in this section except in classes four, five, seven, eight, nine, ten, eleven, thirteen, thirteen and one-half and fourteen; and it shall not make insurance in classes five or thirteen and one-half without having additional capital of at least one hundred thousand dollars for each of said classes. Such company may make insurance in one or all of the following classes: four, seven, eight, nine, ten, eleven, thirteen, thirteen and one-half (excepting against the perils of fire), or fourteen when it has additional capital of at least fifty thousand dollars.

(6½) *Motor Vehicle Insurance Companies; Qualifications.*—No stock insurance company shall make insurance in this state under class thirteen and one-half of section 6059-83 without having a capital stock of at least two hundred thousand dollars fully paid and a surplus of not less than one hundred thousand dollars.

(7) *Other Companies; Requirements.*—No stock insurance company shall make insurance in this state in either of the following classes specified in section 6059-83, four, seven, eight, nine, ten, eleven, thirteen and fourteen, without having a capital stock of at least one hundred thousand dollars fully paid and a surplus of not less than twenty-five thousand dollars, nor shall such company make insurance in more than one of said classes

unless it shall have additional capital of not less than fifty thousand dollars: Provided, however, That the requirement of a surplus as provided in this section shall only apply to domestic insurance companies organizing and commencing to transact the business of making insurance and that such companies may use such surplus in establishing the company in business without impairment of the company.

(8) *Assessment. Mutual—Fraternal Companies.*—The provisions of this section shall not apply to life or fire insurance companies operating on the mutual, or assessment, or fraternal plan. [L. '11, p. 219, § 84; L. '13, p. 321, § 3.]

Section 6059-79 of the insurance code, having provided that domestic corporations previously organized having a certain amount of capital may continue to transact their business under the provisions of the act, the clause in this section prohibiting all companies from engaging in both a life and liability business "except as provided in

section 79," does not authorize such double business by foreign companies previously doing business in this state, since the proviso and exemption of section 6059-79 is expressly restricted to domestic companies only: State ex rel. Aetna Life Ins. Co. v. Schively, 68 Wash. 503, 123 Pac. 784.

§ 6059-85. Incorporation of Companies.

The following number of citizens of the United States, two-thirds of which number shall be residents of the state of Washington, may incorporate a company as follows: For a stock company, not less than five; for a mutual company, not less than ten; for an organization on the plan known as "Lloyds," not less than twenty; for an organization of "Inter-Insurers," not less than twenty-five; for one or more of the purposes specified in section 6059-83 by making and subscribing written articles of incorporation in quadruplicate and acknowledging the same before an officer authorized to take acknowledgment of deeds, and after having the same approved by the commissioner, by filing one of such articles in the office of the secretary of state, another in the office of the insurance commissioner, another in the office of the auditor of the county in which the principal office of the company is to be located, and retaining the fourth in the possession of the company, which articles shall state:

First. The names and the addresses of the incorporators.

Second. The name of the company.

Third. (a) The object for which the company is formed; (b) whether it is a stock or mutual company, and if a mutual company, whether it will insure on the cash premium or assessment plan; (c) the class or classes of risks wherein it will make insurance, according to the divisions made in this act.

Fourth. (a) If a stock company, the amount of the capital stock, and the number of shares, which shall be of the par value of one hundred dollars each; (b) if it be a mutual company, the minimum and maximum liability of its members or policy-holders for the payment of losses occurring under its policies, which liability shall be not less than two nor more than six times the amount of the premium usually charged by solvent stock insurance companies for insuring like or similar risks for the same term, and if that premium is not known, then the premium used shall be according to either the "Dean" schedule or the "Universal Mercantile" schedule for fire risks, and

such schedule for other class or classes of risks as may be approved by the commissioner.

Fifth. The time of its existence, not to exceed fifty years: Provided, That this limit of existence shall not apply to any life insurance company.

Sixth. The number of trustees or directors, which shall not be less than five nor more than eleven, and their names and addresses, who shall manage the affairs of the company for such length of time, not less than two nor more than six months, as may be designated in such articles of incorporation.

Seventh. The name of the city or town in which the principal place of business of the company is to be located in this state, and in what country or countries it intends to transact business.

Amendments may be made to the articles of incorporation of a stock company, by a majority vote of its trustees or directors, and the vote or written assent of two-thirds of the capital stock of the company, and, if a mutual company, by the majority vote of its trustees or directors and the vote or written assent of two-thirds of the members or policy-holders of such company. If the written assent of two-thirds of the capital stock of a stock company, or members or policy-holders of a mutual company has not been obtained, then the vote of the said stock, or of said members may be taken, at any regular meeting of the stockholders or members called for that purpose in the manner provided in the by-laws of such company for special meetings of stockholders or members.

The president and secretary of said company shall certify said amendments in quadruplicate under the seal of said company to be correct, and shall file and keep the same as in the case of original articles of incorporation, and from the time of filing said amendments such company shall have the same powers, and the stockholders thereof shall be subject to the same liabilities as if said amendments had been embraced in the original articles of incorporation. A policy-holder in a mutual insurance company has the same character of interest and occupies the same relation to the company as the stockholder has and occupies to a stock insurance company.

Nothing in this section shall be construed to cure or amend any defect existing in any articles of incorporation in that such articles did not set forth the matters required to make the same valid at the time of filing, nor to cure or amend any defect in the execution thereof. The time of existence of such company shall not be extended by amendments beyond the time fixed in the original articles of incorporation.

No such company shall take the name of a domestic company theretofore organized, nor that of an alien or foreign company admitted to this state, nor one so nearly resembling that of either as to be misleading. The expenses of incorporation and organization, including the placing of the capital stock of any such company incorporated after January first, 1911, shall not exceed seven and one-half per centum of the par value of the stock actually sold. [L. '11, p. 223, § 85.]

§ 6059-86. Mutual Companies—Qualifications.

No domestic mutual insurance company hereafter formed under the laws of this state shall be authorized to transact business as an insurer until it shall have first qualified itself as follows:

First. If it is formed to transact as insurer, a general fire insurance business on the cash premium plan, it must have bona fide written applications severally signed by applicants for fire insurance for one year, and, on risks usually written for a term, not more than five years, from residents of this state, on property owned by the applicant, situate within this state, in separate risks of not to exceed two thousand dollars each, amounting in the aggregate to not less than five hundred thousand dollars; and must have, own, and possess in its own name and exclusive right premiums actually received in cash, to an amount of at least eight thousand dollars and six thousand dollars must be on hand above all liabilities except reinsurance reserve, estimated on the pro rata basis, and premium liability due in installments as demanded, severally and unconditionally executed and delivered by a solvent applicant for the insurance he applies for, all in the aggregate amount, unimpaired, of not less than twenty-five thousand dollars: Provided, That when a mutual fire insurance company accumulates from its underwriting and earnings cash assets of not less than two hundred thousand dollars, of which amount not less than one hundred thousand dollars shall be surplus assets which it must maintain in securities deposited as required of domestic stock insurance companies, and while it maintains such surplus assets on deposit it may issue its policies without liability on the part of its policy-holders, other than to pay the amount of the premium stated in the policy, and which premium shall be not less than the premium charged by solvent stock companies for insuring similar risks. The company may classify its risks according to the various hazards covered, and any saving experienced by the company in loss ratio, expense of management, or from any other source, may be returned to the policy-holders in the various classifications, according to the experience of the company in said classes and as determined by the board of directors of the company: Provided, That such saving must be apportioned equitably among the policy-holders in the classifications in which it is actually earned.

Second. If it is formed to transact, as insurer, a fire insurance business under the cash premium plan on one stated specific kind or class of manufacturing, mercantile, or other business or property, it must have bona fide written applications severally signed by applicants for fire insurance for one year on property owned by the applicant and situate within this state in separate risks of not to exceed two thousand dollars each, amounting in the aggregate to not less than three hundred thousand dollars; and must have, own, and possess in its own name and exclusive right, premiums received in cash to an amount of at least eight thousand dollars and six thousand dollars must be on hand, above all liabilities, except reinsurance, reserve, and premium liability, settled by premium notes due in installments as demanded, severally and unconditionally executed and delivered by a solvent applicant for the insurance he applies for to the aggregate amount of not less than twenty-five thousand dollars: Provided, That when any ten or more persons, partnerships, corporations, or associations engaged in a like class of manufacturing, mercantile or other business shall have organized a company hereunder, it may begin to issue policies under such conditions as may be provided by the board of trustees or managing board thereof, and shall be approved by the commissioners.

Third. If it is formed to transact as insurer, a general fire insurance business on the assessment plan, it must have bona fide written applications sev-

erally signed by applicants for fire insurance for one year, and, on risks usually written for a term, not more than five years, from residents of this state on property owned by the applicant situate within this state in separate risks of not to exceed twelve hundred and fifty dollars each, and amounting in the aggregate to not less than five hundred thousand dollars; and must have, own, and possess in its own name and exclusive right premiums on the insurance applied for, of which not less than fifty per centum thereof must be paid in cash to the aggregate amount of not less than four thousand dollars, which sum shall be on hand, above liabilities except reinsurance reserve, and the remainder and additional premium liability of the applicant must be paid as provided in the by-laws of the company: Provided, That any domestic fire insurance company doing business on the assessment plan and composed exclusively of members of a specified fraternal society, which conducts its business and secures its membership on the lodge system, having ritualistic form of work and ceremonies in such society shall be exempt from the provisions of this act governing the amount of insurance a company may carry on a single risk, financial qualifications, annual meeting, taxes, fees, and licenses, except that it shall pay for its annual license and filing its annual statement the sum of ten dollars.

Fourth. If it is formed to transact as insurer a fire insurance business on the assessment plan outside of incorporated towns in this state, it must have bona fide written applications severally signed by applicants for fire insurance for one year, and, on risks usually written for a term, not more than five years, from residents of this state on property owned by the applicant situate within this state in separate risks of not to exceed fifteen hundred dollars each, amounting in the aggregate to not less than two hundred thousand dollars; and must have, own, and possess in its own name and exclusive right premiums on the insurance applied for of which not less than fifty per centum thereof must be paid in cash and to be on hand above liabilities except reinsurance reserve, and the remainder, and the additional premium liability of the applicant must be paid as provided in the by-laws of the company.

Fifth. If it is formed to transact business as inter-insurers only between the parties forming the company and all parties who shall become members and inter-insurers therein, no such company shall be formed nor transact any business as insurers until not less than twenty-five persons or parties, each of whom must be worth in his or its own right not less than twenty thousand dollars above all liabilities, in property located within this state, such fact to be determined by the commissioner, and in determining the same he may take the verified statement of such parties, and the signed reports of a reputable commercial agency having upwards of one hundred thousand subscribers, which persons or parties shall first prescribe and adopt the terms and conditions upon which they will be governed and become inter-insurers each with the other, and each shall be individually liable with every other solvent member of such company to ratably pay and discharge all losses and legal claims accruing against such company: Provided, That the terms and conditions prescribed, adopted and entered into by such persons in becoming inter-insurers shall embrace the terms and conditions which experience of similar companies has found to be efficient and adequate to promptly and equitably pay and discharge its obligations of which the commissioner shall be the judge: Provided further, That the provisions of this paragraph shall only

apply to inter-insurers associations hereafter organized or hereafter applying for admission and authority to transact business in this state as inter-insurers.

Sixth. If it is formed to transact business as insurer in this state upon the plan known as "Lloyds," no such company shall be formed with less than twenty-persons or copartnerships, citizens of the United States and two-thirds of them residents of this state, each of whom must be worth not less than twenty thousand dollars above all liabilities in real property and securities such as an insurance company is authorized to invest its capital and funds in as provided in this act, such fact to be determined by the commissioner and in determining the same he may take the verified statement of such parties and the signed reports of a reputable commercial agency having upwards of one hundred thousand subscribers, which persons or parties shall first prescribe and adopt the terms and conditions upon which they will be governed and become insurers. If such company be formed to transact business as insurer as specified in class one of section 6059-83 it must have not less than one hundred fifty thousand dollars, in bona fide unimpaired assets in excess of all liabilities, of which assets not less than seventy-five thousand dollars must be in cash and securities such as the funds of an insurance company may be invested in as provided in this act, and the remainder of said assets must consist of cash or such authorized securities, or the legal promissory notes severally made, signed, and delivered by solvent parties payable to the company whenever required for the payment and discharge of losses or legal obligations accruing against such company; and where notes are used to make up the amount of said assets the commissioner shall determine the sufficiency of each note, and he shall have the right to require that the payment of any note shall be secured by good and sufficient collateral, and it shall be his duty to require ample security to be furnished for the payment of such note when the makers thereof are not personally known by him to be solvent and good for the payment of the same. Such company shall deposit not less than two-thirds of its assets and keep the same on deposit through the insurance commissioner's office with the state treasurer in the same manner as deposits are required to be made and kept by stock insurance companies as provided in this act.

Such company may make insurance in any other class specified in said section 6059-83 when permitted by the commissioner upon furnishing additional assets of the kind herein specified in the amounts required of a stock insurance company to make insurance in like classes as provided by this act.

The plan, terms, and conditions prescribed and adopted by such company must be such as the experience of similar companies has found to be efficient and adequate to promptly and equitably pay and discharge its obligations and successfully conduct its business, of which the commissioner shall be the judge. [L. '11, p. 226, § 86.]

§ 6059-87. Mutual Company—By-laws.

The directors of a mutual insurance company shall adopt such by-laws, not in conflict with the laws of this state, as they may deem proper for the government of its officers and the conduct of its business. Said by-laws shall provide for the liability of its members or policy-holders for the payment of its losses and expenses, which liability, including the amount of the premium,

shall not be less than two times the amount of the premium nor more than six times the amount of the premium charged by solvent stock companies for like risks and terms. The by-laws shall limit the expenses to not more than forty per centum of the net premiums charged and collected for insurance, which expense must include all sums paid by the insured for his insurance including any membership, policy, survey, or inspection fee, or other fee or charge, if any. [L. '11, p. 231, § 87.]

§ 6059-88. Qualifications—Foreign—Alien—Mutuals.

No alien, or foreign mutual insurance company shall be licensed to make insurance in this state until it shall have accumulated from its underwriting business and earnings surplus assets of not less than one hundred thousand dollars, and shall have a reinsurance reserve computed on a pro rata basis, which surplus assets, if an alien, shall be maintained on deposit in a depository or depositories for insurance company funds in some state or states of the United States. Such company shall not carry insurance on a single risk for an amount in excess of ten per centum of its surplus assets, as shown by the last report to the insurance commissioner, without protecting such excess by reinsurance in a solvent company. [L. '11, p. 231, § 88.]

§ 6059-89. Impairment—Reduction of Capital Stock.

When the capital stock of any domestic insurance company shall be impaired, it may reduce its capital stock as provided herein to such an amount as shall be justified by its assets; but no part of its assets shall be distributed to its stockholders, and no reduction shall be made except upon the vote of the stockholders approved by at least two-thirds of the directors and certified under the corporate seal by the secretary, a duly certified copy of which shall be filed in the office of the secretary of state, and in the office of the insurance commissioner, and in the office of the auditor of the county in which the principal office of the company is located, and one retained at the principal office of the company. The directors, after such reduction of capital, may require each stockholder to surrender his stock, and, in lieu thereof, may issue a new certificate for such number of shares as he shall be entitled to: Provided, That the capital of such company when so reduced shall not be less than the minimum capital required of a company to transact like business in this state. [L. '11, p. 232, § 89.]

§ 6059-90. Increase of Capital Stock.

Any domestic insurance company may at any time increase the amount of its capital stock, by giving notice once a week for four consecutive weeks, in any newspaper having a general circulation, published in the county where the company is located, of such intention; and by filing with the secretary of state a copy of such advertisement with due proof of publishing the same, together with the declaration under its corporate seal, signed by its president and two-thirds of its board of directors, and by the stockholders representing three-fourths of its capital stock, of their desire to increase the capital, and file like copies and proof in the office of the insurance commissioner, and in the office of the auditor of the county in which the principal office of such company is located, and retain a similar copy and proof in its principal office: Provided, That such increase of capital stock shall be fully subscribed and

paid for in lawful money of the United States within six months after the date of filing such papers in the office of the secretary of state, and, when said increase of capital shall have been fully subscribed and paid in full in cash, the president and secretary of such company shall make and verify under oath a certificate under the seal of the company stating that such increase in stock has been fully subscribed and paid in full in cash, as required by this act, and file such certificate in the office of the secretary of state and in the office of the insurance commissioner, and in the office of the auditor of the county in which the principal office of the company is located, and retain a similar copy in its principal office, and thereupon such increase in capital shall be effectual. [L. '11, p. 232, § 90.]

§ 6059-91. Examination—Reserve—Liability.

In ascertaining the condition of a fire insurance company, under the provisions of this act, or in any examination made by the commissioner, his deputy, or examiner, he shall allow as assets only such investments, cash, and accounts as are authorized by the laws of this state at the date of the examination, but unpaid premiums on policies written within three months shall be admitted as available resources. In ascertaining its liability, there shall be charged in addition to the capital stock and all outstanding claims, a sum equal to the total unearned premiums on the policies in force, computed on a pro rata basis. [L. '11, p. 233, § 91.]

§ 6059-92. Life—Legal Reserve.

The commissioner shall annually make valuation of all outstanding policies, additions thereto, unpaid dividends, and all other obligations of every life insurance company doing business in this state; and all such valuations made by him or his authority shall be according to the standard of valuation adopted by the company: Provided, That in either case the standard of valuation employed shall be stated in his annual report: Provided further, That no such standard of valuation whether on the net level premium, preliminary term, or select and ultimate reserve basis, for policies issued after the passage of this act shall be less than that determined upon such basis according to the American Experience Table of Mortality with three and one-half per centum interest. The commissioner may vary the standard of valuation in particular cases of invalid lives and other extrahazards: Provided, The same is on basis of at least three and one-half per centum, value policies in groups, use approximate average for fractions of a year, and assume as accurate the valuation of the department of insurance of any other state or country, if the insurance officer of such other state or country likewise accredits the valuation made by the commissioner of this state: Provided, That when the preliminary term basis is used it shall not exceed one year.

The legal minimum standard for the valuation of annuities issued after January first, nineteen hundred and twelve, shall be "McClintock's Table of Mortality Among Annuitants," or the American Experience Table of Mortality, with interest at three and one-half per centum per annum, but annuities deferred ten or more years and written in connection with life or term insurance shall be valued in the same mortality table from which the consideration or premiums were computed, with interest not higher than three and one-half per centum per annum.

The legal minimum standard for the valuation of annuity policies issued after the first day of January, nineteen hundred and twelve, shall be the American Experience Table of Mortality with interest and three and one-half per centum per annum: Provided, That any life insurance company may voluntarily value its industrial policies written on the weekly premium payment plan according to the "Standard Industrial Mortality Table" or the "Sub-Standard Industrial Mortality Table."

Any life insurance company may voluntarily value its policies, or any class thereof, according to the American Experience Table of Mortality; or if industrial, at its option, according to the "Standard Industrial Mortality Table," or "Sub-Standard Industrial Mortality Table," at a lower rate of interest than that above prescribed, but not lower than three per centum per annum, and in such case shall report the standards used by it in making the same, to the commissioner in its annual statement: Provided, That no such standards, if adopted, shall be abandoned without the consent of the commissioner first being obtained in writing. [L. '11, p. 233, § 92.]

§ 6059-93. Investments Allowed—Life.

In estimating the condition of any life insurance company, under the provisions of this act, or in any examination made by the commissioner, his deputy, or examiner, he shall allow as assets only such investments, cash, and accounts as are authorized by the laws of this state, at the date of examination, and shall charge as liabilities in addition to the capital stock, all outstanding indebtedness of the company, and the premium reserve on policies, and additions thereto in force computed according to the table of mortality and rate of interest prescribed in this act. The total assets invested and otherwise in every domestic life insurance company shall be held to be accumulations for the exclusive benefit of policy-holders, and no payment to stockholders shall be made therefrom, until all obligations to policy-holders, and creditors have been fully provided for including the reserve required by the preceding section of this act to be determined by the commissioner. [L. '11, p. 235, § 93.]

§ 6059-94. Health—Reserve.

The commissioner shall annually make valuations of all outstanding policies of every company insuring against disablement by sickness, on the net premium basis, according to the "British Friendly Society Tables, eighteen hundred and eighty," or the "Manchester Unity Friendly Society Tables," eighteen hundred and ninety-three to eighteen hundred and ninety-seven, with interest at three and one-half per centum per annum. He may, in his discretion, vary the standard in particular cases, and may also require additional reserve because of hazardous occupations, impairment of the lives of the insured or insufficient net premiums. This provision shall not apply to policies insuring for not longer than one year without privileges of renewal. [L. '11, p. 235, § 94.]

§ 6059-95. Liability—Reserve.

The indebtedness for outstanding losses under insurance against loss or damages resulting from accident to or injuries suffered by employees or other person and for which the insured is liable, and under insurance against

loss from liability on account of the death of or injury to an employee not caused by the negligence of the employer, shall be determined as follows: Each corporation which writes policies covering any of said kinds of insurance shall include in the annual statement required by section 6059-26 a schedule of its experience thereunder, in the United States and foreign countries in the case of corporations organized in the United States, and in the United States only in the case of corporations organized outside of the United States, giving each calendar year's experience separately, and crediting or charging each item to the year in which the policy to which it relates was written, as follows: (1) the earned premiums on all such policies written during the period of ten years immediately preceding the date as of which the statement is made, being the gross premiums on all such policies including excess and additional premiums and premiums in course of collection, less return premiums and premiums on canceled policies, and less the unearned premiums on policies in force as shown in such annual statement; (2) the amount of all payments of whatsoever nature made by reason or on account of injuries covered by such policies written during said period. This amount shall include medical and surgical attendance, payments to claimants, legal expenses, salaries and expenses of investigators, adjusters, and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home-office expenses, and all other payments made on account of such injuries, whether such payments are allocated to specific claims or are unallocated; (3) the number of suits being defended at the date as of which the statement is made under policies written during said period, except suits in which liability is not dependent upon negligence of the insured, and a charge of seven hundred and fifty dollars for each suit; (4) the number of deaths for which the insured are liable without proof of negligence, covered by policies written during said period, and not paid for at the date as of which the statement is made and a charge of the amount necessary to pay for such deaths; (5) the number of unpaid claims at the date as of which the statement is made on account of nonfatal injuries for which the insured are liable without proof of negligence, covered by policies written during said period, and a charge equal to the present value of the estimated future payments; (6) the loss ratio determined from the foregoing as to each year separately, using as the divisor the earned premiums shown in item (1) and as the dividend the amount of payments shown in item (2) plus the amounts charged in items (3), (4) and (5); (7) the number of suits being defended at the date as of which the statement is made under policies written more than ten years prior to such date, except suits in which liability is not dependent upon negligence of the insured; (8) the number of deaths for which the insured are liable without proof of negligence, covered by policies written more than ten years prior to the date as of which the statement is made, and not paid for at such date; (9) the number of unpaid claims at the date as of which the statement is made on account of nonfatal injuries for which the insured are liable without proof of negligence, covered by policies written more than ten years prior to such date.

All unallocated payments in item (2) made in a given calendar year subsequent to the first four years in which a corporation has been issuing such policies shall be distributed as follows: thirty-five per centum shall be charged

to the policies written in that year, forty per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding, ten per centum to the policies written in the third year preceding and five per centum to the policies written in the fourth year preceding; and such payments made in the first four calendar years in which a corporation has been issuing such policies shall be distributed as follows: in the first calendar year one hundred per centum shall be charged to the policies written in that year; in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year; in the third calendar year forty per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year and twenty per centum to the policies written in the second year preceding; and in the fourth calendar year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in such annual statement.

Each such corporation shall be charged with indebtedness for outstanding losses upon such policies determined as follows: (10) for all suits being defended under policies written more than ten years prior to the date as of which the statement is made, except suits in which liability is not dependent upon negligence of the insured, one thousand dollars for each suit; (11) for all suits being defended under policies written more than five years and less than ten years prior to the date as of which the statement is made, except suits in which the liability is not dependent upon negligence of the insured, seven hundred and fifty dollars for each suit; (12) for all deaths for which the insured are liable without proof of negligence covered by policies written more than five years prior to the date as of which the statement is made, the amount necessary to pay for such deaths; (13) for all unpaid claims on account of nonfatal injuries for which the insured are liable without proof of negligence under policies written more than five years prior to the date as of which the statement is made, the present value of the estimated future payments; (14) for the policies written in the five years immediately preceding the date as of which the statement is made an amount determined as follows: multiply the earned premiums of each of such five years as shown in item (1) by the loss ratio ascertained as in item (6) on all the policies written in the first five years of the said ten-year period, using as the divisor the sum of the earned premiums shown in item (1) for such first five years, and as the dividend the sum of the payments shown in item (2) for such first five years plus the sum of the charges in items (3), (4) and (5) for such first five years; but the ratio to be used shall in no event be less than fifty per centum at and after December thirty-first, nineteen hundred and eleven, nor less than fifty-one per centum at and after December thirty-first, nineteen hundred and twelve, nor less than fifty-two per centum at and after December thirty-first, nineteen hundred and thirteen, nor less than fifty-three per centum at and after December thirty-first, nineteen hundred and fourteen, nor less than fifty-four per centum at and after December thirty-first, nineteen hundred and fifteen, nor less than fifty-five per centum at and after December thirty-first, nineteen hundred and sixteen; and from the amount

so ascertained in each of the last five years of said ten-year period deduct all payments made under policies written in the corresponding year as shown in item (2), and the remainder in the case of each year shall be deemed the indebtedness for that year: Provided, however, That if the remainder in the case of any year of the first three years of the five years immediately preceding the date as of which the statement is made shall be less than the sum of the three following items for that year at that date,—(a) the number of suits, except suits in which liability is not dependent upon negligence of the insured, being defended under policies written in that year, and a charge of seven hundred and fifty dollars for each suit; (b) the amount necessary to pay for all deaths for which the insured are liable without proof of negligence, covered by policies written in that year; and (c) the present value of estimated unpaid claims on account of nonfatal injuries for which the insured are liable without proof of negligence, covered by policies written in that year—then the sum of said items (a), (b) and (c) shall be the indebtedness for that year.

A corporation which has been issuing such policies for a period of less than ten years shall nevertheless include in its annual statement a schedule as hereinbefore required for the years in which it shall have issued such policies, and shall be charged with an indebtedness determined in the same manner; but in determining the indebtedness for policies written in the five years immediately preceding the date as of which the statement is made, the minimum ratios hereinbefore prescribed shall be used, subject to the same deductions and provisions as in the case of corporations that have been issuing such policies for ten years or more.

In estimating and ascertaining the assets, liabilities, and financial condition of all other insurance companies, not otherwise provided for by the provisions of this act, the commissioner, his deputy, or examiner shall allow as assets only such investments, cash, and accounts as are authorized by the existing laws of this state, or under the existing laws of the state or country under which such company is organized and which investments he may approve or reject, at the date of the investigation, and in estimating the liabilities there shall be added, in addition to the capital stock, all outstanding claims and a sum equal to the unearned premiums on the policies in force, calculated on the gross sum without any deduction on any account, charged to the policy-holder on each respective risk from the date of the issuance of the policy.

If the commissioner finds this rule to be impracticable in estimating and ascertaining the condition of certain kinds of insurance companies, he shall formulate such rules as he shall deem proper and efficient and consistent with law, having due regard to such rules as may be used in other states or approved by the National Convention of Insurance Commissioners or Superintendents: Provided, That in relation to the affairs of any foreign company, he may, in lieu of such examination and investigation, accept a certificate of the insurance commissioner or superintendent of such state or district, as to its condition. [L. '11, p. 236, § 95.]

§ 6059-96. Valuations—Exceptions.

The provisions of this act relating to the valuation of policies shall not apply to policies issued prior to the date at which this act goes into effect. [L. '11, p. 241, § 96.]

§ 6059-97.—Liabilities of Directors and Corporators.

The directors, corporators, and organizers of any company organized under this act, and those entitled to a participation of the profits of such company, shall be jointly and severally liable for all debts or liabilities of such company, until it has qualified and been admitted to make insurance in this state. [L. '11, p. 241, § 97.]

§ 6059-98. Reinsurance in Nonadmitted Alien Companies Prohibited.

No insurance company authorized to transact business in this state and no manager or agent thereof shall reinsure, transfer, or cede in any manner whatsoever the whole or any part of its liability under a policy covering property within this state, except marine risks, in any alien company not having a duly appointed attorney in fact in the United States to accept service of legal process, or not admitted to transact business in the United States and having a deposit in some state in the United States.

Any company, or manager, or agent who violates the provisions of this section, shall be fined in any sum not exceeding five hundred dollars, and the license of such company, manager or agent shall be revoked during the time such fine remains unpaid. [L. '11, p. 241, § 98.]

§ 6059-99. Attorney General—Prosecuting Attorneys—Duties.

In all proceedings instituted in any court, or otherwise, under the provisions of this act, it shall be and hereby is made the duty of the attorney general and of the several prosecuting attorneys throughout the state, to prosecute or defend all such proceedings when requested by the commissioner, his deputy, or examiner so to do. [L. '11, p. 241, § 99.]

§ 6059-100. Brokerage—License Required—Agents may Exchange Business.

Any person or party who solicits fire, marine, casualty, liability, or surety business to be placed in an insurance company other than represented by him shall be deemed and considered as transacting a brokerage business and shall be required to procure a broker's license: Provided, That nothing in this act shall be considered as prohibiting an exchange of business between duly licensed recording agents. [L. '11, p. 242, § 100.]

§ 6059-101. Inspection Bureau.

After the first day of January, nineteen hundred thirteen, the commissioner, if he deem it necessary for the detection and correction of errors or discovery of violations of this act in effecting insurance, if any be committed, may permit an inspecting or stamping bureau to be maintained under the supervision of a deputy commissioner for the purpose of inspecting all daily reports of fire insurance risks located in this state. [L. '11, p. 242, § 101.]

§ 6059-102. General Penalties.

Any company or person who knowingly violates any provision of this act for which no penalty is provided, shall be deemed guilty of a misdemeanor and shall be punished as provided by law. [L. '11, p. 242, § 102.]

ARTICLE II.

§ 6059-103. Over-insurance—Unlawful.

It shall be unlawful for any insurance company or any agent to knowingly issue any fire insurance policy upon property within this state for an amount which with any existing insurance exceeds the fair value of the property or of the interest of the insured therein, or for a longer time than for five years. [L. '11, p. 242, § 103.]

§ 6059-104. Over-insurance—Procuring—Unlawful.

It shall be unlawful for any party having an insurable interest in property located in this state to knowingly procure any fire insurance policy upon his interest in such property for an amount in excess of the fair value of his interest in the property, or for an amount which, with any existing insurance thereon, exceeds the fair value of his interest in the property. [L. '11, p. 242, § 104.]

§ 6059-105. Over-insurance—Penalties.

Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined in a sum not less than fifteen nor more than twenty-five dollars. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars. [L. '11, p. 243, § 105.]

§ 6059-105½. Total Loss—Measure of Damages—Replacing.

Whenever any policy of insurance shall be hereafter written or renewed insuring real property or any building or structure erected thereon or connected therewith, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured, or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of the loss and measure of damages when destroyed. In case there is a partial destruction of the property insured, no greater amount shall be collected than the injury sustained: Provided, That the insurer shall have the option to repair, rebuild or replace the property lost or damaged with other of like kind and quality if he gives notice of his intention so to do within twenty days after the receipt of notice of loss: Provided, Such insurer shall, within thirty days from the receipt of notice above, commence such rebuilding or replacing and shall

diligently prosecute the same to completion, and shall pay to the insured the reasonable rental value of the premises with the buildings thereon from the date of loss to the date of such completion. [L. '11, p. 243, § 105½.]

§ 6059-106. Policy Standard Form—What to Contain.

On and after January first, nineteen hundred and twelve, no fire insurance company shall issue any fire insurance policy covering on property or interest therein in this state other than on form known as the New York Standard as now or may be hereafter constituted, except as follows:

First. A company may print on or in its policy its name, location and date of incorporation, plan of operation, whether stock or mutual, and if mutual whether on cash premium or assessment plan; and if it be a stock company, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued by an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at —," and, if a mutual company, must state the contingent mutual liability of its policy-holders or members for payment of losses and expenses not provided for by its cash funds until it shall have accumulated surplus assets of not less than fifty thousand dollars, which it must maintain in securities deposited as required of stock companies, and, while it maintains such surplus assets on deposit, it may issue its policies with the statement thereon that the liability of the policy-holder is limited to the premium paid, as hereinafter provided.

Second. A company may print or use in its policies printed forms of description and specifications of the property insured.

Third. A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words, "also any damage by lightning whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance the words, "whether by fire, lightning or both."

Fourth. A domestic company may print in its policies any provisions which it is authorized or required by the law to insert therein, and any foreign or alien company may, with the approval of the commissioner, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this state; but the commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such a way as to affect the question of loss to be appended to the policy by an indorsement or rider as hereinafter provided.

Fifth. The blanks in said standard form may be filled in in print or writing.

Sixth. A company may print upon policies issued in compliance with the preceding provisions of this section the words, "Washington Standard Policy."

Seventh. A company may write upon the margin or across the face of the policy, or write or print in type not smaller than nonpareil upon a slip, slips, rider or riders to be attached thereto, provisions adding to or relating to those contained in the Standard Form; and all such slips, riders, indorsements, and provisions must be signed by the officers or agents of the company so using them.

Eighth. If the policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance such regulation shall apply to and form a part of the policy as the same may be written or printed upon, attached, or appended thereto.

Ninth. If the policy be made by a company operating on the plan known as "Lloyds" it shall have the name and address of each underwriter printed on the back of the policy.

Tenth. Every policy shall have legibly inscribed upon its face and filing back suitable words to designate whether the company making such insurance be a stock, or mutual company, or "Lloyds," or Inter-Insurers Association.

The word "noon" occurring in the policy shall be construed to be the noon of standard time of the place where the property covered by the policy is situated. [L. '11, p. 244, § 106.]

§ 6059-107. Limitation of Risk.

No insurance company authorized to transact business in this state, unless otherwise provided by this act, shall insure a single risk, or a single block in the congested district of any city or town, for a larger amount than one-tenth of its paid-up capital in the United States, unless it provides for reinsurance of the excess simultaneously with the original contract; and if any insurance company violates this provision, the commissioner may revoke its authority to transact business in this state. [L. '11, p. 246, § 107.]

§ 6059-108. Policy—Canceled—Return Premium.

Any fire insurance policy may be canceled at any time by the insurer giving the insured or his representative in charge of the property insured, and the mortgagee, if the insurance is for the benefit of the mortgagee, five days' notice of such cancellation, and if the premium has been actually paid, by paying in cash or mailing by registered letter with proper postage affixed thereto, addressed to the insured at his usual or last known postoffice address, a postoffice or express company money order or bank draft for the return premium computed at pro rata rate for the time the insurance has yet to run, or customary short rate where the insurance is canceled by the insured, or, where the premium has not been paid, by the insured giving the insurer or its agents or agency, who issued the policy notice of such cancellation and paying the premium for the time the insurance has been in force computed at the customary short rate: Provided, That in case the insurer is a mutual company, such cancellation shall not relieve the insured from his statutory liability in common with every other policy-holder of such company for losses sustained by such company at or prior to the time of the cancellation. [L. '11, p. 246, § 108.]

§ 6059-109. Premium—To be Stated.

Every fire insurance policy must state on its face the amount and the rate of the premium. [L. '11, p. 247, § 109.]

§ 6059-110. Foreign Inter-insurance.

Associations of individuals, citizens of the United States, incorporated within the United States to transact business as inter-insurers only between the parties forming the association, and all parties forming the association

and all parties who shall become members and inter-insurers therein, may be authorized to transact insurance in this state in like manner and upon the same terms and conditions as required of domestic inter-insurance associations. [L. '11, p. 247, § 110.]

§ 6059-111. Demoralization of Business—Prohibited.

Any company which precipitates, or aids in precipitating or conducting a rate war and by so doing writes or issues a policy of insurance at a less rate than permitted under their schedules filed with the commissioner, or below the rate deemed by him to be proper and adequate to cover the class of risk insured, shall have its license, and those of its agents, to do business in this state, suspended until such time as the commissioner is satisfied that it is charging a proper rate of premium. [L. '11, p. 247, § 111.]

§ 6059-112. Rate War—Offending Company—Agent's Commission.

Any company which has precipitated, or aided in precipitating or conducting a rate war for the purpose of punishing or eliminating competitors or stifling competition, or demoralizing the business, or for any other purpose, and has ordered the cancellation or rewriting of policies at a rate lower than that provided by its rating schedules where such rate war is not in operation, and has paid or attempted to pay to the assured any return premium, on any risk so to be rewritten, on which their agent has received or is entitled to receive his regular commission, such company shall not be allowed to charge back to such agent any portion of his commission on the ground that the same has not been earned. [L. '11, p. 247, § 112.]

§ 6059-113. Adjuster to Report Violations.

Every adjuster, who investigates any loss claim in this state, shall ascertain whether there be double or over-insurance upon such risk and the facts and circumstances so far as practical pertaining to the origin or happening of the hazard or peril insured against, and in case he believes fraud has been committed or attempted to be committed, he shall promptly report the premises to the commissioner, and in case of fire insurance, to the fire marshal as well. [L. '11, p. 248, § 113.]

§ 6059-114. Insurable Interest in a Ship.

The owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss. [L. '11, p. 248, § 114.]

§ 6059-115. Interest Reduced by Bottomry.

The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry. [L. '11, p. 248, § 115.]

§ 6059-116. Freight—What.

Freight, in the sense of a policy of marine insurance, signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others. [L. '11, p. 248, § 116.]

§ 6059-117. Expected Freight.

The owner of a ship has an insurable interest in expected freight which he would have certainly earned but for the intervention of the peril insured against. [L. '11, p. 248, § 117.]

§ 6059-118. Interest in Expected Freight—What.

The interest mentioned in the last section exists, in the case of a charter-party, when the ship has broken ground on the chartered voyage, and if a price is to be paid for the carriage of goods they are actually on board or there is some contract for putting them on board, and both ship and goods are ready for the specified voyage. [L. '11, p. 248, § 118.]

§ 6059-119. Insurable Interest in Profits.

One who has an interest in the thing from which profits are expected to proceed, has an insurable interest in the profits. [L. '11, p. 249, § 119.]

§ 6059-120. Insurable Interest of Charterer.

The charterer of a ship has an insurable interest in it, to the extent that he is liable to be damnified by its loss. [L. '11, p. 249, § 120.]

§ 6059-121. Information—Communicated.

In marine insurance each party is bound to communicate, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty, and all the information which he possesses, material to the risk, except that neither party to a contract of marine insurance is bound to communicate information of the matters following, unless it be in answer to the inquiries of the other:

First. Those which the other knows;

Second. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;

Third. Those of which the other waives communication;

Fourth. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and

Fifth. Those which relate to a risk excepted from the policy, and which are not otherwise material.

He shall also state the exact and whole truth in relation to all matters that he represents, or upon inquiry assumes to disclose. [L. '11, p. 249, § 121.]

§ 6059-122. Material Information.

In marine insurance, information of the belief or expectation of a third person, in reference to a material fact, is material. [L. '11, p. 249, § 122.]

§ 6059-123. Presumption of Knowledge of Loss.

A person insured by a contract of marine insurance is presumed to have had knowledge, at the time of insuring, of a prior loss, if the information might possibly have reached him in the usual mode of transmission, and at the usual rate of communication. [L. '11, p. 250, § 123.]

§ 6059-124. Concealment Affecting Risk Only.

A concealment in a marine insurance, in respect of any of the following matters, does not vitiate the entire contract, but merely exonerates the insurer from a loss resulting from the risk concealed;

First. The national character of the insured.

Second. The liability of the thing insured to capture and detention;

Third. The liability to seizure from breach of foreign laws of trade;

Fourth. The want of necessary documents; and,

Fifth. The use of false and simulated papers. [L. '11, p. 250, § 124.]

§ 6059-125. Intentional Falsity—Effect.

If a representation, by a person insured under a contract of marine insurance, is intentionally false in any respect, whether material, or immaterial, the insurer may rescind the entire contract. [L. '11, p. 250, § 125.]

§ 6059-126. Representation of Expectation.

The eventual falsity of a representation as to expectation does not, in the absence of fraud, avoid a contract of insurance. [L. '11, p. 250, § 126.]

§ 6059-127. Seaworthiness—Warranty.

In every marine insurance upon a ship or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy. [L. '11, p. 250, § 127.]

§ 6059-128. Seaworthiness—What.

A ship is seaworthy when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy. [L. '11, p. 250, § 128.]

§ 6059-129. Seaworthiness—Compliance With—Exceptions.

An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases:

First. When the insurance is made for a specified length of time, the implied warranty is not complied with, unless the ship be seaworthy at the commencement of every voyage she may undertake during that time; and,

Second. When the insurance is upon the cargo, which, by the terms of the policy, or the description of the voyage, or the established custom of the trade, is to be transshipped at an intermediate port, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped, or transshipped, be seaworthy at the commencement of its particular voyage. [L. '11, p. 251, § 129.]

§ 6059-130. Seaworthiness—Constitute—Things.

A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables, and anchors, cordage, and sails, food, water, fuel, and lights, and other necessary or proper stores and implements for the voyage. [L. '11, p. 251, § 130.]

§ 6059-131. Seaworthiness—Degrees—Stages—Voyage.

Where different portions of the voyage contemplated by a policy, differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if, at the commencement of each portion, the ship is seaworthy with reference to that portion. [L. '11, p. 251, § 131.]

§ 6059-132. Unseaworthiness During Voyage.

When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing the defect exonerates the insurer from liability from any loss arising therefrom. [L. '11, p. 251, § 132.]

§ 6059-133. Seaworthiness—As to Insurance on Cargo.

A ship which is seaworthy for the purpose of an insurance upon the ship may, nevertheless, by reason of being unfit to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo. [L. '11, p. 252, § 133.]

§ 6059-134. Neutral Papers.

Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable suspicion thereon. [L. '11, p. 252, § 134.]

§ 6059-135. Voyage Insured—Determined.

When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between those places. [L. '11, p. 252, § 135.]

§ 6059-136. Sailing—Course—Determined.

If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way between the places specified which, to a master of ordinary skill and discretion, would seem the most natural, direct, and advantageous. [L. '11, p. 252, § 136.]

§ 6059-137. Deviation—What.

Deviation is a departure from the course of the voyage insured, mentioned in the last two sections, or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage. [L. '11, p. 252, § 137.]

§ 6059-138. Deviation—Proper.

A deviation is proper:

First. When caused by circumstances over which neither the master nor the owner of the ship has any control;

Second. When necessary to comply with a warranty, or to avoid a peril, whether insured against or not;

Third. When made in good faith, and upon reasonable grounds of belief in its necessity to avoid a peril; or,

Fourth. When made in good faith, for the purpose of saving human life, or relieving another vessel in distress. [L. '11, p. 252, § 138.]

§ 6059-139. Deviation—Improper.

Every deviation not specified in the last section is improper. [L. '11, p. 253, § 139.]

§ 6059-140. Proper Deviation Exonerates Insurer.

An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation. [L. '11, p. 253, § 140.]

§ 6059-141. Total—Partial—Loss.

A loss may be either total or partial. [L. '11, p. 253, § 141.]

§ 6059-142. Actual and Constructive Total Loss.

A total loss may be either actual or constructive. [L. '11, p. 253, § 142.]

§ 6059-143. Actual Total Loss—What.

An actual total loss is caused by:

First. A total destruction of the thing insured;

Second. The loss of the thing by sinking, or by being broken up;

Third. Any damage to the thing which renders it valueless to the owner for the purposes for which he held it; or,

Fourth. Any other event which entirely deprives the owner of the possession, at the port of destination, of the thing insured. [L. '11, p. 253, § 143.]

§ 6059-144. Constructive Total Loss.

A constructive total loss is one which gives to a person insured a right to abandon, as hereinafter provided. [L. '11, p. 253, § 144.]

§ 6059-145. Actual Loss—Presumed.

An actual loss may be presumed from the continued absence of a ship without being heard of; and the length of time which is sufficient to raise this presumption depends on the circumstances of the case. [L. '11, p. 253, § 145.]

§ 6059-146. Insurance—Cargo—Voyage Broken.

When a ship is prevented, at an intermediate port, from completing the voyage, by the perils insured against, the master must make every exertion to produce, in the same or contiguous port, another ship, for the purpose of conveying the cargo to its destination; and the liability of a marine insurer thereon continues after they are thus reshipped. [L. '11, p. 253, § 146.]

§ 6059-147. Reshipment—Cost, etc.

In addition to the liability mentioned in the last section, a marine insurer is bound for damages, expenses of discharging, storage, reshipment, extra freight, and all other expenses incurred in saving cargo reshipped pursuant to the last section, up to the amount insured. [L. '11, p. 254, § 147.]

§ 6059-148. Insured—Entitled—Payment—When.

Upon an actual total loss, a person insured is entitled to payment without notice of abandonment. [L. '11, p. 254, § 148.]

§ 6059-149. Average Loss.

Where it has been agreed that an insurance upon a particular thing, or class of things, shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured. [L. '11, p. 254, § 149.]

§ 6059-150. Insurance Against Total Loss.

An insurance confined in terms to an actual total loss, does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the thing insured. [L. '11, p. 254, § 150.]

§ 6059-151. Abandonment—What.

Abandonment is the act by which, after a constructive total loss, a person insured by contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured. [L. '11, p. 254, § 151.]

§ 6059-152. Insured may Abandon.

A person insured by a contract of marine insurance may abandon the thing insured, or any particular portion thereof separately valued by the policy, or otherwise separately insured, and recovered for a total loss thereof, when the cause of the loss is a peril insured against:

First. If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril;

Second. If it is injured to such an extent as to reduce its value more than one-half;

Third. If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances; or,

Fourth. If the thing insured, being cargo or freight, the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. But freight cannot in any case be abandoned, unless the ship is also abandoned. [L. '11, p. 254, § 152.]

§ 6059-153. Abandonment—Unqualified.

An abandonment must be neither partial nor conditional. [L. '11, p. 255, § 153.]

§ 6059-154. Abandonment—When may be.

Abandonment must be made within a reasonable time after the information of the loss, and after the commencement of the voyage, and before the party abandoning has information of its completion. [L. '11, p. 255, § 154.]

§ 6059-155. Abandonment—When Defeated.

Where the information upon which an abandonment has been made proves incorrect, or the thing insured was so far restored when the abandon-

ment was made that there was then in fact no total loss, the abandonment becomes ineffectual. [L. '11, p. 255, § 155.]

§ 6059-156. Abandonment—How Made.

Abandonment is made by giving notice thereof to the insurer, which may be done orally, or in writing. [L. '11, p. 255, § 156.]

§ 6059-157. Notice—Requisition of.

A notice of abandonment must be explicit, and must specify the particular cause of the abandonment, but need state only enough to show that there is probable cause thereof, and need not be accompanied with proof of interest or loss. [L. '11, p. 225, § 157.]

§ 6059-158. Abandonment—Sustained—Cause Specified.

An abandonment can be sustained only upon the cause specified in the notice thereof. [L. '11, p. 256, § 158.]

§ 6059-159. Abandonment—Effect.

An abandonment is equivalent to a transfer, by the insured, of his interest, to the insurer, with all the chances of recovery and indemnity. [L. '11, p. 256, § 159.]

§ 6059-160. Abandonment—Formal Waiver.

If a marine insurer pays for a loss as if it were an actual total loss, he is entitled to whatever may remain of the thing insured, or its proceeds, or salvage, as if there had been a formal abandonment. [L. '11, p. 256, § 160.]

§ 6059-161. Agent—Insured—Become Agent—Insurer.

Upon an abandonment, acts done in good faith by those who were agents of the insured in respect to the thing insured, subsequent to the loss, are at the risk of the insurer, and for his benefit. [L. '11, p. 256, § 161.]

§ 6059-162. Acceptance not Necessary.

An acceptance of an abandonment is not necessary to the rights of the insured, and is not to be presumed from the mere silence of the insurer, upon his receiving notice of abandonment. [L. '11, p. 256, § 162.]

§ 6059-163. Acceptance Conclusive.

The acceptance of an abandonment, whether expressed or implied, is conclusive upon the parties, and admits the loss and the sufficiency of the abandonment. [L. '11, p. 256, § 163.]

§ 6059-164. Abandonment—Accepted—Irrevocable.

An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded. [L. '11, p. 256, § 164.]

§ 6059-165. Abandonment—Freight—Affected.

On an accepted abandonment of a ship, freight earned previous to the loss belongs to the insurer thereof; but freight subsequently earned belongs to the insurer of the ship. [L. '11, p. 256, § 165.]

§ 6059-166. Refusal to Accept.

If an insurer refuses to accept a valid abandonment, he is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured. [L. '11, p. 157, § 166.]

§ 6059-167. Omission to Abandon.

If a person insured omits to abandon, he may nevertheless recover his actual loss. [L. '11, p. 257, § 167.]

§ 6059-168. Valuation—When Conclusive.

A valuation in a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or total loss, if the insured has some interest at risk, and there is no fraud on his part; except that when a thing has been hypothecated by bottomry or respondentia, before its insurance, and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract. [L. '11, p. 257, § 168.]

§ 6059-169. Loss—Partial.

A marine insurer is liable upon a partial loss only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured. [L. '11, p. 257, § 169.]

§ 6059-170. Profits.

When profits are separately insured in a contract of marine insurance, the insured is entitled to recover, in case of loss, a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole. [L. '11, p. 257, § 170.]

§ 6059-171. Valuation—Apportioned.

In case of a valued policy of marine insurance on freight or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part. [L. '11, p. 257, § 171.]

§ 6059-172. Valuation—Profits.

[When profits are valued and insured by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount. [L. '11, p. 257, § 172.]

§ 6059-173. Estimating Loss—Open Policy.

In estimating a loss under an open policy of marine insurance, unless otherwise provided in the policy, the following rules are to be observed:

First. The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured;

Second. The value of the cargo is its actual cost to the insured, when laden on board, or where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in

raising money for its purchase, or to any drawback on its exportation or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival;

Third. The value of freight is the gross freight, exclusive of primage, without reference to the cost of earning it; and,

Fourth. The cost of insurance is in each case to be added to the value thus estimated. [L. '11, p. 258, § 173.]

§ 6059-174. Arrival—Damaged.

If the cargo insured against partial loss arrives at the port of destination in a damaged condition, unless otherwise provided in the policy, the loss of the insured is deemed to be the same proportion of the value which the market price at that port, of the thing so damaged, bears to the market price it would have brought if sound. [L. '11, p. 258, § 174.]

§ 6059-175. Insurer—Liable—Expenses.

A marine insurer is liable for all the expenses attendant upon a loss which forces the ship into port to be repaired; and where it is agreed that the insured may labor for the recovery of the property, the insurer is liable for the expense incurred thereby, such expense, in either case, being in addition to a total loss if that afterward occurs. [L. '11, p. 258, § 175.]

§ 6059-176. Insurer—Liable—Contribution—General Average.

A marine insurer, unless otherwise provided in the policy, is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him toward a general average loss called for by a peril insured against. [L. '11, p. 259, § 176.]

§ 6059-177. Contribution.

Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right. [L. '11, p. 259, § 177.]

§ 6059-178. One-third—New—Old.

In the case of a partial loss of a ship or its equipment, the old materials are to be applied towards payment for the new, and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs, except that he must pay for anchors and cannon in full, and for sheathing metal at a depreciation of only two and one-half per centum for each month that it has been fastened to the ship. [L. '11, p. 259, § 178.]

§ 6059-179. Other Laws—Usages Made Applicable by Contract.

A policy of marine insurance may provide that it shall be interpreted and applied according to the laws, usages and practices of any other government, and when so provided the policy shall be interpreted and applied according to the laws, usages and practices of such government. [L. '11, p. 259, § 179.]

§ 6059-180. Discrimination Prohibited.

No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals, between insurants of the same class and equal expectation of life, in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any company or agent, subagent, or broker, make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent, subagent, or broker, pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any other valuable consideration or inducement whatsoever not specified in the policy contract of insurance.

No life insurance company shall issue in this state, nor permit its agents, officers, or employees to issue in this state, agency company stock, or other stock or securities, or any special or advisory board contract, or other contract of any kind promising returns and profits, as an inducement to insurance; and no life insurance company shall be authorized, nor permitted to do business, in this state, which issues or permits its agents, officers, or employees, to issue in this state or in any other state or territory, agency company stock, or other stock or securities, or any special advisory board contract, or other contract of any kind promising returns and profits, as an inducement to insurance; and no corporation or stock company, acting as agent of a life insurance company nor any of its agents, officers, or employees, shall be permitted to agree to sell, offer to sell, or give or offer to give, directly or indirectly, in any manner whatsoever, any share of stock, securities, bonds, or agreement of any form or nature, promising returns and profits, as an inducement to insurance or in connection therewith. [L. '11, p. 260, § 180.]

§ 6059-181. Policies—By Whom Signed.

All life insurance policies delivered in this state shall be signed by the secretary or assistant secretary; or, in their absence, by a secretary pro tempore, and by the president or vice-president, or, in their absence, by two directors, of the company issuing same. [L. '11, p. 261, § 181.]

§ 6059-182. Medical Examination must be Made.

No life insurance company organized under the laws of, or doing business in, this state, shall enter into any contract of insurance upon lives within this state, except industrial insurance or where premiums are payable monthly or oftener, without having previously made, or caused to be made, a prescribed medical examination of the insured by a legally qualified practicing physician. [L. '11, p. 261, § 182.]

§ 6059-183. Policy must be Filed.

On and after January first, nineteen hundred twelve, no policy of life or endowment insurance shall be issued or delivered in this state until a copy of the form thereof has been filed at least thirty days with the commissioner, unless before the expiration of said thirty days the commissioner

shall have approved the same in writing; nor if the commissioner notifies the company in writing, that, in his opinion, the form of said policy does not comply with the requirements of the laws of this state, specifying the reasons for his opinion: Provided, That upon the petition of the company the opinion of the commissioner shall be subject to review by any court of competent jurisdiction. [L. '11, p. 261, § 183.]

§ 6059-184. Terms of Policy.

No life insurance policy, except policies of industrial insurance or where the premiums are payable monthly or oftener, shall be issued or delivered in this state on and after January first, nineteen hundred and twelve, unless it contains in substance the following provisions:

(1) A provision that the insured is entitled to a grace of at least thirty days within which the payment of any premium after the first year may be paid, subject, at the option of the company, to an interest charge not in excess of six per centum per annum for the number of days of grace elapsing before the payment of the premium, during which period of grace the policy shall continue in force, but in case the policy becomes a claim during the said period of grace before the overdue premium or the deferred premiums of the policy year, if any, are paid, the amount of such premiums, with interest on any overdue premium, may be deducted from any amount payable under the policy in settlement.

(2) A provision that [the] policy, so far as it relates to life or endowment insurance, shall be incontestable after two years from its date of issue except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war.

(3) A provision that the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties.

(4) A provision that if the age of the insured has been misstated the amount payable under the policy shall be such as the premium would have purchased at the correct age.

(5) A provision that the policy shall participate in the surplus of the company annually or quinquennially.

(6) A provision specifying the option to which the policy-holder is entitled in the event of default in a premium payment after three full annual premiums shall have been paid.

(7) A provision that after the policy has been in force for three full years, the company at any time, while the policy is in force, will advance, on proper assignment or pledge of the policy and on the sole security thereof, at a specified rate of interest not exceeding six per centum per annum, a sum equal to, or at the option of the owner of the policy less than, ninety per centum of the reserve at the end of the current policy year on the policy and on any dividend additions thereto, less a sum not more than two and one-half per centum of the amount insured by the policy and of any dividend additions thereto; and that the company will deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year and may collect interest in advance on the loan to the end of the current policy year; which pro-

vision may further provide that such loan may be deferred for not exceeding six months after the application therefor is made.

(8) A table showing in figures the loan value, if any, and the options available under the policy each year upon default in premium payments, during at least the first twenty years of the policy, or for its life if maturity is less than twenty years, beginning with the year in which such values and options first become available.

(9) In case the proceeds of a policy are payable in installments or as an annuity, a table showing the amounts of the installments or annuity payments.

(10) A provision that the holder of a policy shall be entitled to have the policy reinstated at any time within three years from the date of default, unless the cash value has been duly paid, or the extension period expired, upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company upon said policy with interest at a rate not exceeding six per centum per annum payable annually.

Any of the foregoing provisions or portions thereof not applicable to single premium or nonparticipating or term policies shall to that extent not be incorporated therein. [L. '11, p. 261, § 184.]

§ 6059-185. Policy Binding on Company.

In any claim arising under a policy which has been issued in this state by any life insurance company, without previous medical examination, or without the knowledge and consent of the insured, or, if said insured is under eighteen years of age, without the consent of the parent, guardian or other person having legal custody of the said minor, the statements made in the application as to age, physical condition, and family history of the insured, shall be held to be valid and binding upon the company, but the company shall not be debarred from proving as a defense to such claim that said statements were willfully false, fraudulent, or misleading. Every policy, except industrial or those calling for premiums monthly or oftener, shall have attached thereto a correct copy of the application, including all answers made by the applicant, and unless so attached the same shall not be considered a part of the policy or received in evidence. [L. '11, p. 263, § 185.]

§ 6059-186. Assessment Life Insurance.

No life insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments or calls made upon its members, shall do business within this state, except such companies or associations as are now licensed to do business within this state, and which shall value their assessment policies, or certificates of membership as yearly renewable term contracts according to the standard of valuation of life insurance policies prescribed by the laws of this state.

Every such company or association must have assets of at least two hundred thousand dollars invested in securities such as are approved by this act, and must have paid in full all legal death claims for the last twelve months.

Every such company or association shall, on or before February fifteenth of each year, file with the commissioner a statement, upon a form to be prescribed and furnished by him, showing the true condition of the company or association as of December thirty-first next preceding, and shall pay a premium tax as otherwise provided in this act. [L. '11, p. 264, § 186.]

§ 6059-187. Health and Accident Insurance.

No policy of insurance against loss or damage from disease or by bodily injury by accident, or both, of the assured, shall be issued or delivered in this state until a copy of the form thereof and the table of rates or manual of risks of the company has been filed at least thirty days with the commissioner, unless before the expiration of said thirty days the commissioner shall have approved the same in writing; nor if the commissioner notifies the company in writing that in his opinion the form of said policy does not comply with the requirements of the laws of this state, specifying the reasons for his opinion: Provided, That upon the petition of the company, the opinion of the commissioner shall be subject to review by any court of competent jurisdiction; nor shall such policy be so issued or delivered unless every portion except the questions and answers in the application is plainly printed in type not smaller than long primer or ten point type, nor unless all exceptions and conditions are printed with the same prominence as the benefits to which such exceptions and conditions apply, nor unless it contains in substance the following provisions:

(1) A provision that such policy, with a copy of the application thereof, if any, and of such other papers as may be attached thereto or indorsed thereon shall constitute the entire contract of insurance; except as it may be affected by any table of rates or classification of risks filed by the company with the commissioner; and except that this provision shall not be required upon policies of industrial insurance, or where the premiums are payable monthly or oftener.

(2) A provision that specifies the time within which notice of accident or disability shall be given, which time shall be not less than ten days from the date of the accident or the beginning of the disability from sickness upon which claim is based: Provided, however, That in case of accidental death, immediate notice thereof may be required; unless the notices herein specified may be shown not to have been reasonably possible.

(3) A provision that notice of a claim for indemnity shall be deemed sufficient when given to the company.

(4) If a past due premium shall be accepted by the company, or by a branch office, or by an authorized agent of the company in the city, town, or county in which the insured shall reside, such acceptance shall reinstate the policy in full as to disability resulting from accidental bodily injuries thereafter sustained, but shall only reinstate the policy as to disability from disease beginning more than ten days after the date of such acceptance.

(5) A provision that if the insured is injured or contracts disease after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act pertaining to any occupation so classified, the company shall pay such proportion of the indemnities provided in the policy as the premium paid would have purchased at the rate, but within the limits fixed by the company, for

such more hazardous occupation according to the company's rates and classification of risks filed with the commissioner in this state at, or prior to the date of issuance of the policy under which indemnity is claimed.

(6) A provision that the company will pay the benefits promised within sixty days of the receipt by it of due proofs of death or disability.

(7) A provision that the policy may be canceled at any time by the company by giving the insured written notice of cancellation, and paying in cash or mailing by registered letter with proper postage affixed thereon, addressed to the insured at his usual or last known postoffice address, a postoffice or express company money order or bank draft for the unearned portion of the premium, but that the cancellation shall be without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect. [L. '11, p. 264, § 187.]

§ 6059-188. Prohibitions.

No such policy insuring against accidental bodily injuries or disease or death shall be issued or delivered in this state, if it contains in substance any of the following provisions:

(1) A provision limiting the time within which proofs of claims shall be furnished to the company to a period less than ninety days from the date of death, dismemberment, or loss of sight or from the termination of any other disability.

(2) A provision that such policy shall authorize the deduction of any premium or assessment from any indemnity payable under the terms of the policy, except such premium or assessment as may be due or covered by written order or note at the time of payment of the indemnity.

(3) A provision limiting the amount of indemnity to be paid to a sum less than the indemnity as stated in the policy and for which the premium has been paid: Provided, however, If the assured shall carry other insurance covering the same hazard without giving written notice to the companies issuing the policies, then, and in that case, each company shall be liable only for such proportionate amount of benefits as the indemnity promised bears to the total amount of indemnity in all the policies covering such hazard, and for the return of such part of the premium paid as shall exceed the pro rata of the premium for the benefits paid. [L. '11, p. 266, § 188.]

§ 6059-189. Blanket Policies not Affected.

Nothing in this act shall affect any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, copartnership, association, or individual employer, police or fire department, underwriters' corps, salvage bureau, or life associations or organizations, when the officers, members, or employees or classes or departments thereof are insured against specified accidental bodily injuries or diseases while exposed to the hazards of the occupation or otherwise, for a premium intended to cover the risks of all persons insured under such policy; nor shall anything in sections 6059-187 and 6059-188 apply to or affect contracts of life insurance, or contracts supplemental thereto, which shall contain provisions intended to safeguard such life insurance against lapse, or that shall provide a special surrender value therefor in the event that the assured thereunder shall, by reason of accidental bodily injury or

disease, be unable to continue the premium payments thereon. [L. '11, p. 267, § 189.]

§ 6059-190. Immediate Disposal of Notes Prohibited.

It shall be unlawful for any company or agent thereof to hypothecate, sell, or dispose of a promissory note, received in payment for any part of a premium on a policy of insurance applied for under the provisions of this article, prior to the delivery of the policy to the applicant. [L. '11, p. 268, § 190.]

§ 6059-191. Penalties.

Any insurance company knowingly and willfully violating any of the provisions of this article shall be fined in any sum not exceeding one thousand dollars.

Any insurance agent knowingly and willfully violating any of the provisions of this article shall be fined in any sum not exceeding five hundred dollars and shall have his license revoked. [L. '11, p. 268, § 191.]

§ 6059-192. Fraternal Exempt.

Nothing in this article shall be construed as applying to fraternal beneficiary associations, societies, or orders with representative form of government, operating on a lodge system, or the beneficiary certificate or policy issued by them. [L. '11, p. 268, § 192.]

§ 6059-193. Surety Companies may Execute Bond, etc.

Whenever any bond, recognizance, obligation, stipulation, or undertaking is by law, state, municipal, or otherwise, or by the rules, or regulations of any board, court, judge, body, or organization, or officer, state, municipal, or otherwise, required or permitted to be made, given, tendered, or filed, for the security or protection of any person or persons, corporation, municipality, state, or any department thereof, or any other organization whatever, conditioned for the doing or not doing of anything in such bond, recognizance, obligation, stipulation, or undertaking, specified, any and all heads of departments, public officers, state, county, town, school district, or other municipality, and any and all boards, courts, judges, and municipalities, now or hereafter required or permitted to accept or approve of the sufficiency of any such bond, recognizance, obligation, stipulation, or undertaking, may, in the discretion of such head of department, court, judge, public officer, board, or municipality, accept such bond, recognizance, obligation, stipulation, or undertaking, and approve the same whenever the same is executed, or the conditions thereof are guaranteed, solely by a company admitted and authorized to transact such business in this state in accordance with the requirements of this act, but no such security shall be accepted on any bond for an amount in excess of ten per cent of the paid-up cash capital, and surplus.

Whenever any such bond, recognizance, obligation, stipulation, or undertaking is so required to be made, given, tendered, or filed with one surety, or with two or more sureties, the execution of the same, or the guaranteeing of the performance of the conditions thereof, shall be sufficient when executed or guaranteed solely by such company, so authorized, and shall be in

all respects a full and complete compliance with every requirement of every law, ordinance, rule or regulation, that such bond, undertaking, recognizance, obligation or stipulation shall be executed or guaranteed by one surety, or by two or more sureties, or that such sureties shall be residents, householders, or freeholders, or both, and a full and complete compliance with every other requirement of every law, ordinance, rule, or regulation, relating to the same, and no justification by such company shall be necessary or required, and any and all heads of departments, court, judges, public officers, boards, and municipalities, whose duties it may be, or shall hereafter be, to accept or approve the sufficiency of any such bond, recognizance, obligation, stipulation, or undertaking, may accept and approve the same, when executed or guaranteed solely by such company. [L. '11, p. 268, § 193.]

§ 6059-194. Premium—May be Taxed as Costs.

Any receiver, assignee, trustee, guardian, executor, administrator, committee, or other fiduciary, required by law to give bonds as such, may include as a part of his lawful expenses, such reasonable sum paid to such a corporation for such suretyship not exceeding one per cent per annum on the amount of said bond, as the head of the department, court, judge, or officer by whom, or the court or body by which he was appointed, allows, and in all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending: Provided, That the premium or charge for bonds given by surety companies for appointive or elective officers of the state, counties and cities of the first, second and third class and towns shall be paid by the state, county, city or town respectively: Provided further, That no such premium or charge shall exceed one-half of one per cent per annum on the amount of such bond, and validating such payments heretofore made. [L. '11, p. 270, § 194; L. '13, p. 138, § 1.]

§ 6059-195. Release from Liability.

Any company executing any bond, recognizance, obligation, stipulation, or undertaking, and any such surety may be released from its liability on the same terms and conditions as are or may be by law prescribed for the release of individuals upon any such bond, recognizance, obligation, stipulation, or undertaking; it being the true intent and meaning of this act to enable companies created for the purpose to execute and become surety on bonds, recognizances, obligations, stipulations, or undertakings, required, or permitted by law, state, or municipal, or otherwise, or by the rules or regulations of any court, judge, officer, board, city charter, village, town, organization, or otherwise to be released from liability thereon in like manner and upon like terms and conditions as sureties are or may be. [L. '11, p. 270, § 195.]

§ 6059-196. Failure to Discharge Contract—Forfeiture.

If any such company shall neglect, fail, or refuse to pay any final judgment or decree, rendered against it, upon any such recognizance, bond, stipulation, or undertaking made or guaranteed by it, in this state, for the period

of thirty days after any such judgment or decree shall have been finally determined in case of an appeal, or within thirty days after the time for taking an appeal has expired when no appeal is taken from such judgment or decree, or in case an appeal be taken and the same be dismissed before final determination on appeal, then within thirty days from such dismissal, it shall forfeit all right to do business in this state and the commissioner shall thereupon revoke its license and the license of its agent. [L. '11, p. 270, § 196.]

§ 6059-197. Formation of Company—Purposes—Requirements.

Every domestic or foreign company organized for the purpose of insuring or guaranteeing the owners or encumbrancers of property within this state against loss by reason of any incorrect statement in the guaranteed certificate of title or policy of title insurance, or other guaranty of title, issued thereon, or by reason of any unexcepted lien or encumbrance upon, or defect in the title thereto, shall from and after the taking effect of this act and before issuing any guaranteed certificate of title, or policy of title insurance, or other guaranty of title deposit with the state treasurer, as a guaranty fund, securities to the amount specified in this act and of the character hereinafter set forth: Provided, That every such company must, before it may issue any policy of title insurance or guaranteed certificates of title, and for so long a time as it may continue to issue any policies of title insurance or guaranteed certificates of title, own and maintain a complete set of tract indexes of the county in which its principal office within this state is located. [L. '11, p. 271, § 197.]

§ 6059-198. Classes of Securities.

Such guaranty fund shall be composed of securities specified as authorized investments in this act: Provided, That any domestic company, owning, at the time this act takes effect, stocks of any national or state bank doing business in this state, which according to its latest report to the comptroller of the currency or the state bank examiner, has its capital fully paid, and has in addition thereto a surplus fund amounting to not less than twenty per cent of its capital, may deposit such stocks at par value thereof with the state treasurer, in lieu of the securities authorized by this act, until the same under the provisions of this act, can be exchanged or converted into securities authorized by this act: Provided, however, That not to exceed forty per cent of the total capital stock of any such bank shall be deposited with the state treasurer as part or whole of any such guaranty fund. All such securities shall be registered in the name of or indorsed or assigned to said state treasurer officially, as the occasion and the due and orderly course of business may require. The securities so deposited shall be held by the state treasurer as a special guaranty fund, securing the faithful performance on the part of any such company of all its undertakings and liabilities upon its guaranteed certificates of title, policies of title insurance, or other guaranties of title to property and to the extent of any outstanding liabilities thereon, shall not be subject to any other outstanding liabilities of the company. [L. '11, p. 271, § 198.]

§ 6059-199. Conditions of Deposit.

That such deposit shall be by the state treasurer held subject to the following conditions:

(1) The state treasurer shall deliver to the company depositing such guaranty fund a receipt in full for all securities so deposited with him. The company may from time to time withdraw securities or any part thereof on depositing with said state treasurer cash or other authorized securities, so as at all times to maintain the value of said guaranty fund deposit at not less than the amount required by this act.

(2) All interest or dividends accruing on said securities deposited with the state treasurer under authority of this act shall belong to and at all times be available to the company making said deposit and the said state treasurer shall permit said company so long as it shall continue solvent to collect the interest or dividends on said securities so deposited. The state treasurer shall be the agent of both parties to receive, receipt for and pay over said interest or dividends when the same are paid to him by reason of the custody of said deposit, and he is hereby authorized to make such indorsements on said securities as the occasion and the due and orderly course of business may require. The rights of said company to demand of and receive from the state treasurer said interest or dividends, shall be subject, however, to the provisions of the following paragraph.

(3) If, pursuant to liability on a guaranteed certificate of title, or policy of title insurance or other guaranty of title to property, a judgment shall be entered in a court of general jurisdiction in this state against a company which has made a deposit of securities with the state treasurer subject to the provisions of this act and such judgment shall have become final either by failure to appeal, dismissal of appeal, or by affirmance on appeal, or otherwise, and such judgment shall not be paid and satisfied in full within thirty days after the finality of said judgment has become fixed, then in every such case said judgment may be enforced against said securities so deposited with the state treasurer upon petition of the judgment creditor in the same cause wherein judgment was obtained, setting forth the facts aforesaid, whereupon it shall be the duty of the court wherein said judgment is entered to direct the issuance of a special execution directed to the sheriff of the county in which the capital of the state is situated, which execution shall be as near as may be in the usual form and shall require on the part of said sheriff, the sale of said securities or so much thereof as may be necessary to the satisfaction of said judgment. When application is made for the issuance of said special execution herein provided for, and the court allows the same, the order in which said special execution is authorized, shall direct that service of a copy of the said judgment and the said petition shall be made within five days thereafter upon the state treasurer. All proceedings relating to the enforcement of said writ of execution against said securities shall conform as near as may be to the practice in ordinary cases except as herein otherwise specially provided. Proceedings under said execution shall be a sufficient authority where notices aforesaid have been served on said state treasurer for the delivery by said state treasurer to the sheriff of the securities to be sold upon said execution.

(4) Except as herein provided, the state treasurer shall hold intact the securities deposited with him and shall retain the same until such time as all

liabilities under any guaranteed certificate of title, or policy of title insurance, or other guaranty of title, issued by the company having deposited such securities, shall have legally terminated, or until such time as all liabilities of said company under such guaranteed certificates of title or policies of title insurance or other guaranties of title, shall have been assumed by some other title insurance company of equal financial standing and responsibility, authorized to transact business in this state, upon which conditions alone and on application of said company verified by the oath of its president and of its secretary, and upon satisfactory examination of its books, and of its officers under oath that such conditions have been met, the state treasurer is authorized and it shall be his duty to forthwith return the securities to the said company. On return of the securities, the certificates of authority issued to said company by the state insurance commissioner shall be revoked and notice thereof given in the same manner as provided for in the next succeeding paragraph:

(5) Provided, however, That if the aforesaid guaranty fund is at any time impaired by reason of the payment of any judgment against the company depositing such funds or by reason of the nonpayment of the annual fee as herein provided, or at all, and remains so impaired for a period of thirty days after notice to the company, the commissioner is hereby authorized and it shall be his duty to immediately revoke the certificate of authority granted said company, and to publish a notice of such revocation in a daily paper of general circulation, published in the city wherein said company has its principal office at least once in each week for six successive weeks, the expense of such publication to be chargeable against the said guaranty fund of said company. [L. '11, p. 272, § 199.]

§ 6059-200. Annual Fee.

That the company so depositing such securities shall on or before the second Monday in January of each year that such securities or any part thereof remain on deposit with the state treasurer as provided by this act, pay to the state treasurer for the use of the state an annual fee equal in amount to one-tenth of one per centum of the value of the securities so deposited by it, and should the same not be paid within thirty days thereafter, the state treasurer is hereby authorized to sell sufficient of said securities to pay the same. [L. '11, p. 275, § 200.]

§ 6059-201. Penalty for Noncompliance.

It shall be unlawful for any company to engage in said business of insuring or guaranteeing the owners or encumbrancers of property against loss as hereinbefore specified, unless such company shall have complied with all of the provisions of this act; and if any company, its agent or attorney shall issue any guaranteed certificate of title, or policy of title insurance, or other guaranty of title to property, or guarantee or insure any owner or encumbrancer of property against loss as hereinbefore specified, without having complied with the laws of this state with regard thereto, such company, or its agent, or attorney, issuing such guaranteed certificate of title, or policy of title insurance, or other guaranty of title, or undertaking such guaranty or insurance shall be guilty of a misdemeanor and be subject to a fine of

not less than one hundred dollars nor more than five hundred dollars for each such offense, in the discretion of the court. [L. '11, p. 275, § 201.]

§ 6059-202. Annual Financial Statements.

Every company engaged in part or wholly in said business of insuring or guaranteeing the owners or encumbrancers of property against loss as hereinbefore specified, shall on or before the first day of February in each and every year make and file with the commissioner a statement verified by oath of the president and secretary of such company, showing the financial condition of such company on the thirty-first day of December next preceding, and shall show:

- (1) The amount of the capital stock of the company.
- (2) The property or assets held by the same, including securities on deposit with the state treasurer as a guaranty fund.
- (3) The income of said company from title insurance during the preceding year.
- (4) The amount and character of risks written during the same period, the amount and character of risks expired during the same period, and the total amount and character of risks outstanding on the thirty-first day of December next preceding.

If the provisions of this section are not complied with on or before the fifteenth day of February in each year, the commissioner shall revoke the certificate of authority issued to the company. [L. '11, p. 275, § 202.]

§ 6059-203. Expiration of Certificate of Authority—Renewal—Suspension.

Every certificate of authority granted in pursuance of the provisions of this act to a company engaged wholly or in part in said business of insuring or guaranteeing the owners or encumbrancers of property against loss as hereinbefore specified, shall expire on the first day of April after the date of issue. The certificate of authority may be renewed from year to year upon application to the commissioner and upon evidence of compliance by the company with the provisions of this act. If the commissioner is not satisfied that the securities composing the guaranty fund of any such company remain secure, he may suspend the authority of such company to do a title insurance business until any impairment or depreciation of such guaranty fund is made good. [L. '11, p. 276, § 203.]

§ 6059-204. Taxation.

Every such company engaged wholly or in part in said business of insuring or guaranteeing the owners or encumbrancers of property against loss as hereinbefore specified, shall be taxed on the basis of the physical property owned by it in the county where such property is located, in accordance with the general laws relating to taxation in this state, and not otherwise. [L. '11, p. 277, § 204.]

§ 6059-205. Owner and Encumbrancer Defined.

The terms "owner" and "encumbrancer" as used throughout this article shall be construed to include anyone having an insurable interest in property. [L. '11, p. 277, § 205.]

§ 6059-206. Fraternal Benefit Societies Defined.

Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 6059-210 hereof, is hereby declared to be a fraternal benefit society. [L. '11, p. 277, § 206.]

§ 6059-207. Lodge System Defined.

Any society having a supreme governing or a legislative body and subordinate lodges or branches by whatever name known, in which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such societies to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system. [L. '11, p. 277, § 207.]

§ 6059-208. Representative Form of Government Defined.

Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided, That the elective members shall constitute a majority in the number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws: Provided, further, That the meetings of the supreme or governing body, and the election of officers, representatives, or delegates shall be held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. [L. '11, p. 277, § 208.]

§ 6059-209. Exemptions.

Except as herein provided, such societies shall be governed by the provisions of this article and shall be exempt from all other provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereinafter enacted shall apply to them unless they be expressly designated therein. [L. '11, p. 278, § 209.]

§ 6059-210. Benefits.

(1) Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age: Provided, That the period of life at which the payment of benefits for disability on account of old age shall commence, shall not be under seventy years, and may provide for monuments or tombstones to the memory of the deceased members and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificates as the laws of the society

may provide: Provided, That nothing in this article contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the terms for which the benefit certificate may be issued. Such society shall, upon written application of the members, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contributions, against the certificate with interest payable or compounded annually at a rate not lower than four per cent per annum: Provided, That this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contribution and to contracts affected by such readjustment.

(2) Any society which shall show by the annual valuation hereinafter provided for, that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American Experience Table and four per cent interest, may grant to its members, extended and paid-up protection or such withdrawal equities as its constitution and laws may provide: Provided, That such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. [L. '11, p. 278, § 210.]

§ 6059-211. Beneficiaries.

The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree ascending or descending, father in law, mother in law, son in law, daughter in law, stepfather, stepmother, stepchildren children by legal adoption, or to a person or persons dependent upon the member: Provided, That if after the issuance of the original certificate the member shall become dependent upon a home maintained by the society for the dependent members or upon a subordinate lodge or society of the order of which he is a member, or upon an incorporated charitable institution, he shall have the privilege with the consent of the society, of making such home, lodge, society or institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules, or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member: Provided, That any society may, by its laws, limit the scope of beneficiaries within the above classes. [L. '11, p. 279, § 211.]

§ 6059-212. Qualifications for Membership.

Any society may admit to beneficiary membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified practicing physician and whose examination has been supervised and approved in accordance with the laws of the society: Provided, That any beneficiary member of such society who shall apply for a certificate providing for disability benefits, need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. [L. '11, p. 280, § 212.]

§ 6059-213. Certificate.

Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution, or laws duly made or enacted subsequent to the issuance of the benefit certificates, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. [L. '11, p. 280, § 213.]

§ 6059-214. Funds.

(1) Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its law. Unless otherwise provided in the contract, such funds shall be held, invested, and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 6059-210 of this article. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of said funds: Provided, That no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August twenty-third, eighteen hundred and ninety-nine, or any higher standard with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

(2) Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. [L. '11, p. 281, § 214.]

§ 6059-215. Investments.

Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies:

Provided, That any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this article for the investment of funds. [L. '11, p. 282, § 215.]

§ 6059-216. Distribution of Funds.

Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes, or the net accretions of either or any of said funds, shall be used for expenses. [L. '11, p. 282, § 216.]

§ 6059-217. Organization.

Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign, giving their addresses, and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

First. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or to lead to confusion.

Second. The purpose for which it is formed, which shall not include more liberal powers than are granted in this article: Provided, That any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised.

Third. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate. Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this article, and all provisions of law have been complied with, the commissioner shall so certify and retain and record, or file, the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the commissioner, said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and

laws, and shall issue to each such applicant, a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate, nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society, nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated, nor until there has been submitted to the commissioner, under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August twenty-third, eighteen hundred and ninety-nine, or any higher standard at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum, nor until it shall be shown to the commissioner by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year as hereinafter provided, returned to said applicants.

The commissioner may make such examination and require such further information as he deems advisable, and upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The commissioner shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner, upon cause shown, unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided, and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organi-

zation and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void.

Every society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. [L. '11, p. 282, § 217.]

§ 6059-218. Powers Retained—Reincorporation—Amendments.

Any society now engaged in transacting business in this state may exercise, after the passage of this act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this act, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided herein or in its constitution and laws and all such amendments shall be filed as original articles of incorporation are required to be filed, and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws. [L. '11, p. 285, § 218.]

§ 6059-219. Mergers and Transfers.

No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer which shall be filed as original articles of incorporation are required to be filed, together with a sworn statement of the financial condition of each of said societies, by its president and secretary, or corresponding officers, and a certificate of such officers duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract, financial statements and certificates, the commissioner shall examine the same, and, if he shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect and thereupon the said contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the state insurance commissioner. [L. '11, p. 286, § 219.]

§ 6059-220. Annual License.

Societies which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage

of this act, and the authority of such societies may thereafter be renewed annually, but in all cases to determine on the first day of the succeeding April: Provided, That the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner ten dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this article. [L. '11, p. 287, § 220.]

§ 6059-221. Admission of Foreign Society.

No foreign society now transacting business, organized prior to the passage of this act, which is not now authorized to transact business in this state, shall transact any business herein without a license from the commissioner. Any such society shall be entitled to a license to transact business within this state upon filing with the commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer, a power of attorney to the commissioner as hereinafter provided; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner of this state; a certificate from the proper official in its home state, province, or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts, and upon furnishing the commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding April: Provided, That such license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this article and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the commissioner ten dollars. When the commissioner refuses to license any society, or revoke its authority to do business in this state, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the state: Provided, That nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein. [L. '11, p. 287, § 221.]

§ 6059-222. Power of Attorney and Service of Process.

Every society, whether domestic or foreign, now transacting business in this state shall, within thirty days after this act takes effect, and every such society hereafter applying for admission, shall before being licensed, appoint

in writing the insurance commissioner and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, certified by said commissioner, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner, in his absence upon the person in charge of his office, and shall be deemed sufficient service upon such society: Provided, That no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than forty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner, he shall forthwith forward by registered mail, one of the duplicate copies prepared and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. [L. '11, p. 288, § 222.]

§ 6059-223. Place of Meeting—Location of Office.

Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state. But its principal office shall be located in this state. [L. '11, p. 289, § 223.]

§ 6059-224. No Personal Liability.

Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society, but the same shall be payable only out of the funds of such society and in the manner provided by its laws. [L. '11, p. 289, § 224.]

§ 6059-225. Waiver of the Provisions of the Laws.

The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members. [L. '11, p. 290, § 225.]

§ 6059-226. Benefits not Attachable.

No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process, or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment. [L. '11, p. 290, § 226.]

§ 6059-227. Constitution and Laws—Amendment.

Every society transacting business under this act, shall file with the commissioner a duly certified copy of all amendments of or additions to its constitution and laws, within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society shall be prima facie evidence of the legal adoption thereof. [L. '11, p. 290, § 227.]

§ 6059-228. Annual Reports.

Every society transacting business in this state, shall annually, on or before the fifteenth day of February, file with the commissioner, in such form as he may require, a statement under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for one year ending on that date and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required, each society shall annually report to the commissioner, a valuation of its certificates in force on the thirty-first day of December, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses: Provided, That the first report of valuation shall be made as of December thirty-first, nineteen hundred and twelve. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August twenty-third, eighteen hundred and ninety-nine, or, at the option of the society, any higher table, or at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per cent per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, That where a com-

bined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience and in such case a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

Beginning with the year nineteen hundred and fourteen, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year, or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum. [L. '11, p. 290, § 228.]

§ 6059-229. Provisions to Insure Future Security.

If the valuation of the certificates, as hereinbefore provided, on December thirty-first, nineteen hundred and seventeen, shall show that the present value of future net contributions, together with the admitted assets, is less than ninety per cent of the present value of the promised benefits and accrued liabilities, such society shall be required thereafter to reduce such deficiency not less than five per centum of the total deficiency on said December thirty-first, nineteen hundred and seventeen, at each succeeding triennial valuation. If at any succeeding triennial valuation such society does not show such percentage of improvement, the commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has not made the percentage of improvement required herein, the commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provision of section 6059-230, or, in the case of a foreign society, he may cancel its license to transact business in this state.

Any such society, shown by any triennial valuation subsequent to December thirty-first, nineteen hundred and seventeen, not to have made the improvement herein required shall, within one year thereafter, complete such deficient improvement, or thereafter, as to all new members admitted, be subject, so far as stated rates of contribution are concerned, to the provisions of section 6059-217, applicable in the organization of new societies: Provided, That the contributions and funds of such new members shall be kept separate and apart from the other funds of the society until the required improvement shall be shown by valuation. If such required improvement is not shown by the succeeding triennial valuation, then the said new mem-

bers may be placed in a separate class and their certificate valued as an independent society in respect to contributions and funds. [L. '11, p. 292, § 229.]

§ 6059-230. Examination of Domestic Societies.

The commissioner, or his deputy or examiner shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examinations, and he or his deputy, or examiner, shall have free access to all the books, papers, and documents that relate to the business of the society and may summon and qualify as witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined, upon statement furnished by the commissioner, and the examination shall be made at least once in three years.

Whenever after examination the commissioner is satisfied that any domestic society has failed to comply with any provisions of this act, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred, or shall determine to discontinue business, the commissioner may present the facts relating thereto to the attorney general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business, and the commissioner shall be appointed receiver of such society, as is provided in case of insolvency of insurance companies, and shall proceed at once to take possession of the books, papers, moneys and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney general against any such society until, after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced. [L. '11, p. 293, § 230.]

§ 6059-231. Application for Receiver, etc.

No application for injunction against or proceedings for the dissolution of or appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney general. [L. '11, p. 295, § 231.]

§ 6059-232. Examination of Foreign Societies.

The commissioner, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. The said commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and

other persons in relation to the affairs, transactions and condition of the society. He may, in his discretion, accept in lieu of such examinations, the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination, shall be paid by the society upon statement furnished by the commissioner.

If any such society or its officers refuses to submit to such examination or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner, relating to the condition and affairs of the society, and during such suspension the society shall not write new business in this state. [L. '11, p. 295, § 232.]

§ 6059-233. No Adverse Publications.

Pending, during or after an examination or investigation of any such society, either domestic or foreign, the commissioner shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report, or finding and to make such showing in connection therewith as it may desire. [L. '11, p. 295, § 233.]

§ 6059-234. Revocation of License.

When the commissioner on investigation is satisfied that any foreign society transacting business under this act has exceeded its powers, or has failed to comply with any provisions of this act, or is conducting business fraudulently, or is not carrying out its contracts in good faith he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If on the date named in said notice such objections have not been removed to the satisfaction of the said commissioner or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction as provided in section 6059-221. [L. '11, p. 296, § 234.]

§ 6059-235. Exemption of Certain Societies.

Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias, exclusive of the insurance department of the Supreme Lodge of Knights of Pythias, and the Junior Order of United American Mechanics, exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United American Mechanics, or societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to any association of local lodges of a society now doing busi-

ness in this state which provides death benefits not exceeding three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year: Provided, always, That any such domestic order or society which has more than five hundred members, and provides for death or disability benefits, and any such domestic lodge, order, or society which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this article. The commissioner may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article.

No society, which is exempt by the provisions of this section from the requirement of this article shall give or allow or promise to give or allow, to any person any compensation for procuring new members.

Any fraternal benefit society, heretofore organized and incorporated and operating within the definition set forth in sections 6059-206, 6059-207, and 6059-208, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this act, and shall have all the privileges and shall be subject to all the provisions and regulations of this article, except that the provisions of this article requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits, shall not apply to such society. [L. '11, p. 296, § 235.]

A domestic fire insurance company authorized to and doing a fire and plate glass insurance business prior to the adoption of the insurance code is subject to the restrictions of the code after its adoption, in view of this section and section 6059-20, providing that all domestic insurance companies

then or thereafter formed, and every person doing an insurance business in the state shall be subject thereto: State ex rel. North Coast Fire Ins. Co. v. Schively, 68 Wash. 148, 122 Pac. 1020.

As to plate glass insurance, see note in Ann. Cas. 1912A, 1091.

§ 6059-236. Taxation.

Every fraternal benefit society organized or licensed under this act is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal, and school tax, other than taxes on real estate and office equipment. [L. '11, p. 298, § 236.]

§ 6059-237. Penalties.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misde-

meanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof neglecting or refusing to comply with, or violating any of the provisions of this article, the penalty for which neglect, refusal, or violation is not specified in this section shall be fined not exceeding two hundred dollars upon conviction thereof. [L. '11, p. 298, § 237.]

§ 6059-238. Existing Insurance Laws Repealed.

This act may be referred to and shall be known as "The Insurance Code" and shall supersede all prior acts on the subject of the organization and government of insurance companies and insurance business, and all such prior acts are hereby repealed. [L. '11, p. 298, § 238.]

§§ 6059—6249.

Repealed. See § 6059-238.

§ 6119.

Repealed. See § 6059-238.

This section merely requires the insurance commissioner to designate two papers from the class of papers having the largest circulation, and vests a discretion in him to designate any two papers belonging to that class, although the difference in their circulation may be considerable, which discretion will not be controlled by the courts except for abuse: *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901.

Under this section, vesting in the insurance commissioner a discretion to designate a newspaper in eastern Washington from the class of papers having the largest general circulation for the publication of the annual insurance reports, the commissioner's act in designating a paper having a circulation of from six thousand to nine thousand when another paper had five times that circulation is not so arbitrary and capricious as to call for interference by the courts: *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901.

§ 6141.

Repealed. See § 6059-238.

Laws of 1905, page 373, prohibiting insurance rebates does not invalidate a note given for the premiums in violation of the statute, as against a holder of the note in due course, since it is not the policy of the law to render negotiable paper void in the hands of innocent holders where the statute has not so expressly declared: *Gray v. Boyle*, 55 Wash. 578, 133 Am. St. Rep. 1042, 104 Pac. 828.

As to the validity, in hands of bona fide holder, of negotiable contract void by statute between original parties, see notes in 4 Ann. Cas. 353, and 11 Ann. Cas. 1181.

§ 6155.

Repealed. See § 6059-238.

An accident policy with premiums payable monthly, expiring one year after issuance, which made provision for weekly indemnity for disability and referred to the special class of employment in which the insured was engaged, although it also covers loss of life from "external, violent and purely accidental means," is an "industrial" or accident policy and not a "life" insurance policy, within the meaning of this section and section 6159; hence in an action thereon, evidence as to the insured's assignment of his wages for the payment of premiums is admissible, although not part of the application: *Pride v. Continental Casualty Co.*, 69 Wash. 428, 125 Pac. 787.

As to life insurance as distinguished from other kinds of insurance, see note in 128 Am. St. Rep. 303.

§ 6158.

Repealed. See § 6059-238.

This section, declaring that the beneficiary shall be entitled to life insurance as against creditors, except that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, does not impliedly repeal section 569, providing that all life and accident insurance shall be exempt from all liability for debt, although the title of the later act is broad enough to cover the whole subject of insurance; since repeals by implication are not favored and exemption laws are favored, and the two acts are not inconsistent: *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326.

As to the liability of proceeds of life insurance for debts of beneficiary, see note in 2 Ann. Cas. 91.

This section, providing that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, has no application to insurance

the premiums on which were not paid by the deceased: *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326.

As to transfer of insurance policy on debtor's life as transfer in fraud of creditor, see note in *Ann. Cas.* 1912B, 896.

§ 6159.

See notes to § 6155.

§ 6199.

Repealed. See § 6059-238.

Under the terms of a policy of fire insurance and this section, limiting liability for

loss by fire to three-fourths of the actual value of bar fixtures, two hundred and eighty dollars, judgment for the full sum is excessive, and should be reduced to two hundred and ten dollars: *Olympia Brewing Co. v. Pioneer Mut. Ins. Assn.*, 53 Wash. 16, 101 Pac. 371.

§ 6226.

Repealed. See § 6059-238.

Under this section, costs on appeal will be allowed for the premium paid for a surety company's bond upon appeal given by a receiver, trustee, etc.: *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 137 Am. St. Rep. 1059, 109 Pac. 113.

TITLE XLVI.

INTEREST.

§ 6250.

The discounting of a note, which was originally free from the taint of usury, is not usurious where no recovery was sought against the assignee and he did not render himself liable thereon, within this section: *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110.

The discounting of a "wheat" note obligating the maker to grow and deliver certain wheat is not usurious, within this section, providing that the discounting of "commercial" paper shall be considered as a loan within the usury laws; since it is not commercial paper, within sections 3392, 3396, providing that an instrument to be negotiable must be payable in money without any promise to do any additional act: *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110.

As to the definition and tests of usury, see note in 46 Am. St. Rep. 179.

Interest is recoverable on earned premiums on an indemnity policy, from the date the balance becomes due, although the legal basis for the recovery was a subject of controversy; since the amount was due on a specific contract for the payment of money and was determinable by computation: *Empire State Surety Co. v. Moran Brothers Co.*, 71 Wash. 171, 127 Pac. 1104.

Where a tender was insufficient in amount, interest is recoverable on the amount due: *Kleeb v. McInturff*, 71 Wash. 419, 128 Pac. 1076.

The defense of usury is personal to the parties and cannot be set up by strangers who were not creditors and who took property from one of the parties subject to and with notice of an alleged usurious transaction, which created a lien on the property: *Grubb v. Stewart*, 47 Wash. 103, 91 Pac. 562.

The defense of usury is personal to the debtor and cannot be set up by a creditor to gain priority over other creditors: *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492.

The usurious discounting of a note and mortgage is no defense to a suit by the transferee against the maker: *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110.

As to purchase of accommodation paper at discount, in excess of legal rate without notice of method thereof, as usury, see note in Ann. Cas. 1912D, 887.

The defense of usury cannot be raised unless it is pleaded, especially where it does not appear on the face of the record: *Grubb v. Stewart*, 47 Wash. 103, 91 Pac. 562.

Usury to be available as a defense must be pleaded: *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492.

As to the doctrine that usury, as a defense, must be distinctly set up and must be proved as laid, see note in 5 L. R. A. 465.

§ 6251.

See notes to § 6255.

A note for five hundred dollars, given as a bonus or fee for procuring a state contract at a public sale and for furnishing nine hundred and sixty dollars to buy the land, for which latter sum a note with the maximum rate of interest was also taken, is usurious, under sections 6251, 6255, especially where the value of the service was inconsiderable, since the contract was entire and part of the consideration was illegal, and a contract usurious in part is illegal as to the whole: *Inland Trading Co. v. Edgcombe*, 57 Wash. 257, 106 Pac. 768.

§ 6255.

Since, under this section, usury does not render a note void, the defense of usury is not available against a holder acquiring the notes before maturity in good faith for value: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837.

TITLE XLVII INTOXICATING LIQUORS.

CHAPTER II. LICENSE AND REGULATION.

§ 6263.

See notes to § 6269.

This section does not require the licensee to personally pay the county treasurer before issuance of the license is ordered by the county commissioners; but the same is to be paid to the treasurer by the auditor with whom the fee is deposited upon making application, after the application is granted: *Skagit County v. American Bonding Co.*, 59 Wash. 8, 109 Pac. 199.

The sale of intoxicating liquors outside of the corporate limits of a city or town, without any license from the county commissioners, is punishable as a misdemeanor, under this section, and section 2673, providing that the doing of any act without a license, when one is required by law, shall be a misdemeanor, notwithstanding section 2962, making it a misdemeanor to sell intoxicating liquors without a license, was repealed by section 2304: *State v. Ray*, 62 Wash. 245, 113 Pac. 634.

§ 6264.

This section, providing that the mayor and council of each city shall have the sole and exclusive authority to license or prohibit the sale of intoxicating liquors is impliedly repealed by section 7507, conferring upon cities of the first class power to frame their own charters and to regulate the sale of intoxicating liquors: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

§ 6267.

The unearned portion of a county liquor license can be recovered by the licensee when his license has become inoperative by reason of the incorporation as a town of the territory in which his saloon was conducted, where the same has not passed beyond the county's control: *Bart v. Pierce County*, 60 Wash. 507, 31 L. R. A., N. S., 1151, 111 Pac. 582.

A county cannot escape repayment of the unearned portion of a liquor license, which has become inoperative, by the fact that the same has been transferred to the county school fund, and transferred to the school districts, since the school fund is a continuing fund under the control of the county, and the rule against a multiplicity of suits forbids separate actions against each school

district, as such course is not necessary: *Bart v. Pierce County*, 60 Wash. 507, 34 L. R. A., N. S., 1151, 111 Pac. 582.

§ 6269.

This section, being primarily a revenue measure, is not in pari materia and to be construed in connection with the general act of 1888 (section 6275, etc.), for the regulation of the liquor traffic, which exempted from its operation druggists dispensing liquors on the written prescription of a reputable physician; hence the provisions of both acts may be enforced and druggists must procure a state license under the revenue act, although not required to do so under the regulative act: *State v. Putnam*, 60 Wash. 386, 111 Pac. 239.

As to the licensing of druggists, see note in 129 Am. St. Rep. 294.

Under this section and section 6263, giving the county commissioners of each county the sole and exclusive authority to regulate the sale of spirituous liquors outside of the corporate limits of a town, a license is required from each county in which the steamboat sells intoxicating liquors; and the same is not excused by a state or by a federal license: *State v. Falkenstine*, 64 Wash. 432, 117 Pac. 254.

The requirement that a steamboat secure a county license for the sale of intoxicating liquors in each county through which it passes is not objectionable because it is unreasonable or prohibitory, as the legislature has the right to prohibit the sales: *State v. Falkenstine*, 64 Wash. 432, 117 Pac. 254.

As to validity of statute prohibiting drinking of intoxicating liquor or being intoxicated on passenger conveyance, see note in Ann. Cas. 1913B, 1061.

§ 6275.

See notes to §§ 6269, 8459.

§ 6288.

The right to sell or drink liquor is not a constitutional right and may be granted to one class of citizens and denied to others: *State v. Nicolls*, 61 Wash. 142, Ann. Cas. 1912B, 1088, 112 Pac. 269.

As to discrimination in respect of persons or localities in enforcing liquor license laws, see note in 9 L. R. A. 781.

SELLING OR FURNISHING LIQUORS. This section, prohibiting the sale of intoxicating liquors to Indians, is a valid exercise of the police power, inherent in state sovereignty; and accordingly does not violate the fourteenth amendment to the federal constitution in so far as it prohibits sale to Indians who are citizens; nor article 1, section 8 of the constitution conferring authority on the general government to regulate commerce with Indian tribes, in so far as it prohibits sales to Indian wards of the United States: *State v. Mamlock*, 58 Wash. 631, 137 Am. St. Rep. 1085, 109 Pac. 47.

The element of intent is not a necessary ingredient of the offense of selling liquor to an Indian of the mixed blood, the statute not using the word "knowingly" or any qualifying words: *State v. Nicolls*, 61 Wash. 142, Ann. Cas. 1912B, 1088, 112 Pac. 269.

Under the police power the legislature can prohibit the sale of liquor to an Indian of mixed blood, although he be a citizen of the United States, without violating the rights and privileges guaranteed by section 1 of the fourteenth amendment to the federal constitution: *State v. Nicolls*, 61 Wash. 142, Ann. Cas. 1912B, 1088, 112 Pac. 269.

A statute prohibiting the sale of liquor to an Indian of mixed blood having more than one-eighth Indian blood applies to all such Indians, regardless of the legal status of his white father: *State v. Nicolls*, 61 Wash. 142, Ann. Cas. 1912B, 1088, 112 Pac. 269.

The words in this section, "which produces intoxication," refer only to the antecedent essences, compounds, etc.; and an information for giving away "spirituous" liquors need not allege that it "produces intoxication," as all spirituous liquors are intoxicating: *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

A conviction of giving liquor to an Indian is sustained where there was evidence that defendant walked to a wagon with the Indian, concealing a bottle of alcohol under his coat and handed it to the Indian, who

put it in the front end of the wagon concealed in a gunny-sack, although the evidence was denied by the Indian and defendant, the credibility of the witnesses being for the jury: *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

Upon a prosecution for giving liquor to an Indian, the defendant's statement that he bought the alcohol for medicinal use in treating rheumatism may be impeached by testimony that he made the purchase for "mechanical purposes," where his purpose in making the purchase had a direct bearing upon his intent in giving it to the Indian and whether for use or for carriage as claimed by defendant: *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

As to validity and construction of statute forbidding sale of liquor to Indians, see note in Ann. Cas. 1912B, 1090.

In a prosecution for selling liquor in a dry unit in violation of the local option law, samples of liquor taken from defendant's place of business a few days after the unlawful sale are admissible in evidence as tending to show the character of his business, the samples being in the same condition as when taken: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

In a prosecution for unlawful sales of intoxicating liquors shipped into dry territory, expense bills and freight receipts issued by a railway agent tending to show shipments of casks of bottled beer from a brewery to defendant are admissible in evidence, although only carbon copies, where the originals had been delivered to the defendant and could not be produced, and the casks had been delivered to him by a drayman: *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

One who, with money furnished by an Indian, procures intoxicating liquor and delivers the same to him, is guilty of a felony within this section: *State v. Reese*, 69 Wash. 437, 125 Pac. 363.

As to loan of intoxicating liquor as sale within a prohibition statute, see note in Ann. Cas. 1913A, 471.

CHAPTER III.

CIVIL REMEDIES AGAINST LIQUOR DEALERS.

§ 6289.

Under either Ballinger's Code, section 2945, or Laws of 1905, page 120, a saloon-keeper is liable to a minor child for the damages sustained by reason of the death of her father, where he sold liquor to the deceased under circumstances which would have led a man of ordinary intelligence to believe that intoxication would probably result, and where de-

ceased became intoxicated and involved in a quarrel and was killed while making a deadly and unprovoked assault upon another; and a finding of damages in the sum of four hundred dollars will not be disturbed where the evidence was conflicting: *Woodring v. Jacobino*, 54 Wash. 504, 103 Pac. 809.

As to wife's right of action at common law against one selling liquor to her husband, see note in 40 L. R. A., N. S., 360.

CHAPTER IV.

LOCAL OPTION LAW.

§ 6292.

The local option law of this state is constitutional: *State v. Donovan*, 64 Wash. 209, 112 Pac. 260.

The local option law of 1909, being a general law applicable to all counties of the state, prevails over previous enactments, and applies to counties that had already adopted township government whereby a different system of regulation was provided, notwithstanding that an amendment to the township government act (passed previously at the same session of the legislature) provided that no act thereafter passed shall be construed as altering, amending or repealing any of its provisions since repeals by implication cannot be thus prevented: *Gunther v. Huneke*, 58 Wash. 494, 108 Pac. 1078.

This act is in direct conflict with, and being the later enactment controls, the act of March 3, 1909 (section 9339½), providing that each township in counties in which the township government has been adopted shall have the power to determine whether licenses for the sale of intoxicating liquors shall be issued therein: *Gunther v. Huneke*, 58 Wash. 494, 108 Pac. 1078.

Under the local option law making a separate unit or district of all that portion of a county outside of incorporated cities and towns, and which failed to contemplate the situation where a new town is subsequently incorporated within the prohibition district, such newly incorporated town may license the sale of intoxicating liquors within the municipality, as it might have done if previously incorporated, and without first submitting the matter to a vote: *State v. Donovan*, 61 Wash. 209, 112 Pac. 260.

The local option law of 1909 prohibits sales of intoxicating liquors by wholesalers in dry units, notwithstanding the proviso that wholesalers may deliver unbroken packages at residences in dry units, in view of the restrictions against all sales in any quantity whatsoever in dry units or the taking or soliciting of orders therein, and the often repeated use of the term "sale" whenever and wherever it was intended to permit a sale in a dry unit, which do not include sales of wholesalers, and also the safeguarding of sales by druggists in dry territory, and the general purpose and spirit of the act, all of which require that the proviso be strictly construed to conform to the language of the general provisions; consequently "sales" by wholesalers, whether located within or without the dry unit, must be made outside of the district: *State v. Robinson*, 67 Wash. 425, 121 Pac. 848.

The local option law of 1909, entitled an act to provide for the submission of

the question whether the "sale" of intoxicating liquors shall be licensed or prohibited, and providing for the enforcement of the result of elections and defining offenses thereunder, relates to but one subject sufficiently expressed in its title; and penalties for the "giving away" of liquor within a dry unit, except to guests in private houses, are germane to the subject, the word "sale" in the title not being determinative of the acts to be punished: *State v. Jones*, 66 Wash. 229, 119 Pac. 384.

In a prosecution for selling liquor in dry territory in violation of the local option laws, it is not error to refuse to give instructions as to defendant's right to sell liquor as a physician, where there was no evidence of such right or any justification for the sale: *State v. Polk*, 66 Wash. 411, 119 Pac. 846.

The uncontradicted statement of one witness that a sale of liquor was made in a town in dry territory is sufficient to support a conviction of selling liquor in violation of the local option law, although the exact place or boundaries of the town were not shown: *State v. Polk*, 66 Wash. 411, 119 Pac. 846.

§ 6293.

A special election upon the local option question cannot be held after the general election in November, 1910, except biennially on the general election day, under this section: *State ex rel. Eckdahl v. Dykeman*, 65 Wash. 580, 118 Pac. 732.

§ 6294.

Under the local option law by which the legislature intended to allow an immediate election if the people of any unit desired it, and thereafter an election should be had only at a general county or state election, a city election is a "general election" within the meaning of this section, especially in view of the history of the passage of the act showing that the several possible times for general elections were considered, and the last election preceding the regular biennial election was adopted, as giving the fairest index of the number of voters who will exercise the franchise: *State ex rel. Griffin v. Superior Court*, 70 Wash. 545, 127 Pac. 120.

A city election for the purpose of electing city officers to carry out the change to a commission form of government is a "general election," within this section: *State ex rel. Forgues v. Superior Court*, 70 Wash. 670, 127 Pac. 313.

This section is substantially complied with by giving the name of the town as their postoffice address, without specifying

any precinct, street or house number, where there was only one voting precinct in the town, and the houses were not numbered: State ex rel. Quillen v. Superior Court, 70 Wash. 343, 126 Pac. 899.

This section is mandatory, and a signature to the petition failing to give the street and house number, if any, is invalid, and cannot be counted in determining whether sufficient electors have signed the petition: State ex rel. Czerny v. Superior Court, 70 Wash. 592, 127 Pac. 207.

This section, providing that every signer of the petition in a city, as distinguished from a town, shall give his "street and house number, if any, of his residence," requires him to give his street, if any, although he has no house number: State ex rel. Czerny v. Superior Court, 70 Wash. 592, 127 Pac. 207.

§ 6297.

Under this section the clerk's certificate reciting the final result is sufficient and admissible, without a certified copy of the details of the canvass: State v. Polk, 66 Wash. 411, 119 Pac. 846.

The clerk's certificate required by this section is sufficient prima facie evidence that local option was in force in the precinct: State v. Polk, 66 Wash. 411, 119 Pac. 846.

§ 6300.

The giving away of liquor on the streets of a town within a dry unit is a violation of this section, notwithstanding the further provision aimed at gifts by dealers for the obvious purpose of evading the penalties against sales: State v. Jones, 66 Wash. 229, 119 Pac. 384.

As to local option laws as unconstitutional delegation of legislative power, see note in 1 L. R. A., N. S., 483.

§ 6303.

A citizen has no inherent right to treat another to intoxicating liquors in a licensed

saloon: Tacoma v. Keisel, 68 Wash. 685, 40 L. R. A., N. S., 757, 124 Pac. 137.

Under this section prohibiting the giving away or delivery of intoxicating liquor by any storekeeper, or the taking or soliciting of orders for a sale, in a dry unit, one may be guilty of taking or soliciting orders without being a "storekeeper": State v. Holmes, 68 Wash. 7, 122 Pac. 345.

A dealer who wrote and mailed a letter in a license city, addressed to a person in a dry district, quoting prices of liquors which it agreed to deliver at the party's address in the dry unit, and inclosing an order blank with return envelope, is guilty of taking or soliciting orders for the sale and delivery of liquors within the limits of a dry unit, within the meaning of this section, since the unlawful act was committed in the city where the letter was delivered: State v. Holmes, 68 Wash. 1, 122 Pac. 345.

In such case, both cities being in this state, no question of interstate commerce is involved: State v. Holmes, 68 Wash. 7, 122 Pac. 345.

§ 6309.

A demijohn of whisky, drawn from a barrel by a wholesale dealer within a wet district, and brought into, and delivered to a customer in, a dry district, is an "unbroken package," within the meaning of this section: State v. Maire, 66 Wash. 591, 30 L. R. A., N. S., 1051, 120 Pac. 87.

A brewery in a no-license unit is not authorized to make a delivery of a case of bottled beer at its brewery to a person calling there for it by this section: State v. Bellingham Bay Brewery, 70 Wash. 650, 127 Pac. 297.

This section does not permit the manufacturer to make sales in a no-license unit, in view of the restrictions in the act against all sales in such units: State v. Bellingham Bay Brewery, 70 Wash. 654, 127 Pac. 298.

TITLE XLVIII. IRRIGATION AND WATER RIGHTS.

CHAPTER I. APPROPRIATION OF WATERS.

§ 6316.

The right to waters by a prior appropriation thereof obtains only in the case of waters upon public lands, and not to waters upon land where the title from the government had been obtained or initiated, since the common-law doctrine of riparian rights prevails in this state and would attach to lands acquired from the government, preventing appropriation thereof: *Mason v. Yearwood*, 58 Wash. 276, 30 L. R. A., N. S., 1158, 108 Pac. 608.

School lands in a territory reserved by the federal government for the use of the common schools of the future state are public lands of the United States, within the rule that the waters of streams on public lands are subject to appropriation under the acts of Congress, 14 Stats. at Large, 253, and 16 Stats. at Large, 218, granting the right as to all public lands generally: *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 Pac. 148.

The right to obstruct the outlet of a lake, acquired by appropriation in 1883, is lost by disseizin and adverse possession, where the dam was removed in 1892, and thereafter the shores of the lake were held in open, exclusive, notorious and adverse possession for more than ten years, and until a new dam was built in 1909, without any obstruction of the lake except by permission in 1907 for four months, and except that once each year during the rainy season, without the knowledge of the owners, a few stones and pieces of wood were thrown into the narrow outlet of the lake (the work requiring about fifteen minutes) and removed in April or May thereafter: *Thomas v. Spencer*, 69 Wash. 433, 125 Pac. 361.

A speculating squatter on relinquished government land, who made no entry on his own behalf during two years, is not a bona fide settler and is not entitled to appropriate waters for irrigation: *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028.

No right to appropriate the waters of a creek for irrigation within an Indian reservation could antedate the opening of the reservation to settlement, nor could it antedate actual bona fide settlement upon contiguous lands capable of being irrigated thereby: *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028.

As to the appropriation of waters and watercourses, see note in 60 Am. St. Rep. 799.

As to ancient and modern doctrine of the relative rights of states and of riparian owners, see note in 127 Am. St. Rep. 41.

As to right to water of new spring, see note in 30 L. R. A., N. S., 1158.

Waters of a creek already appropriated are not subject to appropriation under the statute: *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143.

Where impounded waters were allowed to flow off the owner's land into a watercourse with intent to recapture it below, no more can be taken out than was allowed to flow in, as against prior appropriation of the flow of the stream, after making due allowance for waste: *Miller v. Wheeler*, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

In such a case, in reclaiming the impounded water, the owner cannot cut off any original sources or tributary springs so as to diminish the perennial flow already appropriated: *Miller v. Wheeler*, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

Where the first appropriator of water on public land has perfected his title, and proceeded with reasonable diligence in extending his cultivated area, he is entitled to the quantity of water needed to irrigate his land to the exclusion of subsequent appropriators or riparian owners: *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028.

Where a dispute arose as to the absolute right to use for irrigation the waters of a creek, and the parties agreed to divide the water half and half, and acted thereon, uninterrupted use of one-half of the water under the agreement for the period of nineteen years ripens into title thereto by adverse possession, even as against a prior appropriation; and it is immaterial that such adverse use was by a lower proprietor, the agreement being a distinct recognition of his claim and fixing the extent of it: *Allen v. Roseberg*, 70 Wash. 422, 126 Pac. 900.

As to irrigation rights of riparian owners, see note in 20 Am. St. Rep. 225; also note in 17 Ann. Cas. 829.

Intent to abandon surplus waters is not shown by the fact that the surplus was allowed to run into a natural waterway, when it appears that contracts were made with reference to the use of the accumulated waters after the swamps developed, and the water was actually used for eleven years, and made the subject of conveyance:

Miller v. Wheeler, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

An appropriation of water, prior to the vesting of riparian rights in 1897, by the application of water to irrigation purposes, is not established, reasonable diligence being lacking, where an irrigation company first started an appropriation in 1893, which was forfeited by the failure of the company and abandonment of the work, and that was followed by slight efforts toward the use of water in 1897, and an appropriation and considerable diligence in 1897: *Still v. Palouse Irr. & Power Co.*, 64 Wash. 606, 117 Pac. 466.

As to abandonment of right to water, see note in 59 L. R. A. 845.

Waters appropriated from another watershed for irrigation may be turned into and conveyed by a natural watercourse without becoming subject to the use of others, and is not lost to the appropriators by reason of the loss of identity: *Miller v. Wheeler*, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

PRESCRIPTIVE RIGHTS.—A prescriptive right to the use of water for irrigation purposes, diverted from its natural channel by an upper proprietor, is not acquired by a lower proprietor, where he and his predecessors in interest used the water for domestic and culinary purposes for five years, then for two years used it for watering stock, and then for eight years constantly used the water for the purposes of irrigation: *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423.

Waters appropriated from another watershed for irrigation, and discharged upon the owner's land, forming swamps and accumulations which percolate to and artificially augment the waters of another stream, may be impounded and used by the appropriators as their property, before it leaves their lands, as against a prior appropriator on the augmented stream: *Miller v. Wheeler*, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

No prescriptive right is acquired under a permission to use water by tapping a water company's line on the lands of a third person, the user paying therefor by keeping a dam in repair, since the user of the water was not a proprietor, and the use was permissive and not hostile: *Rhoades v. Barnes*, 54 Wash. 145, 102 Pac. 884.

*The initiation in 1898 of a prescriptive right to take water from a pipe on the lands of another is prevented from ripening by the acts of the owner in 1905, claiming the water and stopping the flow: *Rhoades v. Barnes*, 54 Wash. 145, 102 Pac. 884.

A permissive use of the surplus of appropriated waters will not ripen into rights by prescription, or under the statute of limitations, as the use must be adverse:

Miller v. Wheeler, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

An attempt to make a statutory appropriation of water, used under a license, does not amount to an adverse claim, where it was not so intended, being merely to prevent appropriation by others, and the licensor had no notice of any adverse claim: *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143.

The use of a ditch to convey waters for the statutory period, given by a license, will not ripen into a prescriptive right, where there was no repudiation of the license with notice thereof to the licensor: *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143.

As to prescriptive title to water, see note in 93 Am. St. Rep. 712; see, also, note in 21 L. R. A. 607.

As to prescriptive right to dam water, see note in 59 L. R. A. 838.

The right to appropriate land for an irrigation project depends upon the appropriator's right to the water to be used in such project: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

§ 6317.

One who failed to post any notice of appropriation of water as required by statute cannot, in the absence of any physical appropriation of the water, claim any prior appropriation thereof, as against one who had posted notice and prosecuted preliminary work: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

Under these sections, the rights after posting notice depend upon such reasonable diligence in prosecuting the work as to clearly show an intent not to abandon the appropriation, as by the expenditure of ten thousand dollars in preliminary work of great magnitude, requiring an entire season; and no want of diligence short of abandonment can be asserted by anyone except a subsequent appropriator: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

The posting of notices of appropriation of the waters of a lake upon the unoccupied land of another near the shore line of the lake is not such a trespass as to amount to an unlawful initiation of the appropriation: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

As to abandonment or loss of rights of prior appropriators, see note in 30 L. R. A. 265.

§ 6321.

An agreement for water for irrigation, calling for a certain number of miner's inches for specific tracts of land, which was binding on each parcel of land sepa-

rate and apart from the others, the conditions to be binding upon heirs and assigns, runs with the land, and places a purchaser of a tract in the situation of the original contractee: *Ulrich v. Pateros Water Ditch Co.*, 67 Wash. 328, 121 Pac. 818.

A contract for a certain number of "miner's inches" of water to be taken from an irrigation ditch is ambiguous, and may be shown by parol evidence to mean in that locality a quantity of water which would flow through an orifice one-inch square under at least a four-inch pressure; and when so explained, is sufficiently definite to admit of specific performance: *Ulrich v. Pateros Water Ditch Co.*, 67 Wash. 328, 121 Pac. 818.

As to passing of irrigation rights by conveyance and the method thereof, see note in 65 L. R. A. 407.

§ 6325.

The right to condemn rights of way for irrigation is not limited to the owners of arid land; and sufficient benefit will result to warrant condemnation for irrigation where it appears that the land is semi-arid, raising only a light crop of wheat or wheat hay or crops maturing early in July, while with irrigation it will produce abundantly almost any crop and will be increased one hundred and twenty-five dollars to one hundred and fifty dollars per acre in value: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

Condemnation for an irrigation canal by a water company owning the lands which it seeks to irrigate cannot be defeated by the fact that the company intends to sell the irrigated lands and that its purpose is speculative: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

The right to condemn rights of way for irrigation contemplates irrigation by gravity, and cannot be defeated by the fact that the land could be irrigated by pumping: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

In condemnation of waters of a lake for irrigation purposes, part of which are already used by littoral owners for irrigating their lands, an offer of the petitioner to exempt sufficient water to irrigate the lands of the littoral owners is not an attempt to pay damages in compensation other than money, in contravention of constitution, article 1, section 16, in view of the statute prohibiting the condemnation of waters needed for irrigation: *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

In eminent domain proceedings for a right of way for an irrigation ditch, draining an arm of a lake, in which defendants'

present and future loss was measured by the market value of the land at the time of the trial, it is proper to reject an offer of proof that, in preceding years while plaintiff was unlawfully draining the lake, the defendants' land not taken for the ditch was of much less value with the arm of the lake drained than it was without such drainage, since the sole purpose of the offer was to show damages prior to the proceeding in addition to the compensation to be awarded and claimed for the appropriation: *Spokane Valley Land & Water Co. v. Jones & Co.*, 68 Wash. 534, 123 Pac. 1014.

The riparian owner on a navigable lake is not given any right superior to others to appropriate the water thereof for the purpose of irrigation, by this and the next section, in the act entitled an act providing for condemnation proceedings for right of way for irrigation and relating to the right of appropriation of water: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

As to the principle of eminent domain as applied to irrigation, see note in Ann. Cas. 1912D, 1004. See, also, notes in 1 Ann. Cas. 3041 and 22 L. R. A., N. S., 162.

§ 6326.

Constitution, article 1, section 16, prohibiting the taking of private property for private use, except for drains, flumes or ditches for agricultural, etc., purposes, and article 21, section 1, providing that irrigation, etc., purposes shall be deemed a public use, confer legislative authority for this section, authorizing the condemnation of land for irrigation ditches by a private owner of agricultural lands: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

The common-law doctrine of riparian rights in the use of waters of a stream has become a rule of property in this state: *Nesalious v. Walker*, 45 Wash. 621, 88 Pac. 1032.

A riparian right to the flow of water is subject to a reasonable use for domestic and agricultural purposes by a prior riparian owner: *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141.

As to diligence in applying water to useful purposes, see note in 60 Am. St. Rep. 811.

An upper riparian owner may not impound all the waters of a natural water-course for fourteen hours out of every twenty-four without the consent of lower proprietors or the condemnation of their rights: *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091.

Equity will not, at the suit of a riparian owner, restrain the use of water diverted from a creek and required for irrigation by an adjoining owner, where ample water

is left for all uses of the riparian owner, who suffers no damage from the diversion complained of: *Methow Cattle Co. v. Williams*, 64 Wash. 457, 117 Pac. 239.

A lower riparian owner is entitled to the natural flow of the stream at regular flood seasons beneficially flooding his lands, and can restrain the impounding of such flood waters by an upper riparian owner, and their release during the summer months, to his damage, where such waters are not extraordinary and unprecedented but a usual and natural condition: *Still v. Palouse Irr. etc. Co.*, 64 Wash. 606, 117 Pac. 466.

The doctrine of riparian rights for irrigation purposes as to lands acquired from the government subsequent to March 3, 1877, has not been abrogated by the act of that date (19 Stats. at Large, 377), providing that surplus waters over and above actual appropriation and use, and waters in all lakes and rivers upon the public domain, shall remain and be free from the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing right, since the act relates only to the reclamation of desert lands: *Still v. Palouse Irr. etc. Co.*, 64 Wash. 606, 117 Pac. 466.

As to the correlative rights of upper and lower proprietors of streams, see note in 41 L. R. A. 737.

The owner of a small tract of land upon which there were springs, forming a pond about twenty feet wide by forty feet long, cannot be enjoined by a lower riparian owner from use of the same for a few geese, and horses and cattle at pasture, as the same is a reasonable use, and pollution of the stream thereby is a natural incident to proper and reasonable use thereof: *McEvoy v. Taylor*, 56 Wash. 357, 26 L. R. A., N. S., 222, 105 Pac. 851.

One who is not a riparian owner, but who diverted the waters of a spring to his own land by pipes, cannot enjoin the pollution of the waters by an upper riparian owner who had used the waters on his own lands for ten years prior to the diversion: *McEvoy v. Taylor*, 56 Wash. 357, 26 L. R. A., N. S., 222, 105 Pac. 851.

As to liability for polluting generally, see notes in 1 L. R. A. 296; 7 L. R. A. 457; 12 L. R. A. 577; 13 L. R. A. 117.

An upper proprietor, by the diversion of a natural watercourse into another channel or creek for the period of thirty years, is estopped from preventing the flow of the waters in its new course, where it appears that during such time lower proprietors had acquired title and made valuable improvements bordering upon the creek, relying on the flow of water for irrigation, and that without such irrigation their lands would be valueless, although their use had not been for the statutory prescriptive

period: *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423.

As to right to restoration to ancient channel, see note in 41 L. R. A. 750. And see note in 50 L. R. A. 845.

As to acquisition by artificial stream of character of natural watercourse, see note in 14 Ann. Cas. 909.

In an action to prevent the diversion of waters used for irrigation, the court cannot make a division of the waters between the upper and lower proprietors where there is no evidence as to the proportion to which each was entitled: *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423.

In an action to enjoin the diversion of waters of a creek by a riparian owner and for damages, there is no defect of parties defendant because the plaintiff failed to join upper appropriators of the waters: *Beck v. Bono*, 59 Wash. 479, 110 Pac. 13.

As to injunction as remedy for wrongful diversion of watercourse, see note in Ann. Cas. 1912D, 124.

The measure of damages for diverting water from a mill power, where electrical machinery was installed to operate the mill, is the cost of operating the same: *Dement Brothers Co. v. Walla Walla*, 58 Wash. 60, 107 Pac. 1038.

An owner of a mill may recover damages for the diversion of the waters of a stream used for power purposes, although the mill formerly shut down during the dry season because of insufficient water to run the mill, where it appears that while there was a general shortage through the winter months, even during the dry season there had been power enough to elevate and clean grain and run a feed-mill: *Dement Brothers Co. v. Walla Walla*, 58 Wash. 60, 107 Pac. 1038.

Where springs, the principal source of a city supply, are fed by waters diverted by the city from a stream, so that the diverted waters can be traced as a part of the surface flow, a lower proprietor on the stream may recover his damages caused by the diversion: *Dement Brothers Co. v. Walla Walla*, 58 Wash. 60, 107 Pac. 1038.

As to riparian proprietor's right to use and detain water and to the natural flow of the stream, see note in 79 Am. Dec. 638.

As to equitable estoppel as defense to restrain diversion, see note in 2 Ann. Cas. 786.

A city raising the waters of a lake above high-water mark is liable to littoral owners for damages resulting from overflow or seepage through and under adjoining soil: *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59.

As to liability of a municipality for overflow of stream used by it as a sewer, see note in 3 L. R. A., N. S., 1053.

As to liability of a municipality for tort in connection with its waterworks system, see note in 25 L. R. A., N. S., 239.

No riparian rights can be claimed by a lower proprietor in or to the waters of a new spring that breaks out upon the lands of another and flows therefrom across his land, riparian rights attaching only to streams that are wont to flow from time immemorial: *Mason v. Yearwood*, 58 Wash. 276, 30 L. R. A., N. S., 1158, 108 Pac. 608; notes, 19 L. R. A. 92, 64 L. R. A. 236.

Riparian rights cannot be asserted to the flow of surplus waters of a swamp or marsh which has no outlet, and where there is no natural stream or waterway: *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141.

As to right to water of new spring, see note in 30 L. R. A., N. S., 1158.

As to what is a watercourse, see notes in 3 L. R. A. 609, and 5 L. R. A. 392.

Riparian rights to the waters of a creek are lost by adverse possession, where, for more than the statutory period, an upper proprietor continuously appropriated and diverted the waters in good faith under a claim of right adverse to the lower owner: *Farwell v. Brisson*, 66 Wash. 305, 119 Pac. 814.

As to adverse possession of use of water under claim of right, see note in 93 Am. St. Rep. 722.

Permission to divert the waters of a creek on defendants' land by a ditch for domestic and irrigation purposes, the defendants refusing to either sell or convey a permanent right of way, is a license merely, revocable at will: *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143.

A deed conveying a right of way for a drainage ditch along a line as at present laid out to drain off surplus water on to grantor's land, with the right of ingress and egress to keep the ditch in repair, creates an easement only; but gives the grantor no right to control the drainage: *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141.

The grant of a right of way for a ditch to carry water for irrigation does not prevent the grantor from using the same ditch without interfering with the grantee's use, where the grant does not appear to be exclusive, and the ditch had theretofore been used in common: *Hayward v. Mason*, 54 Wash. 649, 104 Pac. 139.

As to right of way for irrigation ditch and right of fee owner to cross it, see note in 3 L. R. A., N. S., 1148.

A railroad company seeking to condemn a right of way may, when the owners make an unanticipated claim to special damages by reason of injury to a reservoir site and water-power, limit the rights sought to be acquired by filing a stipulation or waiver respecting the use of the site, thereby reducing the special damages claimed; and it is error to refuse to instruct the jury that they should take the stipulation into consideration in determining the amount of the award: *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1191.

Laws of 1895, page 142, authorizes condemnation proceedings by a county to acquire a right of way for a drainage ditch completed under the unconstitutional act, Laws of 1890, page 652: *Lewis County v. McCutcheon*, 53 Wash. 367, 101 Pac. 1083.

Accretions added by the alluvion of a stream belong to the owner of the contiguous bank of the stream: *Spinning v. Pugh*, 65 Wash. 490, 118 Pac. 635.

As to riparian rights to accretions, see note in 19 Am. St. Rep. 234.

§ 6327.

Where the owner of lands gave a right of way for a ditch in consideration of an agreement for water for irrigation purposes, the water to be taken out on his own land, the owner of the ditch cannot defeat such taking and use by invoking the rule that permission to maintain the ditch was revocable at will as a parol license, or void as attempting to create an interest in lands by parol, within the statute of frauds, since the water in the ditch was subject to an agreement for its use as any other personal property: *Methow Cattle Co. v. Williams*, 64 Wash. 457, 117 Pac. 239.

A lower riparian owner may not go above an upper proprietor and divert the water already appropriated by such upper proprietor, to be used on lands down the stream or on contiguous lands that are not riparian to the stream, to the exclusion of the upper proprietor, as each is entitled to a reasonable use only; and such right is not given by this section: *Miller v. Baker*, 68 Wash. 19, 122 Pac. 604.

CHAPTER II.

APPORTIONMENT AND CONDEMNATION.

§ 6338.

This section does not give a riparian owner any right to appropriation superior to the right of the owners not bordering upon the lake, other than the right of appropriation common to all: *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

§ 6339.

This section has no application to fountain heads of watercourses which have been appropriated by others: *Miller v. Wheeler*, 54 Wash. 429, 23 L. R. A., N. S., 1065, 103 Pac. 641.

This section has no application to springs having sufficient flow to form watercourses,

and the common-law rule governs riparian rights on such a watercourse: *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423.

Where new springs broke out upon the defendant's land, and the flow constantly increased from year to year, an adjoining owner, who for twenty-five years diverted and continuously used water from the springs, acquired a prescriptive right to the use of so much of the water as she had adversely used during the statutory period of ten years immediately preceding defendant's obstruction thereof, since easements may be acquired by adverse use; but the plaintiff could not enjoin the defendant's use and diversion of the increased flow not diverted and adversely used by the plaintiff ten years previously: *Mason v. Learwood*, 58 Wash. 276, 30 L. R. A., N. S., 1158, 108 Pac. 608.

In an action to establish the right to use springs, claimed by defendant through adverse possession, plaintiff's evidence of an intention not to abandon the springs is inadmissible where he did not succeed to his title until after defendant's title had ripened: *Church v. State*, 65 Wash. 50, 117 Pac. 711.

Springs which were originally open to appropriation may become the subject of a prescriptive right acquired by the public for a watering trough in the highway through adverse use for the statutory period: *Kiser v. Douglas County*, 70 Wash. 242, 126 Pac. 622.

§ 6368.

The obligations of an irrigation company in the arid district are quasi public, and arbitrary action in the guise of regulations will not be tolerated: *Shafford v. White Bluffs Land etc. Co.*, 63 Wash. 10, Ann. Cas. 1912D, 133, 114 Pac. 883.

As to power of courts to fix rates of irrigation companies, see note in 16 Ann. Cas. 799.

A regulation of an irrigation company providing for an intermittent rather than

a constant flow of water cannot be declared unreasonable as a matter of law: *Shafford v. White Bluffs Land etc. Co.*, 63 Wash. 10, Ann. Cas. 1912D, 133, 114 Pac. 883.

A water contract permitting an irrigation company to adopt reasonable rules and regulations is not controlled by a custom in that locality to supply water in a constant rather than an intermittent flow, since the same depends on the irrigator's necessities and beneficial use: *Shafford v. White Land etc. Co.*, 63 Wash. 10, Ann. Cas. 1912D, 133, 114 Pac. 883.

A contract giving an irrigation company the right to make reasonable rules and regulations, where the water was furnished by pumping, cannot be controlled by the prevailing custom among users of a natural flow, so long as the company supplied the amount contracted for: *Shafford v. White Bluffs Land etc. Co.*, 63 Wash. 10, Ann. Cas. 1912D, 133, 114 Pac. 883.

A water contract providing for a certain amount of water per second of time for each one hundred and sixty acres of land, subject to reasonable rules and regulations of the company as to the time and manner of delivery, is mutual and to be construed in the light of the necessities of the parties, rather than their arbitrary desires; and a regulation providing for an intermittent flow is not unreasonable, as a matter of law, unless it did not give the amount contracted for: *Shafford v. White Bluffs Land and Irr. Co.*, 63 Wash. 10, Ann. Cas. 1912D, 133, 114 Pac. 883.

As to state regulation of tolls for use of appropriated water, see note in 33 L. R. A. 180.

§ 6382.

This section establishes the policy of this state for a joint user in many instances of waters sought to be condemned for irrigation purposes: *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

CHAPTER IV.

REGULATION OF STORED AND FLOWING WATERS.

§ 6398.

This section, authorizing the superior court to appoint a water commissioner, prescribes only ministerial or administrative duties, and not judicial or quasi-judicial duties, and has no relation to

judicial proceedings, where removal was the only power that the court could exercise over him; hence the supreme court has no jurisdiction to prevent the appointment by writ of prohibition: *State ex rel. Bennett v. Taylor*, 54 Wash. 150, 102 Pac. 1029.

CHAPTER VI.

USE OF STATE WATERS.

§ 6415-1. Dams and Works for Irrigation and Power Purposes.

There is hereby granted to persons, firms and corporations organized among other things, for irrigation and power purposes, the right to construct and maintain dams and works incident thereto over, upon and across the beds of the rivers of the state of Washington in connection with such power and irrigation purposes, and there is hereby granted to such persons, firms and corporations an easement over, upon and across the beds of such rivers for such purposes. Such easement shall be limited however, to so much of the beds of such rivers as may be reasonably convenient and necessary for such uses. All such dams and works shall be completed within five years after the commencement of construction work upon the same. The rights and privileges granted by this act shall inure to the benefit of such persons, firms or corporations from the date of the commencement of construction work upon such dams and works incident thereto, and such construction work shall be diligently prosecuted to completion, and the rights, privileges and easements granted by this act shall continue so long as the same shall be utilized by the grantees for the purposes herein specified, and the failure to maintain and use such dams and works after the same shall have been constructed, for a continuous period of two years, shall operate as a forfeiture of all the rights hereby granted and the same shall revert to the state of Washington: Provided, That nothing in this act shall be construed in such a way as to interfere with the use of said rivers for navigation purposes, and all of such rights, privileges and easements granted hereby shall be subject to the paramount control of such rivers for navigation purposes by the United States: And, provided, further, That the use and enjoyment of the grants and privileges of this act shall not interfere with the lawful and rightful diversion of the waters of said rivers by other parties under water appropriations in existence at the time any such persons, firms or corporations shall avail themselves of the benefits and privileges of this act, but no such persons, firms or corporations shall have any right to construct any such dams or works over, upon or across the land between ordinary high water and extreme low water of any river of this state without first having acquired the right to do so from the owner or owners of the lands adjoining the land between ordinary high water and extreme low water over or across which said dam or works are constructed. [L. '11, p. 436, § 1.]

CHAPTER VII.

IRRIGATION DISTRICTS.

§ 6416.

The title of an act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, the same being sections — (specifying certain sections amended), sufficiently expresses the subject of the act without such enumeration

of the amended sections, which may be treated as surplusage; hence the amendment of another section not specified in the title of the amendatory act is not void as not embraced within the title of the act, as required by constitution, article 2, section 19: *Sorenson v. Kittitas Rec. Dist.*, 70 Wash. 528, 127 Pac. 102.

§ 6417. Proceedings to Establish—Election.

For the purpose of organizing an irrigation district, a petition, signed by the required number of holders of title or evidence of title to land within the proposed district, shall be presented to the board of county commissioners of the county in which the lands, or the greater portion thereof, are situated, which petition shall set forth and particularly describe the proposed boundaries of such district, and shall pray that the territory embraced within the boundaries of such proposed district may be organized as an irrigation district. The petition must be accompanied by a good and sufficient bond, to be approved by the board of county commissioners, in double the amount of the probable cost of organizing the district, and conditioned that the bondsmen will pay all of the costs in case such organization shall not be effected. Said petition shall be presented at a regular meeting of the said board, or at any special meeting ordered to consider and act upon said petition, and shall be published once a week, for at least two weeks before the time at which the same is to be presented, in some newspaper of general circulation printed and published in the county where said petition is to be presented, together with a notice by the petitioners stating the time of the meeting at which the same will be presented; and if any portion of the lands within said proposed district lie within another county or counties, then said petition and notice shall be published for the time above provided in one newspaper printed and published in each of said counties. When the petition is presented, the board of county commissioners shall hear the same, and may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing may make such changes in the proposed boundaries as it may find to be proper and just, and shall establish and define the boundaries of the district: Provided, That said board shall not modify the boundaries so as to except from the operation of this chapter any territory within the boundaries of the district proposed by said petitioners, which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district; nor shall any lands which, in the judgment of said board, will not be benefited by irrigation by said system, or have a sufficient water supply for irrigation from some other source, be included within such district: And provided further, That any owner, whose lands are susceptible of irrigation from the same source, and in the judgment of the board it is practicable to irrigate the same by the proposed district system, shall, upon application to the board at the time of the hearing, be entitled to have such lands included in the district. The board of county commissioners shall, as soon as it has established the boundaries of said proposed district, enter an order establishing and defining such boundaries, and ordering that three directors for such district be elected from the district at large, and designating a name for the proposed district, and calling an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of this act, and for the purpose of electing three directors at large. The clerk of the board of county commissioners shall then give notice of the election ordered to be held as aforesaid, which notice shall describe the district boundaries as established, and shall give the name by which said proposed district has been designated, and shall state the purposes and objects of said election, and shall be published once a week, for at least two weeks prior to said election, in a newspaper of general circulation published in the county

where the petition aforesaid was presented; and if any portion of said proposed district lie within another county or counties, then said notice shall be published in a like manner in a newspaper within each of said counties. Said election notice shall also require the electors to cast ballots which shall contain the words "Irrigation District—Yes," or "Irrigation District—No," and also the names of persons to be voted for as directors of the district. [L. '13, p. 558, § 1.]

§ 6418. Election, How Conducted, etc.

For the purposes of the election above provided for, the board of county commissioners must establish a convenient number of election precincts in the proposed district and define the boundaries thereof, and designate a polling place for, and appoint the necessary election officers for each of said precincts, but said precincts may thereafter be changed by the board of directors of said district. Such election shall be conducted as nearly as may be practicable in the manner provided in the election of directors for the district.

The board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the returns of the votes cast thereat, and if upon such canvass it appears that at least two-thirds of all the votes cast are "Irrigation District—Yes," the board shall, by an order entered on its minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the three persons receiving the highest number of votes to be duly elected directors of such district, and shall cause a copy of such order, duly certified, to be filed for record in the office of the county clerk of each county in which any portion of the district may lie. From and after the date of the filing of such order, the organization of the district shall be complete and the directors thereof shall be entitled to enter immediately upon the duties of their office, upon qualifying in accordance with law, and shall hold office until their successors are elected and qualified.

Any person of the age of twenty-one (21) years, being a citizen of the United States and a resident for ninety days of the county in which any of the lands of the district may lie, and who holds title to land or evidence of title to land embraced within the boundaries of any irrigation district, or proposed district in the case of an election for the organization thereof, shall be entitled to vote at any election held therein, called for any purpose. Additional qualifications for voting, required by the general election laws of the state shall not apply, provided there shall be no denial of the right to vote on account of sex. An elector resident within the district shall vote in the precinct in which he resides; and an elector not residing in the district shall vote in the precinct nearest his place of residence. [L. '13, p. 560, § 2.]

§ 6419. Election of Directors—Oath and Bond—Secretary.

There shall be elected in each organized irrigation district of this state, a board of three (3) directors who are electors of the district. An annual election to the office of director shall be held on the first Tuesday of December of each and every year, and the term of each director shall be three years from and after the first Tuesday of January next succeeding his election: Provided, That in the case of the three directors elected at any organization election called by the board of county commissioners, the three directors so elected

shall serve until the first Tuesday of January following the first annual election; and at the first annual election there shall be elected three directors, one to serve for a term ending one year from the first Tuesday of January next following such election, and one to serve for a term of two years from the first Tuesday of January next following such election, and one to serve for a term of three years from the first Tuesday of January next following such election; and an election shall be held in each district thereafter on the second Tuesday in December in each year, at which election one director shall be elected for the full term of three years, or until his successor is elected and qualified: And provided further, That in any irrigation district organized and existing under any law of this state prior to the taking effect of this act, the directors elected at the last election held therein shall hold office, and their terms of office, shall be as follows: That one of the three receiving the lowest number of votes at the election last aforesaid, shall hold his office until the first Tuesday of January, 1914, the one receiving the next highest number of votes shall hold his office for one year from and after the first Tuesday of January, 1914, and the one receiving the highest number of votes shall hold his office for a term of two years from and after the first Tuesday of January, 1914; and an election shall be held in each of the districts last aforesaid on the second Tuesday of December of the year 1913, and on the second Tuesday of December in each year thereafter, at which one director shall be elected for the full term of three years, or until his successor is elected and qualified. In case of any vacancy occurring in the office of director, such vacancy shall be filled by appointment by the board of county commissioners of the county in which the proceedings for the organization of the district were had, and the person so appointed shall serve until the next annual election of directors, when an election by the district shall be had to fill the vacancy for the remainder of the unexpired term. Each director shall take and subscribe an official oath for the faithful discharge of the duties of his office, and shall execute an official bond to the district in the sum of twenty-five hundred dollars (\$2,500.00), conditioned for the faithful discharge of the duties of his office, which bond shall be approved by the judge of the superior court of the county where the organization of the district was affected, and said oath and bond shall be recorded in the office of the county clerk of said county and filed with the secretary of the board of directors. The secretary of the district shall take and subscribe a written oath of office and execute an official bond in the sum of not less than twenty-five hundred dollars (\$2,500.00), to be fixed by the board of directors, and which said bond shall be approved and filed as in the case of the bond of a director. [L. '13, p. 562, § 3.]

§ 6425. Statement of Result—Certificate—Vacancy.

The secretary of the board of directors must, as soon as the result is declared, enter in the records of such board a statement of such result, which statement must show:

1. The whole number of votes cast in the district;
2. The name of the persons voted for;
3. The office to fill which each person was voted for;
4. The number of votes given in each precinct to each of such persons;
5. The number of votes given in each precinct for and against any proposition voted upon.

The board of directors must declare elected the person having the highest number of votes given for each office. The secretary must immediately make out, and deliver to such person a certificate of election signed by him and authenticated by the seal of the district. [L. '13, p. 563, § 4.]

§ 6426. Powers and Duties of Board—By-laws, etc.

The three directors of the district shall constitute the board of directors of such district, and shall elect a president from their number, and appoint a secretary, who shall keep a record of their proceedings. The office of the board and principal place of business of the district shall be at some place in the county in which the organization was effected, to be designated by the board. The board of directors shall hold a regular monthly meeting, at its office, on the first Tuesday in every month, and may adjourn any meeting from time to time as may be required for the proper transaction of business. Special meetings may be called at any time by a majority of the board, but in case the three members of the board do not join in said order, the secretary shall give the number not joining five (5) days' notice of such meeting. The order or notice calling any special meeting shall specify what business shall be transacted, and none other than that specified shall be transacted at such special meeting. All meetings of the board must be public. Two members shall constitute a quorum for the transaction of business, but in all matters requiring action by the board there shall be a concurrence of at least two members of said board. All records of the board shall be open to the inspection of any elector during business hours. The board shall have the power, and it shall be its duty to adopt a seal of the district, to manage and conduct the business and affairs of the district, to make and execute all necessary contracts, to employ and appoint such agents, officers and employees as may be necessary and prescribe their duties, and to establish equitable by-laws, rules and regulations for the government and management of the district, and for the distribution of water to the lands within the district, and generally to perform all such acts as shall be necessary to fully carry out the provisions of this chapter. The by-laws, rules and regulations must be printed in convenient form for distribution in the district. All water distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such land owner, for district purposes, within said district, bears to the whole sum assessed upon the district, and any land owner may assign the right to the whole or any portion of waters so apportioned to him for use upon such lands and under such regulations as may be designated and prescribed by the board of directors. All leases, contracts, or other form of holding any interest in any state or other public lands shall be, and the same are hereby, declared to be title to and evidence of title to lands, and all leasehold, contractual or possessory interests in any such state or public lands, situated within the limits of any irrigation district, and held by any person, shall be valued, assessed and equalized in the manner provided for the valuation and assessment of other property, and shall be charged with their proportional parts of the taxes and assessments of the district, and such leasehold, contractual or possessory interest, for all purposes of the assessment and collection of taxes, shall be treated as the private property of the lessee or owner of the contractual or possessory interest: Provided, That nothing in this section shall be construed to affect the title of the state

or other public ownership, nor shall any lien for such assessment attach to the fee simple title of the state or other public ownership. The board of directors shall have power to lease or rent the use of water for delivery to occupants of public lands situated within the district, at such prices and on such terms as it deems best, but the rental shall be as near as practicable the amount of the district tax for which said land would be annually liable if held as private property: Provided, That as soon as any public land situated within the limits of the district shall be acquired by any private person, or held under any title of private ownership, the owner thereof shall be entitled to receive his ratable proportion of water as in case of other land owners, upon payment by him of such sums as shall be determined by the board, and at the time to be fixed by the board, which sum shall be such equitable amount as such lands should pay having regard to placing said lands on the basis of equality with other lands in the district as to benefits received, and giving credit for any sums paid as water rent by the occupant of said lands prior to the vesting of private ownership, and such lands shall also become subject to all taxes and assessments of the district thereafter imposed. [L. '13, p. 564, § 5.]

§ 6427. Meetings—Notice of Special—Authority.

The board, and its agents and employees, shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches or laterals for the same, on any lands which may be deemed best for such location. Said board shall also have the power to acquire, either by purchase or condemnation, or other legal means, all lands, waters, water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal or canals and irrigation works, including canals and works constructed or being constructed by private owners, or any other person, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. The board may also construct the necessary dams, reservoirs and works for the collection of water for said district, and may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes; and may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the federal reclamation act and all amendments thereof, and the rules and regulations established thereunder, or it may contract with the United States for a water supply under any act of Congress providing for and permitting such contract; and in the purchase of any of the property or property rights aforesaid, or in acquiring or contracting for a water supply for the district, the bonds of the district may be used by the board, at not less than ninety per cent par value, in payment. The use of all water required for the irrigation of the lands, within any district, together with rights of way for canals, laterals, ditches, sites for reservoirs and all other property required in fully carrying out the purposes of the organization of the district is hereby declared to be a public use; and in condemnation proceedings to acquire any property or property rights for the use of the district, the board of directors shall proceed in the name of the district, in the manner provided in this state in cases of ap-

propriation of land, real estate and other property by private corporations. [L. '13, p. 566, § 6.]

§ 6431. Bonds, How and When Sold.

The board may sell the bonds of the district from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of such canals and works, the acquisition of said property and property rights, and otherwise to fully carry out the objects and purposes of the district organization, and may sell such bonds, or any of them, at private sale whenever the board deems it for the best interests of the district so to do. The board of directors shall also have the power to sell said bonds, or any portion thereof, at private sale, and accept in payment therefor labor and material necessary for the construction of its proposed canals or irrigation works, whenever the board deems it for the best interests of the district so to do. If the board shall determine to sell the bonds of the district, or any portion thereof, at public sale, the secretary shall publish a notice of such sale for at least three (3) weeks in such newspaper or newspapers as the board may order. The notice shall state that sealed proposals will be received by the board, at its office, for the purchase of the bonds to be sold, until the day and hour named in the notice. At the time named in the notice, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids: Provided, That such bonds shall not be sold for less than ninety per cent of their face value. [L. '13, p. 567, § 7.]

§ 6432. Bonds and Interest, How Paid.

Said bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district, and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided. And in addition to this provision and the other provisions herein made for the payment of said bonds and interest thereon as the same may become due, said bonds shall become a lien upon all the water rights and other property acquired by any irrigation district formed under the provisions of this chapter, and upon any canal or canals, ditch or ditches, flumes, feeders, storage reservoirs, machinery and other works and improvements acquired, owned or constructed by said irrigation district, and if default shall be made in the payment of the principal of said bonds or interest thereon, according to the terms thereof, the holder of said bonds, or any part thereof, shall have the right to enter upon and take possession of all the water rights, canals, ditches, flumes, feeders, storage reservoirs, machinery, property and improvements of said irrigation district, and to hold and control the same, and enjoy the rents, issues and profits thereof, until the lien hereby created can be enforced in a civil action in the same manner and under the same proceedings as given in the foreclosure of a mortgage on real estate. This section shall apply to all bonds heretofore issued, or which may hereafter be issued by any district. [L. '13, p. 568, § 8.]

§ 6433. Assessments, How and When Made.

The secretary must, between the first Monday in March and the first Monday in June, in each year, ascertain the value of the land in such district,

and the persons who own, claim, and have possession or control thereof, at its cash value, and he must prepare an assessment-book, with appropriate headings, in which must be listed all such property within the district. In such book must be specified, in separate columns, under the appropriate headings:

First. The name of the person to whom the property is assessed. If the name is not known to the secretary the property shall be assessed to "unknown owners";

Second. Land by township, range, section or fractional section, and when such land is not a legal subdivision, by metes and bounds or other description sufficient to identify it, giving an estimate of the number of acres;

Third. City and town lots, naming the city or town, and the number and block, according to the system of numbering in such city or town;

Fourth. The cash value of all land, other than city or town lots;

Fifth. The cash value of city and town lots;

Sixth. The total value of all property assessed;

Seventh. The total value of all property after equalization by the board of directors;

Eighth. Such other things as the board of directors may require. Any property which may have escaped the payment of any assessment for any year, shall, in addition to the assessment for the then current year, be assessed for such year with the same effect and with the same penalties as are provided for such current year. [L. '13, p. 569, § 9.]

§ 6437. Amount of Levy—Procedure in Case of Failure.

The board of directors shall then levy an assessment sufficient to raise the ensuing annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of the bonds of any issue, the board must, from year to year, increase said assessment for the ensuing years in an amount sufficient to pay and discharge the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment-book the respective sums in dollars and cents to be paid as assessments on property therein enumerated. The assessments, when collected by the county treasurer, shall constitute a special fund to be called the "Bond Fund of — Irrigation District." In case of neglect or refusal of the board of directors to cause such assessment or levy to be made as herein provided, then the assessment of property made by the county assessor and the county board of equalization shall be adopted, and shall be the basis of assessments for the district; and the board of county commissioners of the county in which the office of the board of directors is situated shall cause an assessment-roll for the said district to be prepared, and shall make the levy required by this chapter in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by the district. In case of neglect or refusal of the secretary of the district to perform the duties imposed by law, then the treasurer of the county in which the office of the board of directors is situated must perform such duties, and shall be accountable therefor, on his official bond, as in other cases. [L. '13, p. 570, § 10.]

§ 6438. Lien of Assessment.

The assessment upon real property shall be a lien against the property assessed, from and after the first Monday in March for any year, which lien shall be paramount and superior to any other lien theretofore or thereafter created, whether by mortgage or otherwise, except for a lien for prior assessments and for general taxes, and such lien shall not be removed until the assessments are paid or the property sold for the payment thereof as provided by law. [L. '13, p. 571, § 11.]

§ 6439. Collection of Assessments—Notice.

On or before the first day of November the secretary must deliver the assessment-book to the county treasurer of the county in which the office of the board of directors is situated, who shall within twenty days publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable at the office of said county treasurer, and will become delinquent at 6 o'clock in the afternoon on the 31st day of December next thereafter, and that unless paid prior thereto, five per cent will be added to the amount thereof. The notice shall be published once a week for four successive weeks, and posted for the same length of time in some public place in said district. The county treasurer must mark the date of payment of any assessment in the assessment-book, opposite the name of the person paying, and give a receipt to such person, specifying the amount of the assessment and the amount paid, with the description of the property assessed. On the 31st day of December of each year, all unpaid assessments are delinquent, and thereafter the treasurer must collect thereon for the use of the district an addition of five per cent. The district shall pay to the county from the five per cent penalties and other costs received by the treasurer in the collection of delinquent taxes, the amounts actually expended by the treasurer in performing the duties of ex-officio collector and treasurer of the district. [L. '13, p. 571, § 12.]

§ 6440. Publication of Delinquent List—How Made.

On or before the first day of February, the county treasurer must publish the delinquency list, which must contain the names of the persons and a description of the property delinquent, and the amount of the assessments and costs due opposite each name and description. He must append to and publish with the delinquent list a notice that unless the assessments delinquent, together with costs and percentage are paid, the real property upon which such assessments are a lien will be sold at public auction. The publication must be made once a week for three successive weeks, in a newspaper published in each of the counties comprised in the district. The publication must designate the time and place of sale. The time of sale must not be less than twenty-one nor more than twenty-eight days from the first publication, and the place must be at some point designated by the treasurer. [L. '13, p. 572, § 13.]

§ 6441. Sales, When and How Made.

The county treasurer must collect, in addition to the assessment due on the delinquent list, five per cent of the amount thereof. On the day fixed for the sale, or some subsequent day to which he may have postponed it, of which

he must give notice, the county treasurer, between the hours of 10 o'clock A. M., and 3 o'clock P. M. must commence the sale of the property advertised, commencing at the head of the list, and continuing alphabetically or in the numerical order of the lots or blocks, until completed. He may postpone the day of commencing sale, or the sale from day to day, but the sale must be completed within three weeks from the day first fixed. [L. '13, p. 572, § 14.]

§ 6442. Sales, How Conducted—Certificates.

The owner or person in possession of any real estate offered for sale for assessments due thereon may designate in writing to the county treasurer, prior to the sale, what portion of the property he wishes sold, if less than the whole; but if the owner or possessor does not, then the treasurer may designate it, and the person who will take the least quantity of the land, or in case an undivided interest is assessed, then the smallest portion of the interest, and pay the assessment and cost due, including one dollar to the treasurer for duplicate of certificate of sale, is the purchaser. The treasurer shall account to the district for said one dollar. If the purchaser does not pay the assessment and costs before 10 o'clock A. M. the following day, the property on the next sale day must be resold for the assessments and costs. But in case there is no purchaser in good faith for the same on the first day that the property is offered for sale, then when the property is offered thereafter for sale, and there is no purchaser in good faith for the same, the whole amount of the property assessed shall be struck off to the irrigation district as the purchaser, and the duplicate certificate delivered to the secretary of the district, and filed by him in the office of the district. No charge shall be made for the duplicate certificate where the district is the purchaser, and in such case the treasurer shall make an entry, "Sold to the district," and he will be credited with the amount thereof in settlement. An irrigation district, as a purchaser at such sale, shall be entitled to the same rights as a private purchaser, and the title so acquired by the district, subject to right of redemption herein provided, may be conveyed by deed, executed and acknowledged by the president and secretary of the board: Provided, That authority to so convey must be conferred by resolution of the board, entered on its minutes, fixing the price at which such sale may be made, and such conveyance shall not be made for a less sum than the reasonable market value of such property. After receiving the amount of assessments and costs, the county treasurer must make out in duplicate a certificate, dated on the day of sale, stating (when known) the names of the persons assessed, a description of the land sold, the amount paid therefor, that it was sold for assessments, giving the amount and year of the assessment and specifying the time when a purchaser will be entitled to a deed. The certificate must be signed by the treasurer and one copy delivered to the purchaser, and the other filed in the office of the county auditor of the county in which the land is situated: Provided, That upon the sale of any lot, parcel or tract of land not larger than an acre, the fee for a duplicate certificate shall be twenty-five cents, and in case of a sale to a person or a district of more than one parcel or tract of land, the several parcels or tracts may be included in one certificate. [L. '13, p. 573, § 15.]

§ 6443. Sales, Secretary to Keep Record of.

The county treasurer, before delivering any certificate, must in a book enter a description of the land sold corresponding with the description in the certificate, the date of the sale, purchasers' names and amount paid, regularly number the description on the margin of the book and put a corresponding number on each certificate. Such book must be open to public inspection without fee during office hours, when not in actual use. On filing the certificate with such county auditor the lien of the assessment vests in the purchaser and is only divested by the payment to him, or to the county treasurer, for his use, of the purchase money and one per cent per month from the day of sale until redemption. [L. '13, p. 574, § 16.]

§ 6444. Redemption, When Made—Deeds.

A redemption of the property sold may be made by the owner or any party in interest within twelve months from the date of purchase. Redemption must be made in gold or silver coin, as provided for the collection of state and county taxes, and when made to the treasurer he must credit the amount paid to the person named in the certificate and pay it on demand to the person or his assignee. In each report the treasurer makes to the board of directors he must name the persons entitled to redemption money and the amount due each. On receiving the certificate of sale the county auditor must file it and make an entry in a book similar to that required of the treasurer. On the presentation of the receipt of the person named in the certificate, or of the treasurer for his use, of the total amount of the redemption money, the auditor must mark the word "redeemed," the date and by whom redeemed, on the certificate and on the margin of the book where the entry of the certificate is made. If the property is not redeemed within twelve months from the sale the treasurer must make to the purchaser, or his assignees, a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person redeemed the property during the time allowed by law for its redemption. The treasurer shall receive from the purchaser, for the use of the district, one dollar for making such deed: Provided, If redemption is not made of any lot, parcel or tract of land not larger than one acre, the fee for a deed shall be twenty-five cents and any person or district holding a duplicate certificate covering more than one tract of land, the several parcels or tracts of land mentioned in the certificate may be included in one deed. [L. '13, p. 574, § 17.]

§ 6448.

Repealed. See L. '13, p. 579, § 24.

§ 6450. Bids for Construction—Contracts.

Any person to whom a contract may have been awarded for the construction of a canal or any of the works of the district, or any portion thereof, or for the furnishing of labor or material, shall enter into a bond with good and sufficient sureties, to be approved by the board of directors, payable to said district for its use, for at least twenty-five per cent of the amount of the contract price, conditioned for the faithful performance of said contract, and with such further conditions as may be required by law in the case of contracts for public work, and as may be required by resolution of the board.

All works shall be done under the direction and to the satisfaction of the engineer of the district, and be approved by the board. Whenever in the construction of the district canal or canals, or other works, or the furnishing of materials therefor, the board of directors shall determine to let a contract or contracts for the doing of said work or the furnishing of said materials, a notice calling for sealed proposals shall be published in a newspaper in the county in which the office of the board is situated, and in any other newspaper which may be designated by the board, and for such length of time, not less than two weeks, as may be fixed by the board. At the time and place appointed in the notice for the opening of bids, the sealed proposals shall be opened in public, and as soon as convenient thereafter, the board shall let said work or the contract for the purchase of materials, either in portions or as a whole, to the lowest responsible bidder, or the board may reject any or all bids and readvertise, or may proceed to construct the work under its own superintendence: Provided, That the provisions of this section in regard to public bidding shall not apply in cases where the board is authorized to exchange bonds of the district in payment for labor and material. [L. '13, p. 575, § 18.]

§ 6451. Claims, How Paid.

The county treasurer of the county in which is located the office of any irrigation district shall be and is hereby constituted ex-officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to criminal prosecution for malfeasance and misfeasance, or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. It shall be his duty to collect and receipt for all assessments and taxes levied as in this chapter provided. There shall be deposited with said county treasurer all sums collected for the defraying of the expenses of the district, whether said sums are collected by tolls or special assessments, and they shall be placed by the county treasurer in the expense fund of the district. The said county treasurer shall also keep such other funds as may be required by law governing irrigation districts, or provided for by this chapter, and shall place therein moneys collected for said funds. The county treasurer shall pay out the moneys received or deposited with him, or any portion thereof, upon warrants drawn on the several funds, signed by the president and countersigned by the secretary of the district, except the sums to be paid out of the bond fund upon the coupons and bonds presented to the treasurer. The said treasurer shall report, in writing, on the first Monday in each month to the board of directors of the district, the amount of money held by him, the amount in each fund, the amount of receipts for the month preceding in each fund, and the amount or amounts paid out of each fund, and said report shall be filed with the secretary of the board. The secretary shall also report to the board, in writing, on the first Monday in each month, the amount deposited with the county treasurer belonging to the district during the preceding month, the amount of receipts for the month preceding, and the amount and items of expenditures during the preceding month, and said report shall be filed in the office of the board. [L. '13, p. 576, § 19.]

Under this section authorizing the board of directors and secretary to receive and pay out the funds of an irrigation district, the district treasurer, as disbursing officer,

is not a necessary party to proceedings in mandamus to compel the district to sell bonds to satisfy a judgment against the

district: *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

§ 6452. Constructing and Operating Fund—Tolls.

The cost and expense of purchasing and acquiring property, and constructing the works and improvements herein provided for, and the expenses incidental thereto, and for the carrying out of the purposes of this chapter, may be paid by the board of directors out of the funds received from bond sales. For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair and improvement of such portions of said canal and works as are completed and in use, the board may either fix rates or tolls and charges, and collect the same from all persons using said canal for irrigation and other purposes, or they may provide for the payment of said expense by a levy of assessment therefor, or by both said tolls and assessment; if by the latter method, such levy shall be made on the completion and equalization of the assessment-roll each year, and the board shall have the same powers and functions for the purposes of said levy as possessed by it in case of levy to pay bonds of the district. The procedure for the collection of assessments by such levy shall in all respects conform to the provisions of this chapter, relating to the payment of principal and interest of bonds herein provided for, and shall be made at same time. [L. '13, p. 577, § 20.]

§§ 6458—6461.

Repealed. See L. '13, p. 579, § 24.

§ 6466. Payment of Past Assessments Required.

The board of directors, as a condition precedent to the granting of the petition to include other lands in the district, shall require that the petitioners severally pay to such district such respective sums as shall be determined by the board at the hearing above provided for, which sums shall be such equitable amount as such lands shall pay having regard to placing said lands on the basis of equality with other lands in the district as to benefits received, and such lands shall also become subject to all taxes and assessments of the district thereafter imposed. [L. '13, p. 578, § 21.]

§ 6474.

Repealed. See L. '13, p. 579, § 24.

§§ 6484, 6485.

Repealed. See L. '13, p. 579, § 24.

§ 6488. Assessments Refunded.

In case of the exclusion of any lands under the provisions of this act, the board of directors shall determine what refund, if any, shall be made to any person or persons who have paid any assessments to such district on any lands so excluded, but such refund, if any, shall be on a basis equitable alike to lands remaining in the district and lands excluded therefrom. Such payment shall be made in the same manner as other claims against the district, and from such fund or funds as the board of directors may designate, and which may be legally applied to such payments. [L. '13, p. 578, § 22.]

§ 6488-1. Effect on Pending Proceedings.

All irrigation districts in the state of Washington, and all proceedings had for the organization of any irrigation district, and all proceedings now pending in or relating to any irrigation district, shall be governed and controlled by the terms of this act, and this act shall not be construed as abridging or abrogating any of the rights or privileges of any irrigation district now organized, or being organized, and any contract, obligation, lien or charge, or bonds of any district, which may have been made, incurred, authorized or issued, prior to the taking effect of this act shall not be abridged or impaired by the terms of this act, but this act shall be construed as being a continuation of, and in aid of the previously existing laws relating to irrigation districts, except as to the sections specially repealed; and if in any instance relating to an existing district or any of its proceedings, the term of this amendatory act shall not be legally applicable, the district may proceed, and any contract, obligation, lien or charge against it may be enforced, under the terms and provisions of the law relating to irrigation districts in force and in effect prior to the taking effect of this act. [L. '13, p. 579, § 23.]

TITLE XLIX.

JUSTICES OF THE PEACE AND CONSTABLES.

CHAPTER III.

JUSTICES AND CONSTABLES IN CITIES AND TOWNS.

§ 6531.

Under this section, as qualified by section 6532, two justices of the peace are to be elected in a city formerly having less than five thousand inhabitants until it is officially determined that the city has more than

that number; and such justices hold office until the next biennial election, although thereafter it was officially determined that at the time of their election the city had over five thousand inhabitants: State ex rel. Williams v. Brooks, 58 Wash. 648, 109 Pac. 211.

§ 6533-1. Number in Cities of Over Fifty Thousand Population.

After the taking effect of this act, there shall be in cities of fifty thousand population two justices of the peace and two constables, and one additional justice and one additional constable in such cities for each additional fifty thousand population or a major fraction thereof, to be elected at the general election to be held in November, 1914, and quadrennially thereafter, whose term of office shall be for the term of two years from the second Monday of January following the election: Provided, There shall not be more than five justices in any city unless the same has a population of 300,000 or more: And provided further, That nothing in this act shall be construed to affect justices of the peace or constables or the offices of justices of the peace or constables in cities having a population of less than fifty thousand inhabitants. [L. '13, p. 103, § 1.]

§ 6533-2. Commissioners to Appoint.

Whenever it shall appear to the board of county commissioners of any county containing a city of fifty thousand or more that such city is entitled to an additional justice and constable as provided in this act, the board of county commissioners are hereby authorized and directed immediately after this act goes into effect to appoint such additional justice and constable in such city, who shall hold office until his successor is elected and qualified at the next general election. [L. '13, p. 103, § 2.]

§ 6533-3. Salaries in Cities Over One Hundred Thousand.

The salaries of such justices of the peace in all cities having a population in excess of 100,000 according to the census of the federal government last taken shall be eighteen hundred (1800) dollars per annum. [L. '13, p. 103, § 3.]

§ 6533-4. Future Salaries.

The salaries of justices of the peace and constables hereafter elected or appointed shall be and remain the same as are now provided by law. [L. '13, p. 104, § 4.]

§ 6571-8. Minor Defined.

For the purposes of this act a minor is defined to be a person of either sex under the age of eighteen (18) years. [L. '13, p. 604, § 8.]

§ 6571-9. Hearing—Witnesses.

The commission shall specify times to hold public hearings, at which times employers, employees or other interested persons may appear and give testimony as to the matter under consideration. The commission shall have power to subpoena witnesses and to administer oaths. All witnesses subpoenaed by the commission shall be paid the same mileage and per diem allowed by law for witnesses before the superior court in civil cases. [L. '13, p. 604, § 9.]

§ 6571-10. Arbitration Conference—Report.

If, after investigation, the commission shall find that in any occupation, trade or industry, the wages paid to female employees are inadequate to supply them necessary cost of living and to maintain the workers in health, or that the conditions of labor are prejudicial to the health or morals of the workers, the commission is empowered to call a conference composed of an equal number of representatives of employers and employees in the occupation or industry in question, together with one or more disinterested persons representing the public; but the representatives of the public shall not exceed the number of representatives of either of the other parties; and a member of the commission shall be a member of such conference and chairman thereof. The commission shall make rules and regulations governing the selection of representatives and the mode of procedure of said conference, and shall exercise exclusive jurisdiction over all questions arising as to the validity of the procedure and of the recommendations of said conference. On request of the commission, it shall be the duty of the conference to recommend to the commission an estimate of the minimum wage adequate in the occupation or industry in question to supply the necessary cost of living, and maintain the workers in health, and to recommend standards of conditions or labor demanded for the health and morals of the employees. The findings and recommendations of the conference shall be made a matter of record for the use of the commission. [L. '13, p. 604, § 10.]

§ 6571-11. Commission to Fix Wages—Minimum.

Upon the receipt of such recommendations from a conference, the commission shall review the same and may approve any or all of such recommendations, or it may disapprove any or all of them and recommit the subject or the recommendations disapproved of, to the same or a new conference. After such approval of the recommendations of a conference the commission shall issue an obligatory order to be effective in sixty (60) days from the date of said order, or if the commission shall find that unusual conditions necessitate a longer period, then it shall fix a later date, specifying the minimum wage for women in the occupation affected, and the standard conditions of labor for said women; and after such order is effective, it shall be unlawful for any employer in said occupation to employ women over eighteen (18) years of age for less than the rate of wages, or under conditions of labor prohibited for women in the said occupation. The commission

shall send by mail so far as practicable to each employer in the occupation in question a copy of the order, and each employer shall be required to post a copy of said order in each room in which women affected by the order are employed. When such commission shall specify a minimum wage hereunder the same shall not be changed for one year from the date when such minimum wage is so fixed. [L. '13, p. 605, § 11.]

§ 6571-12. Rehearing.

Whenever wages or standard conditions of labor have been made mandatory in any occupation, upon petition of either employers or employees, the commission may at its discretion reopen the question and reconvene the former conference or call a new one, and any recommendations made by such conference shall be dealt with in the same manner as the original recommendations of a conference. [L. '13, p. 605, § 12.]

§ 6571-13. Exceptions to Minimum Scale.

For any occupation in which a minimum rate has been established, the commission through its secretary may issue to a woman physically defective or crippled by age or otherwise, or to an apprentice in such class of employment or occupation as usually requires to be learned by apprentices, a special license authorizing the employment of such licensee for a wage less than the legal minimum wage; and the commission shall fix the minimum wage for said person, such special license to be issued only in such cases as the commission may decide the same is applied for in good faith and that such license for apprentices shall be in force for such length of time as the said commission shall decide and determine is proper. [L. '13, p. 606, § 13.]

§ 6571-14. Investigate Employment of Minors—Minimum Wage.

The commission may at any time inquire into wages, and conditions of labor of minors, employed in any occupation in the state and may determine wages and conditions of labor suitable for such minors. When the commission has made such determination in the cases of minors it may proceed to issue an obligatory order in the manner provided for in section 6571-11 and after such order is effective it shall be unlawful for any employer in said occupation to employ a minor for less wages than is specified for minors in said occupation, or under conditions of labor prohibited by the commission for said minors in its order. [L. '13, p. 606, § 14.]

§ 6571-15. Statistics.

Upon the request of the commission the commissioner of labor of the state of Washington shall furnish to the commission such statistics as the commission may require. [L. '13, p. 606, § 15.]

§ 6571-16. Witnesses Protected.

Any employer who discharges, or in any other manner discriminates against any employee because such employee has testified or is about to testify, or because such employer believes that said employee may testify in any investigation or proceedings relative to the enforcement of this act, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of from twenty-five dollars (\$25.00) to one hundred dollars (\$100) for each such misdemeanor. [L. '13, p. 606, § 16.]

§ 6571-8. Minor Defined.

For the purposes of this act a minor is defined to be a person of either sex under the age of eighteen (18) years. [L. '13, p. 604, § 8.]

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shall send by mail so far as practicable to each employer in the occupation in question a copy of the order, and each employer shall be required to post a copy of said order in each room in which women affected by the order are employed. When such commission shall specify a minimum wage hereunder the same shall not be changed for one year from the date when such minimum wage is so fixed. [L. '13, p. 605, § 11.]

§ 6571-12. Rehearing.

Whenever wages or standard conditions of labor have been made mandatory in any occupation, upon petition of either employers or employees, the commission may at its discretion reopen the question and reconvene the former conference or call a new one, and any recommendations made by such conference shall be dealt with in the same manner as the original recommendations of a conference. [L. '13, p. 605, § 12.]

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§ 6571-15. Statistics.

Upon the request of the commission the commissioner of labor of the state of Washington shall furnish to the commission such statistics as the commission may require. [L. '13, p. 606, § 15.]

§ 6571-16. Witnesses Protected.

Any employer who discharges, or in any other manner discriminates against any employee because such employee has testified or is about to testify, or because such employer believes that said employee may testify in any investigation or proceedings relative to the enforcement of this act, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of from twenty-five dollars (\$25.00) to one hundred dollars (\$100) for each such misdemeanor. [L. '13, p. 606, § 16.]

§ 6571-17. Penalty.

Any person employing a woman or minor for whom a minimum wage or standard conditions of labor have been specified, at less than said minimum wage, or under conditions of labor prohibited by the order of the commission; or violating any other of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00). [L. '13, p. 607, § 17.]

§ 6571-17½. Complaints.

Any worker or the parent or guardian of any minor to whom this act applies may complain to the commission that the wages paid to the workers are less than the minimum rate and the commission shall investigate the same and proceed under this act in behalf of the worker. [L. '13, p. 607, § 17½.]

§ 6571-18. Civil Actions by Employee.

If any employee shall receive less than the legal minimum wage, except as hereinbefore provided in section 6571-13, said employee shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for such lesser wage. In such action, however, the employer shall be credited with any wages which have been paid upon account. [L. '13, p. 607, § 18.]

§ 6571-19. No Appeal from Commission on Facts.

All questions of fact arising under this act shall be determined by the commission and there shall be no appeal from its decision upon said question of fact. Either employer or employee shall have the right of appeal to the superior court on questions of law. [L. '13, p. 607, § 19.]

§ 6571-20. Biennial Report.

The commission shall biennially make a report to the governor and state legislature of its investigations and proceedings. [L. '13, p. 607, § 20.]

CHAPTER IV.

HOURS OF LABOR.

§ 6575.

This section is violated by requiring city teamsters to harness and hitch their teams, collect their tools, and be at the place of work before the legal day begins, so as to put in eight hours "on the job," and thereafter return to the barn and unhitch and unharness their teams, putting in about an hour in excess of the lawful eight hour day: *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

As to statutory restriction of hours of labor on public works, see *Ann. Cas.* 1912A, 773.

As to violation of the eight hour law by an employer in the aspect of a crime, see note in 78 Am. St. Rep. 244.

§ 6580.

For penalty, see § 6568.

This section is not unconstitutional as depriving employers and employees in the enumerated callings of their right to contract without due process of law, all doubts being resolved in favor of the validity of the law: *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

As to the constitutionality of statutes limiting hours of day's labor, see note in *Ann. Cas.* 1912D, 393.

The unconstitutionality of this act as an arbitrary and unwarranted exercise of the police power cannot be shown by evidence

that defendant's factory was sanitary and healthful, the labor of female employees light and harmless, and that they could be employed for nine hours a day without endangering or impairing their health or physical condition, since the courts can look only to the law itself and scientific

facts of which it can take judicial notice: *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

As to validity of statute regulating employment of adult females in other respects than number of hours of labor, see note in 12 Ann. Cas. 799.

§ 6580a. Eight Hour Day for Females.

No female shall be employed in any mechanical or mercantile establishment, laundry, hotel or restaurant in this state more than eight hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four: Provided, however, That the provisions of this section in relation to the hours of employment shall not apply to, nor affect, females employed in harvesting, packing, curing, canning or drying any variety of perishable fruit or vegetables, nor to females employed in canning fish or shell-fish. If it shall be adjudicated that the foregoing proviso and exception shall be unconstitutional and invalid for any reason, an adjudication of invalidity of said proviso or of any part of this act shall not affect the validity of the act as a whole or any other part thereof. [L. '11, p. 131, § 1.]

§ 6581.

Act of Congress of March 4, 1907, making it unlawful for any common carrier to require employees to remain on duty for a longer period than sixteen consecutive hours, and providing that the act shall "take effect and be in force one year after its passage," did not take effect as a law un-

til the end of such period; and it did not supersede this section during such year upon any principle of comity, or upon the theory that Congress had occupied the field of statutory regulation and fixed a reasonable time to allow carriers to comply with the regulations: *State ex rel. Atkinson v. Northern Pac. R. Co.*, 53 Wash. 673, 17 Ann. Cas. 1013, 102 Pac. 876.

CHAPTER V.

HEALTH AND SAFETY TO EMPLOYEES IN FACTORIES, ETC.

§ 6587.

This section applies to a main power shaft in a printing-shop: *Berger v. Metropolitan Press Printing Co.*, 61 Wash. 35, 111 Pac. 872.

The purpose and effect of this section is to make it negligence, as a matter of law, to fail to comply with the requirements of the statute: *Kreymborg v. Thurston*, 63 Wash. 219, 115 Pac. 77.

The factory act requiring machinery to be guarded is not limited to employees working with the machine, but applies to any employee whose work makes it possible for him to be injured: *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245.

Assumption of risks, under the factory act, should be withdrawn from the jury, where reasonable minds cannot differ as to the master's failure to comply with the act: *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245.

As to the liability of employer for failure to comply with statute requiring guards for machinery, see note in 131 Am. St. Rep. 437.

An employee does not assume the risk from the failure of the master to guard machinery as required by the factory act: *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 Pac. 145; *Anderson v. Pacific National Lumber Co.*, 60 Wash. 415, 111 Pac. 337.

As to assumption of risk by employee in respect of dangerous machinery, see note in 119 Am. St. Rep. 434.

This section can have no application to an accident in which a boy was injured while voluntarily using a shaft as a horizontal bar for gymnastic exercises, and did not come in contact with it in the performance of his duties; and the defense of assumption of risks accordingly applies: *Talkington v. Washington Veneer Co.*, 61 Wash. 137, 112 Pac. 261.

Under this section, the defense of assumption of risks does not apply unless the court can say, as a matter of law, that the employee was not in the performance of duty when he came in contact with an unguarded shaft; and this the court cannot do, where there was a conflict in the testimony as to whether an employee, injured on an unguarded shaft, had to reach over the shaft in order to clean up and remove sticks from a conveyor chain: *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245.

A head sawyer in a mill assumes the risks, and cannot recover for injuries received by coming in contact with the rock saw, under which he walked when it had been lowered, where the master had made an honest effort to guard the saw, providing such a guard as was in general use within this section, and the sawyer had used the same in that condition without complaint, even if it were practicable to have provided some other kind of guard that might have prevented the accident: *Burns v. Leudinghaus*, 65 Wash. 448, 118 Pac. 305.

Whether it was practicable for the rollers in front of an edger in a sawmill to have been guarded under the factory act, is for the jury, where it appears that they might have been effectively guarded by a stationary rod across the front of the edger and a dead roller in front of the live roller: *Lepper v. Stetson & Post Lumber Co.*, 61 Wash. 523, 112 Pac. 514.

Where the question of practicability is in issue, it is not error to allow the defendant to show by experts that other mills under similar circumstances had found a certain guard for a shingle saw to be impracticable, under this section, requiring guards for all machinery which it is practicable to guard: *Shaw v. Woodland Shingle Co.*, 61 Wash. 56, 111 Pac. 1070.

The factory act, Laws of 1903, page 40, requiring the safeguarding of certain specified machines of various kinds, "and machinery of other or similar description" in factories, will not be confined to the subjects mentioned on the theory of ejusdem generis, but includes friction wheels not named, since the rule has no application where the specified subjects greatly differ from one another and where such construction would violate the evident intent of the legislature: *Ward v. National Lumber & Box Co.*, 54 Wash. 304, 103 Pac. 1.

Where the uncontradicted evidence shows that an accident could not have happened if a saw had been properly guarded, and that a reasonably safe guard would not have interfered with its efficient operation, the master is chargeable with negligence as a matter of law: *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4.

In an action for personal injuries, a special verdict finding that plaintiff's act of stepping into a conveyor near a cut-off saw was very dangerous from the fact that the

cut-off saw was not properly guarded, and that the method employed was safe provided the cut-off saw had been properly guarded, does not show contributory negligence and is not inconsistent with a general verdict for the plaintiff, in the absence of any finding that the danger was known to the plaintiff or so obvious and apparent that a person of ordinary prudence would not have attempted the act: *Kreymborg v. Thurston*, 63 Wash. 219, 115 Pac. 77.

As to the distinction between the defenses of assumption of risk and contributory negligence, see note in 18 Ann. Cas. 960.

§§ 6594, 6595, 6596.

Repealed. See L. '11, p. 373, § 30.

§ 6595.

A notice of an injury is sufficient to authorize a recovery under the factory act, where it was prepared at a meeting by appointment with the defendant, retained without objection, and a few days later plaintiff asked for a copy, which was refused, and the defendant did not affirmatively allege a defective notice, but merely denied the giving of any notice and misled the plaintiff as to the issue: *Berger v. Metropolitan Press Printing Co.*, 55 Wash. 422, 104 Pac. 617.

Where an employee was injured while assisting to place a belt upon a pulley, his notice of the injury stating that he came to work at 6:30 P. M. on a certain date, that one C. started the motor, the belt slipped off, C shut off the power, and while trying to put on the belt, his hand was caught, is sufficient under the factory act, since the purpose of the law to give notice of the time, place and cause is fulfilled, and technical accuracy is not required: *Berger v. Metropolitan Press Printing Co.*, 55 Wash. 422, 104 Pac. 617.

Notice of an accident is a condition precedent to an action for personal injuries under this section; and where the injured person became insane, a notice in his behalf signed by an unauthorized person, after the expiration of the six months, no general guardian having been appointed is not such a notice as is required by the statute: *Nelson v. Young-Cole Lumber Co.*, 58 Wash. 56, 107 Pac. 873.

In an action for injuries sustained in a coal mine, it is not material that no claim was made by plaintiff before suit commenced, during some four months after the accident, there being no attempt to show the purpose of such evidence, claimed on appeal to be relevant as showing false testimony by the plaintiff at the coroner's inquest: *Starck v. Washington Union Coal Co.*, 61 Wash. 213, 112 Pac. 235.

As to the construction of the provision in employer's liability act, requiring notice of injury to be given to the employer, see note in 15 Ann. Cas. 292.

CHAPTER VII.

WORKINGMEN'S COMPENSATION ACT.

§ 6604-1. Declaration of Police Power.

The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. [L. '11, p. 345, § 1.]

The constitutional provisions against class legislation does not take from the state the power to classify in the adoption of police regulations, and permits of a wide discretion in that respect: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

The workingmen's compensation act, Laws of 1911, page 345, does not violate the constitutional restrictions against class legislation in that its contributions exacted from the numerous industries are diverted to the relief of that particular class of injured and disabled workmen, instead of being applied to the use of injured workmen generally or the state at large, that being one of the prerogatives of legislation: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

Such act requiring employers in hazardous employments to create a fund out of which losses to employees shall be paid is not a denial to owners of property of the equal protection of the laws: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

The workingmen's compensation act, Laws of 1911, page 345, assessing employers in extrahazardous employments fixed sums based upon the amount of their pay-rolls, to create a fund to reimburse injured employees, does not violate the constitutional provisions designed to secure equal and uniform taxation of property, since the same is not a general tax, but is in the nature of a license tax for revenue and regulation and not subject to the constitutional limitations

in question: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

Article 1, section 3, of the state constitution and the fourteenth amendment to the federal constitution, which provide that no person shall be deprived of property without due process of law, are not violated by the workingmen's compensation act, Laws of 1911 page 345, in that it creates a liability without fault on the part of employers in extrahazardous employments to contribute fixed sums based upon their pay-rolls to create a fund to reimburse all employees injured in such employments without regard to negligence or common-law liability therefor, and also takes the property of one employer to pay the obligations of another; since it is within the police power as a reasonable enactment in support of economic and moral considerations affecting the protection of the public health, safety or welfare, although it incidentally deprives some persons of property without fault; and since it is not so utterly unreasonable or extravagant as to capriciously interfere with or destroy private rights: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A., N. S. 466, 117 Pac. 1101.

As to the constitutionality of workingmen's compensation acts, see note in *Ann. Cas.* 1912B, 174.

It is competent for the legislature, in the reasonable exercise of the police power, to regulate extrahazardous industries by compelling employers engaged therein to pay a fixed sum to be used for the compensation

of injured employees, and to require such employees to accept specified sums for certain injuries in lieu of their common-law right of damages; and the abolition of all such rights of action and defenses therein, and the substitution in lieu thereof of the schedule of damages provided in the act, to be paid employees out of the fund created, does not violate the constitutional provision guaranteeing the right to trial by jury, if the state in the exercise of the police power can abolish the right of action entirely: State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

The workingmen's compensation act, Laws of 1911, page 345, which requires employers in extrahazardous employments to contribute

fixed sums based upon their pay-rolls to create a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability therefor, and provides that no employer shall exempt himself from the burden or waive the benefits of the act by any contract or regulation, and that any such contract or regulation shall be void pro tanto, is not unconstitutional as interfering with the right of contract, since "liberty" to contract is not absolute, and means absence from arbitrary restraint, not immunity from reasonable regulation and prohibition enforced in the interests of the community by public policy: State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

§ 6604-2. Enumeration of Extrahazardous Works.

There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extrahazardous" wherever used in this act, to wit:

Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gasworks, waterworks, reduction-works, breweries, elevators, wharves, docks, dredges, smelters, powder-works; laundries operated by power; quarries; engineering works; logging, lumbering and ship-building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steamboats, tugs, ferries and railroads. If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 6604-4. [L. '11, p. 346, § 2.]

§ 6604-3. Definitions.

In the sense of this act words employed mean as here stated, to wit:

Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

Mill means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers.

Mine means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals; electric, steam or water power plants; telegraph and telephone plants and lines; electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used.

Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extrahazardous work.

Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay-roll at a salary or wage not less than the average salary or wage named in such pay-roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.: invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, stepfather, stepmother, grandson,

granddaughter, stepson, stepdaughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

Beneficiary means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

Invalid means one who is physically or mentally incapacitated from earning.

The word "child," as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

The words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease. [L. '11, p. 346, § 3.]

§ 6604-4. Schedule of Contribution.

Insomuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay-roll for that year, to wit: (the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard):

CONSTRUCTION WORK.

Tunnels; bridges; trestles; subaqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire-escapes; sewers; house moving; house wrecking.....	.065
Iron, or steel frame structures or parts of structures.....	.080
Electric light or power plants or systems; telegraph or telephone systems; pile-driving; steam railroads.....	.050
Steeple, towers or grain elevators, not metal framed; drydocks without excavation; jetties; breakwaters; chimneys; marine railways; water-works or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters.....	.050
Steam-heating plants; tanks, water-towers or windmills, not metal frames .....	.040
Shaft sinking.....	.060
Concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin works; gasworks, or systems; marble, stone or brick work; road-making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smoke-stacks or chimneys .....	.050
Excavations not otherwise specified; blast furnaces.....	.040
Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings.....	.035
Ship or boat building or wrecking with scaffolds; floating docks.....	.045
Carpenter work not otherwise specified.....	.035
Installation of steam boilers or engines; placing wire in conduits; installing dynamos; putting up belts for machinery; marble, stone or	

tile setting, inside work; mantel setting; metal ceiling work; mill-or ship wrighting; painting of buildings or structures; installation of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering steam-pipes or boilers; installation of machinery not otherwise specified..	.030
Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass setting; building hothouses; lathing; paper-hanging; plastering; inside plumbing; wooden stair building; road making.....	.020

OPERATION (INCLUDING REPAIR WORK) OF

(All combinations of material take the higher rate when not otherwise provided.)

Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks.....	.050
Electric light or power plants; interurban electric railroads not using third rail system; quarries.....	.040
Street railways, all employees; telegraph or telephone systems; stone crushing; blasting furnaces; smelters; coal mines; gasworks; steam-boats; tugs; ferries .....	.030
Mines, other than coal; steam heating or power plants.....	.025
Grain elevators; laundries; waterworks; paper or pulp mills; garbage works .....	.020

FACTORIES USING POWER-DRIVEN MACHINERY.

Stamping tin or metal.....	.045
Bridge work; railroad car or locomotive making or repairing; cooper-age; logging with or without machinery; sawmills; shingle-mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fibre ware; rolling-mills; making steam shovels or dredges; tanks; water-towers; asphalt; building material not otherwise specified; fertil-izer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries, metal stamp-ing extra; creosoting works; pile treating works.....	.025
Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hard-ware; tile; brick; terra-cotta; fire clay; pottery; earthenware; por-celain ware; peat fuel; brickettes .....	.020
Breweries; bottling works; boiler works; foundries; machine-ships not otherwise specified.....	.020
Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or tex-tiles not otherwise specified.....	.015
Making jewelry, soap, tallow, lard, grease, condensed milk.....	.015
Creameries; printing; electrotyping; photo-engraving; engraving; lithographing015

MISCELLANEOUS WORK.

Stevedoring; longshoring030
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Operating stockyards, with or without railroad entry; packing-houses..	.025
Wharf operation; artificial ice, refrigerating or cold storage plants;	
tanneries; electric systems not otherwise specified.....	.020
Theater stage employees.....	.015
Fireworks manufacturing .....	.050
Powder works .....	.100

The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay-roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay-roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay-roll, an adjustment shall be made on or before February 1st of the following year in the manner above provided.

For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

The fund thereby created shall be termed the "accident fund" which shall be devoted exclusively to the purpose specified for it in this act.

In that the intent is that the fund created under this section shall ultimately become neither more or less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.

It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule

rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

For the purposes of such payment and making good of deficit the particular classes of industry shall be as follows:

CONSTRUCTION WORK.

Class 1. Tunnels; sewer; shaft sinking; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples; towers or grain elevators not metal framed; tanks, water-towers, windmills not metal framed.

Class 3. Subaqueous works; canal other than irrigation or docks with or without blasting; pile-driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structures or parts of structures; fire-escapes; erecting fireproof doors or shutters; blast furnaces; concrete chimneys; freight or passenger elevators; fire-proofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smokestack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations; glass setting; building hothouses; lathing; paper-hanging; plastering; wooden stair building.

Class 6. Electric light and power plants or system; telegraph or telephone systems; cable or electric railways with or without rock work or blasting; waterworks or systems; steam-heating plants; gasworks or systems; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installation of automatic sprinklers; covering steam-pipes or boilers; installation of machinery not otherwise specified; installing electrical apparatus or fire-alarm systems in buildings; house heating or ventilating systems.

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

OPERATION (INCLUDING REPAIR WORK) OF

Class 10. Logging; sawmills; shingle-mills; lath-mills; masts and spars with or without machinery.

Class 12. Dredges; dry or floating docks.

Class 13. Electric light or power plants or systems; steam heat or power plants or systems; electric systems not otherwise specified.

Class 14. Street railways.

Class 15. Telegraph systems; telephone systems.

- Class 16. Coal mines.
- Class 17. Quarries; stone crushing; mines other than coal.
- Class 18. Blast furnaces; smelters; rolling-mills.
- Class 19. Gasworks.
- Class 20. Steamboats; tugs; ferries.
- Class 21. Grain elevators.
- Class 22. Laundries.
- Class 23. Waterworks.
- Class 24. Paper or pulp-mills.
- Class 25. Garbage works; fertilizer.

FACTORIES (USING POWER-DRIVEN MACHINERY).

- Class 26. Stamping tin or metal.
- Class 27. Bridge work; making steam shovels or dredges; tanks; water-towers.
- Class 28. Railroad car or locomotive making or repairing.
- Class 29. Cooperage; staves; veneer; box; packing cases; sash[,] door or blinds; barrel; keg; pail; basket; tub; woodware or wood fibre ware; kindling wood; excelsior; working in wood not otherwise specified.
- Class 30. Asphalt.
- Class 31. Cement; stone with or without machinery; building material not otherwise specified.
- Class 32. Canneries of fruits or vegetables.
- Class 33. Canneries of fish or meat products.
- Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; foundries; machine shops not otherwise specified.
- Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware.
- Class 36. Peat fuel; brickettes.
- Class 37. Breweries; bottling works.
- Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.
- Class 39. Working in food stuffs, including oils, fruits, vegetables.
- Class 40. Condensed milk; creameries.
- Class 41. Printing; electrotyping; photo-engraving; engraving; lithographing; making jewelry.
- Class 42. Stevedoring; longshoring; wharf operation.
- Class 43. Stock yards; packing-houses; making soap, tallow, lard, grease; tanneries.
- Class 44. Artificial ice, refrigerating or cold storage plants.
- Class 45. Theater stage employees.
- Class 46. Fireworks manufacturing; powder works.
- Class 47. Creosoting works; pile-treating works.

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay-roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards. If an employer besides employing workmen in extrahazardous employment shall also employ workmen in employments not extrahazardous the provisions of this

act shall apply only to the extrahazardous departments and employments and the workmen employed therein. In computing the pay-roll the entire compensation received by every workman employed in extrahazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise. [L. '11, p. 349, § 4.]

§ 6604-5. Schedule of Awards.

Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

(a) Where death results from the injury the expenses of burial shall be paid in all cases, not to exceed seventy-five dollars (\$75) in any case, and

(1) If the workman leaves a widow or invalid widower, a monthly payment of twenty dollars (\$20) shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall also receive five dollars (\$5) per month for each child of the deceased under the age of sixteen years at time of the occurrence of the injury until such minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed thirty-five dollars (\$35). Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, viz.: the sum of two hundred forty dollars (\$240), but the monthly payment for the child or children shall continue as before.

(2) If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of ten dollars (\$10) shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars (\$35), and any deficit shall be deducted proportionately among the beneficiaries.

(3) If the workman leaves no widow, widower, or child under the age of sixteen years, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed twenty dollars (\$20) per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive

twenty dollars (\$20) per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

(4) In the event a surviving spouse receiving monthly payment shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter, until such child shall arrive at the age of sixteen years, paid to the child increased 100 per cent, but the total to all children shall not exceed the sum of thirty-five dollars (\$35) per month.

(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

(1) If unmarried at the time of the injury, the sum of twenty dollars (\$20).

(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of twenty-five dollars (\$25). If the husband is not an invalid, the monthly payment of twenty-five dollars (\$25) shall be reduced to fifteen dollars (\$15).

(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or widower, have any such child or children, the monthly payment provided in the preceding paragraph shall be increased by five dollars (\$5) for each such child until such child shall arrive at the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars (\$35).

(c) If the injured workman die during the period of permanent total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars (\$20) per month until death or remarriage, to be increased five dollars (\$5) per month for each child under the age of sixteen years until such child shall arrive at the age of sixteen years; but if such child is or shall be without father or mother, such child shall receive ten dollars (\$10) per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed thirty-five dollars (\$35). Upon remarriage the payments on account of a child or children shall continue as before to the child or children.

(d) When the total disability is only temporary, the schedule of payment contained in paragraphs (1), (2) and (3) of the foregoing subdivision (b) shall apply so long as the total disability shall continue, increased fifty per cent for the first six months of such continuance, but in no case shall the increase operate to make the monthly payment exceed sixty per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent.

(e) For every case of injury resulting in death or permanent total disability it shall be the duty of the department to forthwith notify the state treasurer, and he shall set apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of twenty dollars (\$20), to a person thirty years of age, is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of four thousand dollars (\$4,000), but the total in no case to exceed the sum of four thousand dollars (\$4,000). The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly installments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such investments of the accident fund, and may borrow from the main fund to meet monthly payments pending conversion into cash of any security, and in such case shall repay such temporary loan out of the cash realized from the security.

(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of fifteen hundred dollars (\$1500). The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents or parent shall also receive a lump sum payment equal to ten per cent of the amount awarded the minor workman.

(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

(i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.

(j) If a beneficiary shall reside or remove out of the state the department may, in its discretion, convert any monthly payments provided for such case

into a lump sum payment (not in any case to exceed four thousand dollars (\$4,000) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of twenty dollars (\$20) to a person thirty years of age is worth four thousand dollars (\$4000), or, with the consent of the beneficiary, for a smaller sum.

(k) Any court review under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred. [L. '11, p. 356, § 5; L. '13, p. 467, § 1.]

§ 6604-6. Intentional Injuries—Status of Minors.

If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted, for any excess of damage over the amount received or receivable under this act.

A minor working at an age legally permitted under the laws of this state shall be deemed sui juris for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor workman except as expressly provided in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as other property of minors. [L. '11, p. 361, § 6.]

§ 6604-7. Conversion into Lump Sum Payment.

In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed \$4,000.00) on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth the sum of \$4,000.00, in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary. [L. '11, p. 362, § 7.]

§ 6604-8. Defaulting Employers.

If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 6604-4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the hus-

band, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow-servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the state may be prosecuted or compromised by the department in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. [L. '11, p. 362, § 8.]

§ 6604-9. Employer's Responsibility for Safeguard.

If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statute or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same required by section 6604-4 to be paid:

(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to fifty per cent of that amount.

(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to fifty per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in section 6604-7.

The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow-workmen, unless such removal be by order or direction of the employer or superintendent or foreman of the employer, or anyone placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow-workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or anyone placed by the employer in control, or direction of such workman, the schedule of compensation provided in section 6604-5 shall be reduced ten per cent for the individual case of such workman. [L. '11, p. 363, § 9.]

§ 6604-10. Exemption of Awards.

No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever be taken in execution or attached or garnished,

nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void. [L. '11, p. 364, § 10.]

§ 6604-11. Nonwaiver of Act by Contract.

No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void. [L. '11, p. 364, § 11.]

§ 6604-12. Filing Claim for Compensation.

(a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

(b) Where death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such other proof as required by the rules of the department.

(c) If change of circumstance warrant an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

(d) No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued. [L. '11, p. 364, § 12.]

§ 6604-13. Medical Examination.

Any workman entitled to receive compensation under this act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination, or obstructs the same, his rights to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period. [L. '11, p. 365, § 13.]

§ 6604-14. Notice of Accident.

Whenever any accident occurs to any workman it shall be the duty of the employer to at once report such accident and the injury resulting therefrom to the department, and also to any local representative of the department. Such report shall state:

1. The time, cause and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.

2. Whether the accident arose out of or in the course of the injured person's employment.

3. Any other matters the rules and regulations of the department may prescribe. [L. '11, p. 365, § 14.]

§ 6604-15. Inspection of Employer's Books.

The books, records and pay-rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the pay-roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records and pay-rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor. [L. '11, p. 365, § 15.]

§ 6604-16. Penalty for Misrepresentation as to Pay-roll.

Any employer who shall misrepresent to the department the amount of pay-roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state. All sums collected under this section shall be paid into the accident fund. [L. '11, p. 366, § 16.]

§ 6604-17. Public and Contract Work.

Whenever the state, county or any municipal corporation shall engage in any extrahazardous work in which workmen are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the state, county or municipality. If said work is being done by contract, the pay-roll of the contractor and the subcontractor shall be the basis of computation, and in the case of contract work consuming less than one year in performance the required payment into the accident fund shall be based upon the total pay-roll. The contractor and any subcontractor shall be subject to the provisions of the act, and the state for its general fund, the county or municipal corporation shall be entitled to collect from the contractor the full amount payable to the accident fund, and the contractor, in turn shall be entitled to collect from the subcontractor his proportionate amount of the payment. The provisions of this section shall apply to all extrahazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay-roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter or municipal ordinance, provision is made for municipal employees injured in the course of employment, such employees shall not be entitled to the benefits of this act and shall not be included in the pay-roll of the municipality under this act. [L. '11, p. 366, § 17.]

§ 6604-18. Interstate Commerce.

The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a

rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay-roll of the workmen who accept as aforesaid. [L. '11, p. 367, § 18.]

§ 6604-19. Elective Adoption of Act.

Any employer and his employees engaged in works not extrahazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent of the minimum rate specified in section 6604-4 shall be applicable to such case until otherwise provided by law. [L. '11, p. 367, § 19.]

§ 6604-20. Court Review.

Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision (1) of section numbered 6604-5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. No bond shall be required, except that an appeal by the employer from a decision of the department under section 6604-9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court except that in cases arising under sections 6604-9, 6604-15 and 6604-16 either party shall be entitled to a jury trial upon demand. It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in

civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal adviser of the department and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same. [L. '11, p. 368, § 20.]

§ 6604-21. Creation of Department.

The administration of this act is imposed upon a department, to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the governor. One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commissioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of state a statement of his reasons therefor. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol, but branch offices may be established at other places in the state. Each member of the commission shall have power to issue subpoenas requiring the attendance of witnesses and the production of books and documents. [L. '11, p. 369, § 21.]

§ 6604-22. Salary of Commissioners.

The salary of each of the commissioners shall be thirty-six hundred dollars per annum, and he shall be allowed his actual and necessary traveling and incidental expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses and such compensation as the commission may deem proper, not to exceed six dollars per day to an auditor, or five dollars per day to any other assistant. [L. '11, p. 369, § 22.]

§ 6604-23. Deputies and Assistants.

The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed \$5,000.00 per month. They may employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to five dollars for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms and blanks. They may establish and require all employers to install and maintain an uniform form of pay-roll. [L. '11, p. 370, § 23.]

§ 6604-24. Conduct, Management and Supervision of Department.

The commission shall, in accordance with the provisions of this act:

(1) Establish and promulgate rules governing the administration of this act.

(2) Ascertain and establish the amounts to be paid into and out of the accident fund.

(3) Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

(4) Supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome.

(5) Issue proper receipts for moneys received, and certificates for benefits accrued and accruing.

(6) Investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations coming under the observation of the department.

(7) Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses.

(8) Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid. [L. '11, p. 370, § 24.]

§ 6604-25. Medical Witnesses.

Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed ten dollars per day each. [L. '11, p. 371, § 25.]

§ 6604-26. Disbursement of Funds.

Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the

unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An act to provide for state depositories and to regulate the deposits of state moneys therein," shall be applied to said moneys and the handling thereof by the state treasurer. [L. '11, p. 371, § 26.]

§ 6604-27. Test of Invalidity of Act.

If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 6604-4 for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidated except the provisions of section 6604-31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof. [L. '11, p. 372, § 27.]

It was competent for the legislature in this section of the workingmen's compensation act to provide that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part of it; and anything that

might have been eliminated by the legislature can be eliminated by the courts, if it is unconstitutional, without affecting the balance of the act: State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L. R. A., N. S., 466, 117 Pac. 1101.

§ 6604-28. Statute of Limitations Saved.

If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: Provided, That such action be commenced within one year after such repeal or adjudication; but in any such action any sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by section 6604-4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed. [L. '11, p. 372, § 28.]

§ 6604-29. Appropriations.

There is hereby appropriated out of the state treasury the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident fund; and there is hereby appropriated out of the accident fund for the purpose to which said fund is applicable the sum of \$1,500,000.00, or so much thereof as shall be necessary for the purposes of this act. [L. '11, p. 373, § 29.]

§ 6604-30. Safeguard Regulations Preserved.

Nothing in this act contained shall repeal any existing law providing for the installation or maintenance of any device, means or method for the prevention of accidents in extrahazardous work or for a penalty or punishment for failure to install or maintain any such protective device, means or method, but sections 6594, 6595, and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911. [L. '11, p. 373, § 30.]

§ 6604-31. Distribution of Funds in Case of Repeal.

If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing. [L. '11, p. 374, § 31.]

§ 6604-32. Saving Clause.

This act shall not affect any action pending or cause of action existing on the 30th day of September, 1911. [L. '11, p. 374, § 32.]

TITLE LI.

LANDS OF THE STATE.

CHAPTER I.

BOARD OF STATE LAND COMMISSIONERS.

§ 6612.

Under Ballinger's Code, section 2198, giving the commissioner of public lands power to review and reconsider his official acts relating to public lands until a lease or contract has been executed and signed, the commissioner acts within his discretion in refusing to sign a contract for the sale of the whole of lots, where, pending the advertised sale, the legislature passed an act, which took effect after the sale granting a city a right of way through the lots for a street:

State ex rel. Stirrat v. Ross, 54 Wash. 481, 103 Pac. 824.

As to title of purchaser to public land before issue of patent, see note in 50 Am. Dec. 494.

As to when action of land office is conclusive, see note in 20 Am. Dec. 273.

As to establishment of highway over public land subsequent to entry thereon by one who has not perfected his title, see note in 24 L. R. A., N. S., 764.

CHAPTER II.

APPEALS FROM BOARD OF STATE LAND COMMISSIONERS.

§ 6620.

Under this section, relating to appeals to the superior court on applications to purchase shore lands, it is proper to allow an application, based upon the ownership of lots below high-water mark, to be amended so as to show that the applicant had ac-

quired the record title thereto through a bona fide purchaser from the owner of the upland, section 6754 providing that such bona fide purchaser or persons claiming under him shall have the preference right to purchase the shore lands: Shoret v. Signor, 58 Wash. 89, 107 Pac. 1033.

CHAPTER V-A.

SELECTION OF LIEU LANDS.

§ 6635-1. Land Commissioner to Make Agreement for Lieu Land.

For the purpose of obtaining from the United States indemnity or lieu lands for such lands granted to the state for common schools, educational, penal, reformatory, charitable, capitol building or other purposes, as have been or may be lost to the state, or the title to or use or possession of which is claimed by the United States or by others claiming by, through or under the United States, by reason of any of the causes entitling the state to select other lands in lieu thereof, the inclusion of the same in any reservation by or under authority of the United States, or any other appropriation or disposition of the same by the United States, whether such lands are now surveyed or unsurveyed, the commissioner of public lands, with the advice and approval of the board of state land commissioners and the attorney general, is authorized and empowered to enter into an agreement or agreements, on behalf of the state, with the proper officer or officers of the United States for the relinquishment of any such lands and the selection in lieu thereof, under the provisions of this act, of lands of the United States of equal area and value. [L. '13, p. 300, § 1.]

§ 6635-2. Examination and Appraisal.

Upon the making of any such agreement, the board of state land commissioners shall be empowered and it shall be their duty to cause such examination and appraisal to be made as will determine the area and value, as nearly as may be, of the lands lost to the state, or the title to, use or possession of which is claimed by the United States by reason of the causes mentioned in section 6635-1, and proposed to be relinquished to the United States, and shall cause an examination and appraisal to be made of any lands which may be designated by the officers of the United States as subject to selection by the state in lieu of the lands aforesaid, to the end that the state shall obtain lands in lieu thereof of equal area and value. [L. '13, p. 300, § 2.]

§ 6635-3. Transfer of Title to United States.

Whenever the title to any lands selected under the provisions of this act shall become vested in the state of Washington by the acceptance and approval of the lists of lands so selected, or other proper action of the United States, the governor, on behalf of the state of Washington, shall execute and deliver to the United States a deed of conveyance of the lands of the state relinquished under the provisions of this act, which deed shall convey to and vest in the United States all the right, title and interest of the state of Washington therein. [L. '13, p. 301, § 3.]

§ 6635-4. Agent to Rent Escheated Lands.

The commissioner of public lands is authorized to employ an agent or agents to rent any improved escheated urban property for such rental and time and in such manner as the commissioner may direct: Provided, That no lease thereof for a term longer than one year shall be made except to the highest bidder at public auction in the manner provided by law for the leasing of public lands, and, except in such case, no lessee shall be entitled to compensation for any improvements which he may make thereon. Such agent or agents shall cause such repairs to be made to such property as the commissioner may direct, and shall deduct the cost thereof, together with such compensation and commission as the commissioner may authorize, from the rentals for such property, and the remainder which shall have been collected shall be transmitted monthly to the commissioner of public lands. [L. '13, p. 247, § 1.]

CHAPTER VI.**CLASSIFICATION AND SELECTION.****§ 6641. Classification of State Lands.**

That for the purpose of this act all lands belonging to and under the control of the state shall be divided into the following classes:

(1) *Granted Lands.* (a) Common school lands and lieu and indemnity lands therefor. (b) University lands and lieu and indemnity therefor. (c) Other educational land grants. (d) Lands granted to the state of Washington for other than educational purposes, and lieu and indemnity lands therefor. (e) All other lands, including lands acquired or to be hereafter acquired by grant, deed of sale, or gift, or operation of law, including arid lands.

(2) *Tide Lands.* All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, except in front of cities where harbor lines shall have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line and excepting oyster reserves.

(3) *Shore Lands.* Lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow.

(4) *Harbor Lines and Areas.* Such lines and areas as are described in article 15 of the constitution of the state of Washington and which have been established according to law. All of which outer harbor lines so established as aforesaid are hereby ratified and confirmed, also all such harbor lines and areas as may and shall be hereafter established. [L. '11, p. 129, § 1.]

Tide lands, proper, are those lying between the lines of ordinary high tide and mean low tide, the law accepting the mean and not the extreme where boundaries are concerned: *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 135 Am. St. Rep. 1007, 107 Pac. 349, 832.

There is no conflict between this section defining tide lands and section 6744 dividing all tide lands into two classes with reference to the location of the boundaries of cities and towns: *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 135 Am. St. Rep. 1007, 107 Pac. 349, 832.

A state deed of all tide lands situate in front of, adjacent to, or abutting upon, certain portions of the government meander line particularly described, extends only to

the line of mean low tide, under this section, especially as a grant by a state is to be construed most strongly against the grantee, and restricted to the narrowest limits that will reasonably satisfy the grant if no limit is fixed by the deed: *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 135 Am. St. Rep. 1007, 107 Pac. 349, 832.

A state deed of tide lands cannot be collaterally attacked on account of alleged defects in assignments of the land contract to the grantee, after the commissioner of public lands has approved the assignments and issued the deed: *Price v. Loe*, 56 Wash. 253, 105 Pac. 469.

As to right of state to grant tide lands, see note in 22 L. R. A., N. S., 337.

§ 6641-1. Preference Rights.

The prior and preference right to purchase all tide lands of the second class lying between the line of mean low tide and the line of extreme low tide in front of all tide lands of the second class heretofore sold or conveyed by the state of Washington is hereby granted for the period of ninety days from the date this act goes into effect to the purchasers, their grantees or successors in interest of any tide lands of the second class heretofore sold or conveyed by the state of Washington. Such additional tide lands may be so purchased at the rate of one dollar per lineal chain measurement to be based on the United States government meander lines bordering the said tide lands heretofore sold. Upon application and payment for such additional tide lands within said ninety days to the land commissioner of the state of Washington, deed shall be issued to the respective purchaser or purchasers therefor. If such application and payment is not made within said ninety days by the parties to whom the preference rights under this section are given then such additional tide lands shall be sold as other tide lands are sold under the laws of the state of Washington. [L. '11, p. 130, § 2.]

CHAPTER VII.

APPRAISAL AND SALE OF GRANTED LANDS.

§ 6670-1. Time for Removal of Timber.

In all cases where timber on state school and granted land has heretofore been sold separate from the land, the purchaser shall be allowed five years

from the date of sale within which to remove said timber: Provided, That the board of state land commissioners may extend the time for the removal thereof for any period not exceeding ten years from the date of first renewal of said contract, upon application being made for such extension, and upon the payment of the sum or rent of one dollar and fifty cents per acre, per annum; the said rental so received to be paid into the various funds as now provided by law: Provided, however, This act shall not operate to grant any extension of time for a longer period than ten years from the first day of June, 1905, and shall only apply to sales made prior to 1905. [L. '11, p. 643, § 1.]

§ 6670-2. Extension of Time for Removal of Timber.

In all cases where any timber on any state school or granted lands has been heretofore sold separate from the land and, in the judgment of the board of state land commissioners, the interest of the state will be better served by granting an extension of time for the removal thereof, the said board may extend the time for the removal of such timber for a further period of not to exceed five years from and after the date upon which it may now be removed, upon application and satisfactory showing and upon the payment of the annual rental or charge of one dollar and fifty cents (\$1.50) per acre per year, the said rental to be paid into the various funds as now provided by law: Provided, That before any such extension be granted the applicant shall furnish to the board satisfactory proof that all state, county and other taxes levied or assessed upon such timber have been fully paid; And, provided further, That the provisions of this act shall only apply to sales of timber made prior to June 15th, 1909. [L. '13, p. 73, § 1.]

§ 6672. Public Sale—Procedure.

When the board of state land commissioners shall have decided to sell any lot, block, tract or tracts of granted lands, or timber, fallen timber, stone, gravel or other valuable materials thereon, it shall be the duty of the commissioner of public lands to forthwith fix the date of sale and give notice thereof by advertisement published once a week for five weeks next before the time he shall name in said notice, in at least one newspaper of general circulation published in the county in which the lands are situated, which notice shall specify the place, time and terms of sale, describing with particularity each parcel of land to be sold and stating the appraised value thereof, and by causing to be posted in a conspicuous place in the office of the auditor of the county wherein such lands are situated a copy of said notice. And the commissioner of public lands shall cause all such lands or materials thereon to be sold and arrange such date of sale so that it will fall on the first Tuesday of the month, except where such Tuesday would fall on a legal holiday, in which case no sales shall be made until the following month. The commissioner of public lands shall cause to be printed in pamphlet form a list of all school, granted or other public lands or materials thereon, or tide or shore lands of the first or second class, or detached tide lands, or harbor area leases or mineral lands required by law to be sold at public auction and the appraised value, where the law provides for appraisement, that are to be sold in the several counties of the state, said lists to be issued each month, at least four weeks prior to the date of sale of

such lands or materials enumerated thereon, such lands and materials to be listed under the name of the county wherein located, in alphabetical order, giving the appraised values, character of same and such other information as may be of interest to prospective buyers. Said commissioner of public lands shall cause to be distributed to the auditor of each county in the state a sufficient number of such lists to supply the demands made upon them respectively, as reported by such auditors, not exceeding one hundred copies in any one county. And said county auditors shall keep the lists so furnished in a conspicuous place or receptacle on the counter of the public office of their respective departments, and when requested so to do shall mail copies of such lists to residents of their counties. The commissioner of public lands shall retain for free distribution in his office five hundred copies of said lists, as above set forth, such lists to be kept in a conspicuous place or receptacle on the counter of the general office of the commissioner of public lands; and when requested so to do, the commissioner shall mail copies of said lists each month as issued to any applicant therefor. Proof of publication shall be made by affidavit of the publisher or person in charge of the newspaper publishing the notice of sale and by certificate of the auditor showing the posting of the notice of sale as aforesaid and the receipt of the lists as aforesaid, which shall forthwith be sent to and filed with the commissioner of public lands. The board of state land commissioners is hereby authorized to expend any sum of money, not exceeding fifteen dollars in additional advertising of such sale as the said board shall determine to be for the best interests of the state. Such sale shall take place on the day advertised, between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon, in front of the courthouse, or of the building in which the superior court is held, in the counties in which there is no courthouse, and shall be sold at public auction to the highest bidder, on the terms prescribed by law and as specified in the notice hereinbefore provided; and no land shall be sold for less than its appraised value. Such sale shall be conducted under the direction of the board, or the commissioner of public lands; by the county auditor of the county in which the lands are situate; and such auditor shall at once deliver to the purchaser under his hand and seal, a memorandum of his purchase, containing a description of the land purchased, the price bid and the terms of sale, upon the delivery to such auditor, by the purchaser, either in cash or by certified check, or draft drawn upon some bank doing business in this state, or by postal order, of an amount equal to one-tenth of the price of the land by him purchased, payable to the order of the commissioner of public lands; and such auditor shall at once send to the commissioner of public lands such cash or certified check, draft or postal order and a copy of the memorandum delivered to the purchaser, together with such additional report of his doings and proceedings with reference to such sale as may be required by the commissioner of public lands or the board of state land commissioners. If any land so offered for sale be not sold, the same may again be advertised for sale, as provided in this act, whenever in the opinion of the board it shall be expedient so to do; and such land shall again be advertised for sale as provided in this act, whenever any person shall apply to said board in writing to have such land sold and shall agree to pay, at least the appraised price thereof and shall deposit with the commissioner of public lands at the time of making such application, a suffi-

cient sum of money to pay the cost of advertising for such sale, as provided in making original application. [L. '13, p. 93, § 1.]

§ 6680.

This section, providing that any sale or lease of state lands made by mistake, or not in accordance with law, shall be void and the contract or lease assumed thereon shall be of no effect and the holder of the contract required to surrender the same, applies only to executory contracts, and not to sales that have been fully executed by delivery of the state deed and full payment of the price: State v. Ort, 66 Wash. 130, 119 Pac. 21.

As to validity of mortgage on government land made by claimant holding under homestead act prior to final proof, see note in 9 Ann. Cas. 934.

In the absence of fraud or connivance of the purchaser, the state cannot maintain an action to set aside its deed of state lands on the ground of mistake of its officers in determining that the character of the lands is agricultural, when in fact it contained more than one million feet of merchantable timber, and under the law could not be sold as agricultural land: State v. Ort, 66 Wash. 130, 119 Pac. 21.

As to right of entryman to notice and hearing before cancellation of entry, see note in 75 Am. St. Rep. 880.

As to effect of patent and how it may be attacked, see notes in 2 Am. Dec. 568 and 12 Am. Dec. 564.

CHAPTER IX.

CAPITAL LAND GRANT.

§ 6698. Appraisement and Sale—Procedure.

The state capitol commission shall cause said lands to be appraised and prepare an abstract or record of all the capitol building lands with such maps and other data as may be deemed necessary to properly show in detail and by legal subdivision the location thereof, and of the timber and other materials thereon, and the character and value thereof, and such record shall be open to inspection to anyone desirous of bidding on any such lands or the materials thereon. The commission shall seek proposals by advertising in the public press or otherwise, within or without the state, for the sale of such lands in tracts not to exceed one hundred and sixty acres in extent, and readvertise and reseek other and new proposals or bids as often as said commission shall deem necessary, and may sell any such lands at public auction, with a view to obtaining the full market value of said lands, announcing the times, terms and particulars of sale as is now provided for sale of other state lands: Provided, however, The commission may fix times at which offers shall be received on any or all capitol lands, or materials thereon, and the commission may reject or accept any or all such bids but no bids shall be accepted from any bidder for any tract of land or materials on any tract which is not the highest bid offered, except where any bidder has bid on more than one tract his total bids may be taken into consideration in determining the best bid: Provided further, That the commission may sell the timber or other materials separate from the land, and said commission shall fix the time in which such timber, or other materials shall be removed from the lands, and may provide that the purchaser of timber or other materials separate from the land shall not be limited as to the time of removal thereof upon payment to the state for the use of such lands upon which such timber or other materials are situated of an annual rental to be fixed by the commission at or before the time of sale: Provided further, That the commission may lease any of the capitol building lands for agricultural purposes for a period of not exceeding five years and under such terms and conditions as the commission may deem advisable, but all im-

provements made on any such lands by a lessee thereof shall revert to the state at the expiration of the lease. [L. '11, p. 325, § 9.]

§ 6700. Sale at State Capitol—Proceeds—Plans for Capitol Building.

All sales shall take place at the state capitol and the proceeds of such sale of lands, or the timber or other materials shall be paid into the capitol building fund to be used as in this act provided. All contracts for the construction of capitol buildings shall be let after notice for proposals or bids have been advertised for at least four (4) consecutive weeks in at least three newspapers of general circulation throughout the state. [L. '11, p. 326, § 10.]

§ 6701. Conveyances, Manner of.

Upon performance by the purchaser of all such conditions as shall have been fixed by the commission for the sale of any such lands or the timber or other materials thereon, conveyances shall be made therefor by deed executed by the governor[,], attested by the secretary of state, to the extent of the interest so sold to such purchaser. [L. '11, p. 326, § 11.]

§ 6702. Commission—Assistants—Expenses.

The commission may employ such cruisers, draftsmen, engineers, architects or other assistants as may be necessary for the best interests of the state in carrying out the provisions of this act, and all expenses incurred by the commission, and all claims against the capitol building fund shall be audited by the commission and presented in vouchers to the state auditor, who shall draw a warrant therefor against the capitol building fund as herein provided or out of any appropriation made for such purpose. [L. '11, p. 326, § 12.]

§ 6704-1. Construction of Capitol Buildings.

It is hereby declared to be the purpose and intention of this act:

(A) To provide for the paying off, canceling or refunding, by the issue of bonds therefor, the present outstanding warrant indebtedness against the capitol building fund and the interest due and unpaid thereon at the time of the payment, cancellation or refundment thereof;

(B) To acquire and in the manner authorized, the property described in section 1 of chapter 20, Laws 1909, special session, approved August 23, 1909, and to use such lands in conjunction with the lands belonging to the state and known as the "Sylvester Site" or "Old Capitol Site" for the erection and building thereon of a group or system of buildings for capitol purposes, and for beautifying, parking and laying out grounds about such capitol buildings, all of which grounds or land shall hereafter be known as "Capitol Place";

(C) To build on such "Capitol Place" a series or group of buildings for state official purposes. The main or principal building to be built on the foundation heretofore erected as the foundation for a capitol building, and such main building, when built, to contain the principal executive offices of the state and the rooms and halls for the use of the legislature, which building shall be known, when completed, as the "Capitol," the other buildings to be grouped around and adjacent to said "Capitol" and to be built from time to time as needed;

(D) For the purpose of providing adequate quarters for the supreme court and its officers, and offices for the attorney general, and the state law library,

thereby relieving the present congested condition of office quarters in the present building now used for capitol purposes, as soon as plans can be provided therefor there shall be erected as one of the capitol buildings on said "Capitol Place" a building to be known as the "Temple of Justice," for the purpose of housing the departments aforesaid, the approximate cost of said building to be \$300,000;

(E) That the capitol commission shall without delay cause complete topographic and profile maps to be made of the lands composing "Capitol Place," and shall furnish the same at a price to be fixed by the commission to architects seeking to offer plans for "Capitol Place," and said commission shall fix a time not later than the first day of August, 1911, for receiving ground plans for a series or group of buildings on said "Capitol Place," showing the main building or "Capitol," a court building or "Temple of Justice" and at least two other buildings for general offices, and accompanying said plans shall be submitted complete plans and specifications for the construction of said "Temple of Justice" building, and with such further details as to the grounds or buildings, or both, as the capitol commission may call for. The commission may reject any and all plans and may call for new plans from time to time, or may select or adopt all or part of any plan or plans submitted and may enter into the usual contract or agreement with any architect or architects for compensation for plans adopted, or may enter into any contract or agreement for recommendation to the legislature for compensation for any plan or plans adopted in whole or in part, and do any and all things whatsoever to carry out the provisions, purposes, and intent of this act to the end that, as speedily as consistent with economy, suitable, adequate, and commodious buildings and grounds may be provided for official purposes, and that to this purpose, from time to time, new buildings, or additions to buildings theretofore constructed, except additions to the main building, may be constructed, all in accordance with a general plan, and so as not to interfere with the symmetry, grandeur, or architectural beauty of the whole system or group;

(F) That all buildings to be built as herein provided shall be of absolute fireproof construction;

(G) That the appropriation or appropriations hereinafter made, or provided for in any subsequent legislation, shall not prohibit the capitol commission from proceeding, should sufficient funds be received from the sales of capitol building lands or materials thereon (but shall be deemed an authorization), to construct the other buildings or to acquire or improve the grounds used for capitol purposes as herein provided, or to further carry out the purposes of this act. [L. '11, p. 319, § 1.]

§ 6704-2. Bonds to be Negotiated.

As defined to be the purpose in section 6704-1 the said capitol commission may proceed at once to issue negotiable annual interest bearing bonds in an amount not exceeding four million dollars against the capitol building fund and to sell the same or to exchange the same for the paying off, refunding and canceling of the present outstanding warrants against the said capitol building fund, including the interest due and unpaid thereon at the time of such payment, cancellation or refunding thereof and for

repaying to the general fund of the state the advancements made therefrom to the capitol building fund under this or any other act. Such bonds shall bear a rate of interest not to exceed five per cent per annum, and shall be issued in accordance with the provisions hereinafter defined. The proceeds of the bonds herein authorized to be issued shall be used: 1st, in the payment of all outstanding warrants and interests thereon against the capitol building fund; 2d, in repaying to the general fund the advancements made therefrom to the capitol building fund; 3d, for the carrying out of the other purposes mentioned in section 6704-1. The capitol commission may issue and sell all or any part of said bonds at any one time or from time to time as in their discretion seems best, or may exchange any of said bonds in payment in all or in part for any work done under the provisions of this act. The capitol commission may in its discretion allow a brokerage commission of not to exceed one-eighth of one per cent on the bonds issued, said commission to be paid from the proceeds of the sale of such bonds. The state of Washington hereby guarantees the payment of the principal and the interest on all bonds issued under the provisions of this act. [L. '11, p. 321, § 2; L. '13, p. 139, § 1.]

§ 6704-3. Construction of Temple of Justice.

The state capitol commission, as soon as it shall have adopted general plans for the construction of buildings on said "Capitol Place" and shall have adopted plans and specifications for the said "Temple of Justice," shall proceed under such terms and conditions as the commission may provide, to call for bids and make contracts for the construction and completion of said "Temple of Justice." For the purpose of the construction of said "Temple of Justice" and for acquiring the lands authorized to be acquired by chapter 20, Laws 1909, special session, or so much of said lands as the commission may deem expedient at the time to so acquire, the commission is hereby authorized to issue bonds as in this act provided to the extent of three hundred and fifty thousand dollars (\$350,000), and until such time as said bonds are issued and sold, and for the purpose of providing, without delay, available funds to construct such building and acquire such lands there is hereby appropriated out of the general fund of the state the said sum of three hundred and fifty thousand dollars which amount so appropriated from the general fund shall be deemed a temporary loan only from said general fund and to the amount only as may be needed for the purposes named and until repaid to the general fund from the proceeds of the sale of the bonds as herein authorized: Provided, The commission may sell all or part of said bonds at any one time or may exchange any of said bonds in payment in all or in part for the building of said "Temple of Justice," as may be provided in the contract for the construction thereof or by any subsequent agreement. [L. '11, p. 321, § 3.]

§ 6704-4. Bonds—Interest-bearing Coupons.

Whenever the commission shall have been authorized to do so, as in this act or any further act, to issue bonds it shall issue negotiable annual interest bearing coupon bonds, in denominations of one thousand dollars, payable in five years, or any multiple of five years up to twenty years, but if issued for a longer period than five years, the state to have the right, through the

capitol commission, or its successor or successors in such functions, to pay or refund the same at any five year period during the life of such bonds. Bonds authorized under this act shall bear interest not to exceed five per centum per annum, such bonds and all interest coupons thereof payable at the office of the state treasurer, and no coupon shall draw interest after the date named in such coupons unless there be no money in the treasury to pay the same and the treasurer shall stamp thereon "Not paid for want of funds," giving the date of such indorsement, in which event such coupon so stamped shall from such date draw the same rate of interest as it represented on the bonds until it is finally called for payment by the state treasurer. Notice of the time of payment of any bond or coupon shall be made by registered mail to the last known address of the holder thereof as shown on the record of the state treasurer kept for such purpose: Provided, No notice shall be required of any payment to be made of any coupon or bond on date named in such coupon or bond. Interest coupons shall be detached by the state treasurer at his office at the time of payment. No bonds shall be sold or exchanged for less than the face value thereof, and the commission may, in the call for the sale of any bonds provide that such bonds shall be issued only as deemed necessary by the commission, and the commission may issue a new call at any time, or may offer any such bonds for sale from time to time without any formal notice or call for bids thereon. The commission may issue new bonds to take up any issue of bonds theretofore issued, or to take up any issue of warrants, that may have been issued for any purpose authorized in this act or any future act, and the reissue of any bonds or warrants or the issue of any bonds or warrants to take up any outstanding bonds or warrants or the paying out of any funds raised by the sale of any bonds or warrants shall not be deemed an increase in the amount authorized to be expended or indebtedness created under the provisions of this act. [L. '11, p. 322, § 4; L. '13, p. 140, § 2.]

§ 6704-5. Purchase of Bonds.

Whenever the capitol commission shall offer any bonds for sale, and there shall be in the permanent school fund, or other permanent or investment fund, sufficient uninvested funds to cover the purchase of such issue of bonds or any part thereof, the board, officer or officers, authorized to invest any such fund may invest the same in any of said bonds: Provided, however, Whenever any of said bonds are purchased by said school fund or other permanent or investment fund the capitol commission, or the board, commission or officer authorized to succeed it in such functions, may pay any or all of such bonds, so held by the permanent school fund or such other fund at any time there is sufficient money in the capitol building fund for that purpose: And provided further, That any and all bonds purchased by any of the permanent funds as in this section provided, shall, for the purposes of such investment, be deemed in all respects state general bonds and shall be guaranteed both principal and interest by the general fund of the state. [L. '11, p. 323, § 5.]

§ 6704-6. Vouchers Signed for Claims.

All claims authorized to be paid under this act except as otherwise provided or intended, shall be by vouchers signed by the governor as chairman

of the capitol commission and attested by the secretary or acting secretary thereof, and warrants drawn thereon by the state auditor against the capitol building fund, or other fund or appropriation authorized to be used for such purpose. [L. '11, p. 324, § 6.]

§ 6704-7. Interest Paid from General Fund.

All interest that may become due on bonds or warrants issued by the capitol commission shall be guaranteed by the state, and such interest shall be paid out of the general fund of the state: Provided, however, That any and all expenditures made out of the general fund shall be deemed a loan from said general fund and a debt against the capitol building fund and shall be repaid to the general fund from the proceeds of the capitol land grant after all other claims against the capitol building fund shall have been paid. Interest payments made out of the general fund as herein authorized may be made when due by the state treasurer and the state auditor shall draw his warrant therefor in favor of the treasurer for the amount so paid. [L. '11, p. 324, § 7.]

§ 6704-8. Refunding.

Any paying off, or refunding of the present outstanding warrant indebtedness against the capitol building fund shall not be deemed an indebtedness incurred by the state capitol commission and the said capitol commission in addition to the expenditures hereinbefore authorized may at any time expend, for the purposes as outlined in section 6704-1, any moneys received from the proceeds of the sale or rental of capitol building lands, and all sums of moneys so received are hereby appropriated therefor. [L. '11, p. 324, § 8.]

§ 6704-9. Limit on Expenditures.

Any of the amounts herein authorized to be expended or obligations incurred, whether such amounts are specifically named or otherwise are hereby appropriated: Provided, That at no time shall the total expenditures for capitol buildings and grounds, whether authorized under this act or any subsequent enactment, exceed the estimated value of the capitol land grant. [L. '11, p. 327, § 13.]

§ 6724.

See notes to § 3637.

CHAPTER XII. TIDE AND SHORE LANDS.

§ 6744.

See notes to § 6641.

§ 6750.

See notes to § 6754.

A patent from the government prior to the adoption of the state constitution passed title to tide lands included within the government meander line, where the line was run below high-water mark, in view of the constitutional disclaimer of title to tide

lands patented by the government, constitution, article 17, section 2; and hence the owner of such lands is entitled, regardless of the location of high-water mark, to the preference right to purchase tide lands abutting thereon, conferred by this section upon the owner of lands abutting or fronting upon tide or shore lands of the first class, to the exclusion of one owning the uplands above or abutting on high-water mark: *Bleakley v. Lake Washington Mill Co.*, 65 Wash. 215, 118 Pac. 5.

As to title of state to lands covered by tidal and other navigable waters, see note in 53 Am. St. Rep. 289.

§ 6754.

See notes to §§ 6620, 8766.

Laws of 1897, page 250, section 45, giving upland owners the preference right to purchase shore lands is a mere gratuity, and is not intended as in lieu of riparian rights: *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988.

The purchaser of lots abutting on a street that reaches to high-water mark on a lake has the preference right to purchase the abutting shore lands, by virtue of his ownership of the fee of the entire street: *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988.

As to the effect of streets on shore in considering rights to accretions, see note in 58 L. R. A. 208.

Where the board of harbor line commissioners filed a plat fixing the shore line of a lake from thirty-nine and one-half to one hundred and thirty-nine feet distant from an adjacent city block, no part of the block abuts on the shore lands of the lake, and the line is conclusively fixed as to the owner of the block claiming a preference right to purchase shore lands, until vacated for error at the instance of the state or of a party in interest claiming that the shore line was located too far inland: *Williams v. Cole*, 54 Wash. 110, 102 Pac. 870.

The right of an abutting owner to access to the street in front of his property gives him no right as an abutting owner to the shores of a lake across or bordering on the other side of the street: *Williams v. Cole*, 54 Wash. 110, 102 Pac. 870.

In such a case, the existence of a street between the block and the shore land is conclusively settled by a final judgment against the city in which the court finds that there is no street, and no appeal was taken therefrom by the city: *Williams v. Cole*, 54 Wash. 110, 102 Pac. 870.

The grantee of lots below the line of ordinary high water on a navigable lake acquires no title thereto and has no preference right to purchase shore lands as an owner of abutting upland: *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033.

Under this section the bona fide purchaser of lots below high-water mark, from the owner of the uplands, or one claiming through such bona fide purchaser, is entitled to the preference right to purchase the shore lands, regardless of the present ownership of the abutting uplands: *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033.

The grant of an easement for a railway right of way along a shore line extending to or below high-water mark does not convey or affect the grantor's preference right to purchase shore lands from the state as the owner of abutting uplands, under sections 6750, 6754: *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578.

The statute giving to the owner of uplands the preference right to purchase abutting tide lands from the state for the period of sixty days after the filing of the tide lands plat, has reference to the owner of the legal title to the uplands during the sixty days when the right must be exercised, and confers no rights upon a vendee in possession under a contract of sale with deed in escrow, who did not acquire legal title by full payment of the price and delivery of the deed until nine months after the tide lands plat was filed: *Book v. Thomas*, 61 Wash. 607, 112 Pac. 917.

Where the vendor of uplands under contract of sale executed and placed in escrow a deed, the delivery of the deed cannot be held to relate back to the time of the delivery in escrow, so as to work an assignment of the vendor's preference right to purchase tide lands as owner of the legal title prior to final payment and final delivery of the deed: *Book v. Thomas*, 61 Wash. 607, 112 Pac. 917.

It will not be inferred that a vendor of uplands retaining legal title intended to assign his preference right to purchase tide lands prior to parting with his title, by reason of the reservation in his contract of the mutual use of a dock situated on the tide lands, since the reservation shows either that it was thought that the dock was partly on the upland, or that it might pass as an appurtenance unless reserved: *Book v. Thomas*, 61 Wash. 607, 112 Pac. 917.

The owner of a foundry is not entitled to a preference right to purchase shore lands as the owner of "valuable improvements" prior to March 26, 1890, pursuant to sections 6750, 6754, by reason of the erection of an "office building" constructed by one man in two or three days, and a coke-shed of the capacity of one-half ton, the latter probably erected after March 26th, and the former at some indefinite time after December 24, 1889, the value of the buildings not being shown, especially in view of the fact that the state had asserted its title to all tide lands November 11, 1889: *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578.

As to the nature of riparian rights and the lands to which they attach, see note in 9 Ann. Cas. 1235.

CHAPTER XIII.

HARBOR LINES AND AREAS, AND SALES AND LEASES THEREOF.

§ 6776. Leasing of Harbor Areas for Booming Purposes.

That the board of state land commissioners be and hereby is authorized to lease any harbor area, tide lands or other lands of the state of Washington, whether the same be now reserved from lease or sale by any existing act or not, except tide lands or harbor area in front of any incorporated city or town or within two miles thereof on either side, and excepting any oyster reserve containing oysters in merchantable quantities, to any person, firm or corporation, for booming purposes. Such leases shall not be granted for a longer term than ten years from the date thereof; and the board of state land commissioners shall prior to the issuance of any such lease fix an annual rental for the lands leased, and prescribe the terms and conditions of the lease. The board may declare a forfeiture of any lease for a violation of any of the terms or conditions thereof. Any person, firm or corporation leasing any lands under the provisions of this act shall receive, hold and assort the logs and other timber products of all persons requesting such service, and upon the same terms and without discrimination, and may charge and collect tolls on all logs or other timber products so handled, said tolls not to exceed seventy-five cents per thousand on all logs, spars or other large timber, and reasonable rates on all other timber products, and shall be subject to the same duties and liabilities, so far as the same are applicable, as are imposed upon boom companies organized under the laws of this state. Failure to use any lands leased under the provisions of this act for boom purposes for a period of more than one year shall work a forfeiture of the lease, and such lands shall revert to the state without any notice or declaration of forfeiture. At the expiration of any lease issued under the provisions of this act, the original lessee shall have the preference right to release the lands covered by his original lease for a further term, not to exceed ten years, at such rental and upon such terms and conditions as may be prescribed by the board of state land commissioners. [L. '11, p. 388, § 1.]

§ 6781-1. Lease by Port Commission.

The port commission of each port district heretofore created or hereafter to be created under the laws of the state of Washington, shall have full power and authority to lease the harbor areas and tide lands belonging to the state of Washington situate within the territorial limits of such port district to such persons and upon such terms and conditions conforming to the provisions of the constitution of the state of Washington as shall be determined by resolution of such port commission. Every such lease shall provide that the rentals thereunder shall be payable to the state treasurer. [L. '13, p. 585, § 1.]

§ 6781-2. Preference Rights to Abutting Owners.

The owner of any tide or shore lands abutting any such harbor area shall have the preference right, to be exercised by written application filed within ninety (90) days following the filing of the plat of any tide or shore lands hereafter to be filed, covering tide or shore lands or harbor area within

the limits of any port district, or in case of plats heretofore filed, then within ninety (90) days following the taking effect of this act, to obtain a lease of the harbor area abutting his tide land or shore land for a thirty (30) year period, and every lease obtained by virtue of the exercise of such preference right shall conform to the provisions of the state constitution and shall provide that the harbor area described therein, or such a reasonable portion thereof as shall be designated by the port commission of such port district, having in view the requirements of the business proposed to be carried on thereon, shall be improved upon plans approved by such port commission, the construction of such improvement to be commenced within such time as may be fixed in each case by such port commission, such time to be in no case less than two (2) years from the date of such lease and be completed within such reasonable time thereafter as such port commission shall fix in each case, any of which times so fixed may be thereafter extended by such commission, the character of which improvements may, with the approval of the port commission, be changed either before or after completion, but in all cases where the abutting owner or one claiming under him had prior to February 22, 1913, built upon such area, his improvements shall, so far as otherwise conforming to the provisions of the state constitution, be recognized and accepted as a sufficient compliance with the requirements of this act so far as concerns the area covered thereby, and as to uncovered area such improvements shall be given the same consideration as in other cases, and every lease obtained by virtue of such preference shall further provide that the annual rental to be paid shall be a sum equal to two per cent of the assessed valuation for the year preceding the date of such lease of an equal area of adjoining or abutting shore or tide lands, exclusive of improvements thereon, and where the adjoining or abutting strip of shore or tide lands is of less width than the harbor area, a value proportional to said width: Provided further, however, That the foregoing provision fixing the rate of rental shall not extend beyond December 31, 1928, but all rentals after that date shall be subject to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same: Provided, further, That it shall not be necessary for any public corporation proposing to make use of any such harbor area to acquire by condemnation or otherwise the preference right hereby granted relating thereto, but nothing herein contained shall be construed to deprive any party to any such condemnation proceeding of any damages to which he would have been entitled if this act had not been passed. [L. '13, p. 585, § 2.]

§ 6781-3. Bond of Lessee—Rates.

The port commission shall require of every lessee under this act a bond with sufficient surety, to be approved by the port commission, in such penalty, and not exceeding twice the amount of the annual rental, but in no case less than five hundred dollars, as may be prescribed by the port commission, conditioned for the payment by the lessee of the rental reserved in his lease at or prior to the time of payment therein specified, during the term of such lease or during such part thereof as the port commission in its discretion shall require to be covered by such bond; and in case only a part of the term of such lease shall be covered thereby, said port commission shall

require of such lessee another like bond, to be executed and delivered within three months and not less than one month prior to the expiration of the period covered by the previous bond, covering the remainder of the term of the lease, or such part thereof as the port commission in its discretion shall require to be covered thereby. The port commission shall have power at any time to summon sureties upon any bond and to examine into the sufficiency thereof, and if it shall find the same to be insufficient it shall require the lessee to file a new and sufficient bond within thirty days after receiving notice so to do, under penalty of cancellation of the lease; and the port commission shall have power upon sixty days' notice to cancel any lease for a substantial breach by the lessee of any of the conditions thereof, or for lack of a bond therewith as herein required. Notwithstanding any such lease now or hereafter existing the state shall ever retain and does hereby reserve the right to regulate the rates of wharfage, dockage or other tolls to be imposed by the lessee or his assigns upon commerce for any of the purposes for which the leased area may be used, and the right to prevent extortion and discrimination in such use thereof. [L. '13, p. 587, § 3.]

§ 6781-4. Preference Right to Re-lease.

The lessee under any lease now existing of harbor area situate in a port district, which shall be canceled or annulled for any reason, shall, upon such cancellation or annulment, have, for ninety (90) days thereafter, a preference right to a new lease, for the remainder of the term of the lease canceled or annulled, upon the terms and conditions provided in sections 6781-2 and 6781-3; but in all cases where any canceled or annulled lease contained provisions relating to the right of the state to annul or cancel the same, like provisions shall be incorporated in any new lease covering in whole or in part the same area. [L. '13, p. 588, § 4.]

§ 6781-5. Preference Rights Annulled.

All preferences of lease of harbor areas or tide lands situate in a port district heretofore created by the laws of the state of Washington, which have not been already exercised are hereby annulled. [L. '13, p. 588, § 5.]

§ 6781-6. Rentals from Harbor Areas and Tide Lands.

That the rents hereinafter to be paid under existing or future leases of harbor areas and also of tide lands belonging to the state of Washington, shall be hereafter disposed of as follows:

In cases where the leased harbor area or tide land is situated within the territorial limits of a port district already created or to be hereafter created under the laws of the state of Washington, seventy-five (75) per cent of the rents received for such cases shall be paid by the state treasurer to the county treasurer of the county wherein such port district is situated for the use of such port district and go into a special fund to be expended only for harbor or waterfront improvement purposes and the remaining twenty-five (25) per cent shall be paid into the general fund of the state treasury; except that in cases where the port district itself shall have constructed or shall own structures or improvements situate upon leased harbor areas, or tide lands, the entire rentals of such improved area or tide land shall go to such port district. In all other cases seventy-five (75) per cent of the rents

shall be paid by the state treasurer into the county treasury of the county in which the leased harbor areas or tide lands are situate, the same to go into a special fund known as the "harbor improvement fund," and to be disbursed only for harbor or harbor improvement purposes; and the remaining twenty-five (25) per cent shall be paid into the general fund of the state treasury. The state treasurer being hereby authorized and directed to make such payments to the respective county treasurers for the use of such port districts or counties, as the case may be, on the first days of July and January of each year, of all moneys in his hands on such dates payable under the terms of this act to such port districts and counties respectively. [L. '13, p. 588, § 1.]

§ 6781-7. Use of Harbor Area—Structures Built by Permission of Land Commissioner—Terms and Conditions.

Whenever, in any waterways created under the laws of the state of Washington, the government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the state, no structure shall be allowed in the strip of waterway between the boundary and the nearest pierhead line except by the consent of the state land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty (30) years: Provided, however, That the owner of land abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90) days following the date when this act shall go into effect, to obtain such a permit for a thirty (30) year term, and every permit obtained by virtue of the exercise of such right shall provide that the area described therein or such reasonable portion thereof as shall be designated by the state land commissioner, having in view the requirements of the business proposed to be carried on thereon, shall be improved upon plans approved by the state land commissioner, the construction of such improvement to be commenced within such time as may be fixed in each case by the state land commissioner, such time to be in no case less than two (2) years from the date of such permit, to be completed within such reasonable time thereafter as the state land commissioner shall fix in each case, any of which times so fixed may be thereafter extended by him, the character of which improvements may be changed either before or after completion with the consent of the state land commissioner, but in all cases where the abutting owner or one claiming under him had prior to February 22, 1913, built upon such area, his improvements shall be recognized and accepted as a sufficient compliance with the requirements of this act so far as concerns the area covered thereby, and as to uncovered area such improvements shall be given the same consideration as in other cases, and every permit obtained by virtue of the exercise of such right shall further provide that the annual rental to be paid shall be a sum equal to two per cent of the assessed valuation for the year preceding the date of such permit of an equal area of adjoining or abutting shore or tide lands, exclusive of improvements thereon, and where the adjoining or abutting strip of shore or tide lands is of less width than the harbor area, a value proportional to said width: Pro-

vided further, however, That the foregoing provision fixing the rate of rental shall not extend beyond December 31, 1928, but all rentals after that date shall be subject to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same: Provided further, That it shall not be necessary for any public corporation proposing to make use of any such strip of waterway to acquire by condemnation or otherwise the right hereby granted relating thereto, but nothing herein contained shall be construed to deprive any party to any such condemnation proceeding of any damages to which he would have been entitled if this act had not been passed. The state land commissioner shall require of the holder of every permit under this act a bond with sufficient surety, to be approved by said commissioner, in such penalty, and not exceeding twice the amount of the annual rental, but in no case less than five hundred dollars, as may be prescribed by said commissioner, conditioned for the payment of the rental reserved in the permit at or prior to the time of payment therein specified, during the term of such permit or during such part thereof as said commissioner in his discretion shall require to be covered by such bond; and in case only a part of the term of such permit shall be covered thereby, said commissioner shall require another like bond, to be executed and delivered within three months and not less than one month prior to the expiration of the period covered by the previous bond, covering the remainder of the term of the permit, or such part thereof as said commissioner in his discretion shall require to be covered thereby. The said commissioner shall have power at any time to summon sureties upon any bond and to examine into the sufficiency thereof, and if he shall find the same to be insufficient he shall require the holder of the permit to file a new and sufficient bond within thirty days after receiving notice so to do, under penalty of cancellation of the permit; and the said commissioner shall have power upon sixty days' notice to cancel any permit for a substantial breach by the holder thereof of any of the conditions thereof, or for lack of a bond therewith as herein required. In any case where such waterway shall be within the territorial limits of a port district organized under the laws of the state of Washington, the duties herein assigned to the state land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows: Seventy-five (75) per cent shall be paid by the state treasurer to the county treasurer of the county wherein such port district is situated, for the use of said port district and twenty-five (25) per cent, into the state treasury, except that in cases where the port district itself shall have constructed or shall own structures or improvements situate upon such strip of waterway the entire rentals for such improved strip of waterway shall be paid directly to such county treasurer for the use of such port district. Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to the state of Washington, except that in cases situate in a port district such control and use shall vest in such port district. [L. '13, p. 582, § 1.]

CHAPTER XIV. LEASING OF MINERAL LANDS.

§ 6783.

This section, providing for the leasing of state lands on the discovery of precious minerals, leaves no discretion in the commissioner of public lands where the law has been complied with: *State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 Pac. 216.

As to the distinction between a lease and a license in respect of mineral lands, see note in 18 L. R. A. 492.

The commissioner of public lands is not limited in the execution of leases of state mineral lands, for prospecting purposes, to the government legal subdivisions of a section, by the proviso to this section, authorizing the changing of boundaries to conform to the section lines, since the law permits a lease for "any amount not to exceed eighty acres," and should not be construed to authorize the leasing of other than mineral lands: *State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 Pac. 216.

CHAPTER XVI. ACQUISITION OF OYSTER LANDS.

§ 6799.

The grantee of tide lands extending only to mean low tide has no interest entitling him to object to a state sale of oyster lands lying below the line of mean low tide, since only the state can question the right of another to purchase such lands: *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 135 Am. St. Rep. 1007, 107 Pac. 349, 832.

As to right of fishery separated from upland, see note in 40 L. R. A. 393.

As to the right of the state to grant tide land so as to destroy wharfage right of shore owner, see note in 63 L. R. A. 264.

§ 6804.

Judicial powers are not conferred on the state land commissioner by this section, since the state deed is not absolute but conditional and contains the conditions of the defeasance, and the administrative officers may be clothed with quasi-judicial powers, having no authority to fix a penalty: *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273.

The state land commissioner is authorized to hear and determine an application for the cancellation of a state deed for oyster lands,

by this section providing that if oyster lands sold by the state shall be used for any other purpose than oyster culture, the deed shall be canceled upon application to the state land commissioner: *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273.

Under this section, providing for the cancellation by the commissioner of public lands of state oyster land deeds for breach of condition, but which fails to provide the form of notice to be given to the grantee, any suitable notice of application for the cancellation is sufficient: *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273.

As to the power of the states to regulate the taking of fish in tide waters, see note in 23 Am. St. Rep. 837; and see note in 42 Am. St. Rep. 138.

This section, providing for the cancellation of a state oyster land deed for breach of condition is not impliedly repealed by other general laws relating to tide lands somewhat inconsistent therewith, since there is no plain legislative intent to that end, and the act is not among the acts expressly repealed and may exist without any necessary conflict with the general acts: *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273.

CHAPTER XVII. SALE OF ARTIFICIAL OYSTER-BEDS TO OCCUPIERS.

§ 6806.

Where, under this and the next section, state oyster lands are deeded for the purposes of oyster culture, with reversion to the state in case the lands are not used for that purpose, the state reserving the right to repurchase on paying for improvements, the state cannot convey the fee and reversion to a third person: *Scott v. Olympia Oyster Co.*, 63 Wash. 364, 115 Pac. 737.

One who fraudulently obtained the fee to state oyster lands by false representations that they were not oyster lands, knowing that a conditional fee had been granted for the purposes of oyster culture, cannot maintain ejectment against parties in possession under the oyster land deed: *Scott v. Olympia Oyster Co.*, 63 Wash. 364, 115 Pac. 737.

As to remedies for the interference with rights of fishery, see note in 131 Am. St. Rep. 764.

CHAPTER XXII.

RIGHTS OF WAY OVER PUBLIC LANDS.

§ 6831-1. Reservation of Logging Rights of Way—Condemnation.

All state lands hereafter granted, sold or leased containing timber, stone, mineral or other products or when other state lands contiguous or in proximity thereto contain valuable timber, stone, mineral or other products, shall be subject to the right of the state, or any grantee or lessee thereof hereafter acquiring such other lands, or acquiring the timber, stone, mineral or other products thereon, to acquire the right of way over such lands so granted, for private railroads, skid roads, flumes, canals, watercourses or other easements for the purpose of and to be used in the transporting and moving of such timber, stone, mineral or other product from such other lands, over and across the lands so granted or leased, upon the state or its grantee paying to the owner of the lands so granted, sold or leased reasonable compensation therefor. In case the parties interested cannot agree upon the damages incurred, the same shall be ascertained and assessed in the same manner as damages are ascertained and assessed against a railroad seeking to condemn private property. [L. '11, p. 506, § 1.]

§ 6831-2. Subject to Right of State—Railroad Commission to Control.

Every grant, deed, conveyance, lease or contract hereafter made to any person, firm or corporation over and across any state lands for the purpose of right of way for any private railroad, skid road, flume, canal, watercourse or other easement to be used in the hauling of timber, stone, mineral or other products of the land, shall be subject to the right of the state or any grantee thereof or other person owning or hereafter acquiring any lands containing valuable timber, stone, mineral or other products contiguous to or in proximity thereto, or hereafter acquiring the timber, stone, mineral or other product situate upon state lands so contiguous or in close proximity to the said lands, over which said right of way or easement is acquired having such timber, stone, mineral or other product transported or moved over such railroad, skid road, flume, canal, watercourse or other easement after the same is or has been put in operation upon paying therefor just and reasonable rates for transportation or for the use of such railroad, skid road, flume, canal, watercourse or other easement and upon complying with just, reasonable and proper rules affecting such transportation, which rates, rules and regulations shall be under the supervision and control of the railroad commission of Washington. [L. '11, p. 507, § 2.]

§ 6831-3. Right to Transport—Charges.

Any person, firm or corporation hereafter acquiring the right of way or other easement over state lands or over any tide or shore land belonging to the state or over or across any navigable water or stream for the purpose of transporting or moving timber, stone, mineral or other products, and engaged in such business thereon, shall accord to the state or any grantee thereof hereafter acquiring lands containing valuable timber, stone, mineral or other products contiguous and in proximity thereto, or any person, firm or corporation hereafter acquiring the timber, stone, mineral or other prod-

ucts situate upon state lands so contiguous and in proximity to the lands over which said right of way or easement is operated, proper and reasonable facilities and service for the transportation and moving of such timber, stone, mineral and other products under reasonable rules and regulations and upon payment of just and reasonable charges therefor, or, if such right of way or other easement is not then in use to have the right to use such right of way or easement for transporting and moving such products under such reasonable rules and regulations and upon payment of just and reasonable charges therefor. [L. '11, p. 507, § 3.]

§ 6831-4. Appeal to Commission—Order.

Should the owner or operator of any private line of railroad, skid road, flume, canal, watercourse or other easement operating over lands hereafter acquired from the state, as in this act set out, fail to agree with the state or with any subsequent grantee thereof as to the reasonable and proper rules, regulations and charges concerning the transportation of timber, stone, mineral or other products, from lands contiguous or in proximity of the lands over which the right of way or easement is granted, for carrying and transporting such products or for the use of the railroad, skid road, flume, canal, watercourse or other easement in transporting such product, the state or such person, firm or corporation owning and desiring to ship such products may apply to the railroad commission and have the reasonableness of the rules, regulations and charges inquired into and it shall be the duty of the railroad commission to inquire into the same in the same manner and it is hereby given the same power and authority to investigate the same as it is now authorized to investigate and inquire into the rules and regulations and charges made by railroads and is authorized and empowered to make such order as it would make in an inquiry against a railroad, and in case such railroad, skid road, flume, canal, watercourse or other easement is not then in use may make such reasonable, proper and just rules and regulations concerning the use thereof for the purposes aforesaid as may be just and proper and such order shall have the same force and effect and be binding upon the parties to such hearing as though such hearing and order was made affecting a railroad. [L. '11, p. 508, § 4.]

§ 6831-5. Penalty—Rights Revert to State.

In case any person, firm or corporation owning and operating any private railroad, skid road, flume, canal, watercourse or other easement over and across lands hereafter acquired from the state obtained subject to the provisions of this act shall fail to comply with any rule, regulation or order made by the railroad commission after an inquiry as provided for in the preceding section, such person, firm or corporation shall be subject to a penalty not exceeding one thousand dollars for each and every violation thereof, and in addition thereto such right of way, railroad, skid road, flume, canal, watercourse or other easement and all improvements and structures on such right of way and connected therewith, shall revert to the state of Washington and may be recovered by it in an action instituted in any court of competent jurisdiction. [L. '11, p. 509, § 5.]

TITLE LIII.

LIBRARIES, MUSEUMS AND HISTORICAL SOCIETY.

CHAPTER I.

STATE LIBRARIES.

§ 6958. Salary of Librarian.

The state librarian shall receive an annual salary of fifteen hundred dollars, to be paid monthly, and the state auditor shall draw warrants on the state treasurer therefor. [L. '13, p. 246, § 1.]

CHAPTER II.

PUBLIC LIBRARIES AND MUSEUMS.

§ 6971. Establishment—Petition and Vote.

By a majority vote at any election, any county, city, village, town, school district, or other body authorized to levy and collect taxes, or by a vote of its county commissioners upon petition of one hundred (100) voters voting at the last election, any county, or by a vote of its common council, any city, may establish and maintain a free public library with or without branches, either by itself or in connection with any other body authorized to maintain such library. Whenever twenty-five taxpayers shall petition, the question of providing library facilities shall be voted on at the next election or meeting at which taxes may be voted: Provided, That due public notice shall have been given of the proposed action. [L. '13, p. 383, § 1.]

TITLE LIV.

LICENSES.

CHAPTER II.

BARBERS.

§ 7010. Bond of Treasurer—Oath of Members.

The treasurer of said board shall give surety bond to be approved by and deposited with the auditor of the state in the sum of \$1,000, and the members of said board shall take the oath provided by law for public offices. The cost of said bond shall be paid by the state. [L. '13, p. 258, § 1.]

§ 7011. Compensation and Expenses.

Each member of the barbers' examining board shall receive a compensation of five dollars per day for each day in which he is actually and necessarily engaged in attendance upon meetings of the board, and in going to and in returning from the place of meeting, and all necessary expenses incurred in attending such meeting; all such compensations and expenses and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers, to be approved by a majority of said board, as in the case of state officers. The secretary and treasurer of said board shall receive a compensation to be determined by said board not to exceed \$50 per month. All money received or collected by said board or any member or officer thereof during any month shall be turned over before the tenth day of the succeeding month to the state treasurer together with a verified statement showing the sources from which such money was derived. [L. '13, p. 259, § 2.]

CHAPTER V.

EMBALMERS.

§ 7040. Bond of Treasurer.

The treasurer shall give surety bond to be approved by and deposited with the auditor of the state, in the sum of \$1,000 and the members of said board shall take the oath provided by law for public officers. The cost of said bond shall be paid by the state. [L. '13, p. 251, § 1.]

§ 7041. Compensation of Members.

Each member of the state embalmers' examining board shall receive a compensation of five dollars a day for each day in which he is actually and necessarily engaged in attendance upon the meetings of the board, and in going to and returning from the place of meeting, and all necessary expenses incurred in attending such meetings; all such compensation and expenses and all expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers to be approved by a majority of said board, as in the case of state officers. The secretary and treasurer of

said board shall receive a compensation to be determined by said board not to exceed \$100 per annum. All money received or collected by said board or any member or officer thereof, during any month shall be turned over before the 10th day of the succeeding month to the state treasurer, together with a verified statement showing the sources from which such money was derived. [L. '13, p. 252, § 2.]

CHAPTER VI.

PEDDLERS.

§ 7065.

This act, requiring a county license from all peddlers except in cities and towns when their licensing is regulated by such cities or towns is not an unconstitutional discrimination between classes, since the legislature may delegate, as a revenue measure, the power on the subject to cities and towns, and it is not necessary that the police power be exercised by uniform regulations throughout the state: McKnight v. Hedge, 55 Wash. 289, 104 Pac. 504.

This act requiring a county license from peddlers, except peddlers of agricultural and farm products, and books, periodicals and newspapers, does not arbitrarily discriminate between persons in substantially the same situation, but the classification is reasonable and germane to the object and purposes of the legislation and therefore constitutional: McKnight v. Hodge, 55 Wash. 289, 40 L. R. A., N. S., 1207, 104 Pac. 504.

This act, requiring a license fee of one hundred dollars from peddlers on foot, one hundred and fifty dollars and two hundred

and fifty dollars from peddlers with one and two horses, and three hundred dollars from peddlers with other conveyances, is not unconstitutional as exacting unequal fees, as the classification is a proper basis for measuring the license fee: McKnight v. Hodge, 55 Wash. 289, 40 L. R. A., N. S., 1207, 104 Pac. 504.

§ 7067.

The proviso to this section, that county peddlers' licenses shall expire by limitation on the second Monday in January succeeding the year in which they were issued, is wholly inconsistent with and repugnant to the body of the act requiring the issuance of an annual license authorizing the licensee to do business for the term of one year from the date thereof, and is therefore inoperative and void: McKnight v. Hodge, 55 Wash. 289, 40 L. R. A., N. S., 1207, 104 Pac. 504.

As to who is a "peddler" within licensing statute or ordinance, see note in Ann. Cas. 1912D, 1289.

CHAPTER VII.

TRADING STAMPS.

§ 7069-1. Licenses for Stamps.

Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place. [L. '13, p. 413, § 1.]

§ 7069-2. County License.

In order to obtain such license the person, firm, or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 7069-1. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein. [L. '13, p. 414, § 2.]

§ 7069-3. How Redeemed.

No person, firm, or corporation shall furnish or sell to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city or county in this state other than that in which such furnishing or selling shall take place. [L. '13, p. 414, § 3.]

§ 7069-4. Penalty.

Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor. [L. '13, p. 414, § 4.]

TITLE LV. LOGS AND LOGGING.

CHAPTER III. MARKING AND DRIVING.

§ 7100.

Shore rights required to facilitate the driving of logs must be acquired by private treaty of condemnation: *State ex rel. United Tanners Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

As to occupancy of premises in relation to logging contracts, see 4 L. R. A., N. S., 702.

As to right to use stream for floating logs, see note in 41 L. R. A. 371.

CHAPTER IV. TOLL-LOGGING ROADS.

§ 7107.

The power of eminent domain is not conferred for private purposes by sections 7107, 7109, granting the right to toll logging roads, chutes, flumes, and artificial watercourses for the carriage of timber products, under the requirement that the road transport all timber products offered

for carriage as its means of transportation is adapted to carry, and providing that such roads shall be deemed quasi-public companies and common carriers; and the fact that its duty is limited to the carriage of timber products does not affect the public character of the service: *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444.

CHAPTER V. BOOM COMPANIES.

§ 7112.

A boom company may temporarily obstruct a river for such time as may be necessary to sort and pass the logs of the owners below: *State ex rel. United Tanners' Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

Open, notorious, and continuous use of a nonmeandered stream for more than ten years, under a claim of right (a notice of appropriation filed with the secretary of state under this section), for the purpose of floating logs by means of splash dams, creates an easement and right to make use of the stream, as against subsequent purchasers of riparian lands who knew of such use at the time of their purchase and acquiesced therein until the prescriptive period had run: *Berryman v. East Hoquiam Boom & Logging Co.*, 68 Wash. 657, 124 Pac. 130.

As to prescriptive title to water, see note in 93 Am. St. Rep. 719.

As to log booms in stream, see note in 39 L. R. A. 491.

Riparian owners on a navigable stream, whose means of ingress and egress to and from their lands is totally obstructed by a boom company, are entitled to maintain an action to enjoin the obstruction, although it

may be a public nuisance: *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 132 Am. St. Rep. 1127, 103 Pac. 814.

An order compelling a boom company to remove a boom and clear away logs and jams in a river is warranted, notwithstanding that the acts of loggers were claimed to have caused the obstructions, where it appears by the findings that the boom company contracted with loggers for the use of its splash dams, whereby logs were driven down the stream by artificial freshets, a toll being paid to the company for such drives, that the log jams and injury to riparian owners resulted therefrom, that more logs were driven down than could be handled by the company's boom, and that the loggers placed a boom across the river to hold such accumulations, which boom the company opened from time to time and replaced, since the loggers are shown to be so closely connected with the company as to be either its servants or joint tort-feasors: *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 132 Am. St. Rep. 1127, 103 Pac. 814.

§ 7120.

In condemnation proceedings by a boom company to condemn riparian rights of own-

ers on the bank of a stream in which the tide ebbs and flows, the owners are not entitled to have the damages assessed with reference to the value of the property as a boom site, since the right to maintain a boom is not appurtenant to the uplands, the tide lands belong to the state, and the boom site may be granted by the state without reference to riparian ownership: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

In condemnation proceedings of lands and shore rights for a boom site, a riparian owner is not entitled to damages for the probable value of his land for a mill site or for commercial purposes depending in any degree on the use of the tide lands embraced in the boom site: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

In condemnation of shore and uplands needed by a boom company for booming purposes, the jury may take into consideration the value of the land as a boom site, where the defendants are owners of the shore as well as the uplands: *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636.

In condemnation for a boom site, the owners are entitled to compensation for the land taken and added inconveniences in getting to the navigable channel, and for damages by reason of erosions necessarily caused by the proper and lawful maintenance of the boom, and the changed use of the stream: *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

As to relative rights and duties between those maintaining dam in floatable stream and those using stream for floating logs, see notes in 22 L. R. A., N. S., 545, and 28 L. R. A., N. S., 144.

§ 7121.

This section does not prevent a company from condemning the right to damage by artificial freshets lower lands outside of the

plat, where the company was not seeking to improve the river or exercise its granted powers at the point where the injury occurs, as the object of the act was that of notice to riparian owners where the improvements were to be made: *State ex rel. Gray's Harbor Boom Co. v. Superior Court*, 57 Wash. 71, 106 Pac. 481.

"Contiguous lands" in this section is not to be restricted to lands "next to" or "touching" the river: *State ex rel. Gray's Harbor Boom Co. v. Superior Court*, 57 Wash. 71, 106 Pac. 481.

§ 7122.

This section, granting boom and driving companies the right to construct booms and splash dams for the driving of logs and timber products, under the right of eminent domain, provided that the "outlet" of the stream is not obstructed, by necessary implication gives the right to obstruct restricted navigation in small streams at times when such use is necessarily an exclusive one; and such obstruction would not fall within the general statutes defining nuisances or be a valid objection to eminent domain proceedings to condemn the right to overflowed lands: *State ex rel. Pealer v. Superior Court*, 58 Wash. 565, 109 Pac. 340.

§ 7123.

Under this section a boom company which had improved a navigable stream upon which it was not previously practicable to float logs, thereby aiding in the floating of logs, is entitled to driving charges without any actual work in handling the logs, the tolls being simply compensation for benefits conferred by improving the stream, and the right to impose the same being a right of government: *Franck v. Pittock & Leadbetter Lumber Co.*, 67 Wash. 553, 122 Pac. 7.

As to relative rights and duties between those maintaining dam in floatable stream and those using stream for floating logs, see notes in 22 L. R. A., N. S., 545 and 28 L. R. A., N. S., 144.

TITLE LVII.

MARRIAGE.

§ 7150.

A marriage between first cousins domiciled in Seattle, contracted in Victoria, B. C., where they went to evade the law of this state prohibiting such marriages, the parties immediately returning to their domicile, is void, and it is error to refuse a decree of divorce therefrom: *Johnson v. Johnson*, 57 Wash. 89, 26 L. R. A., N. S., 170, 106 Pac. 500.

As to incestuous marriages, see note in 79 Am. St. Rep. 378; and see note in 1 Ann. Cas. 613.

As to the exception of incestuous marriages to the rule of valid when made valid everywhere, see note in 60 Am. St. Rep. 942.

In an action by a woman for a breach of promise of marriage which occurred but a few months before the action was commenced, evidence of the defendant's financial ability at the time of the trial is admissible: *Fisher v. Kenyon*, 56 Wash. 8, 20 Ann. Cas. 1264, 104 Pac. 1127.

As to admissibility of defendant's financial condition, see note in 20 Ann. Cas. 1265.

A verdict for nine thousand dollars for breach of promise of marriage, reduced by the trial court to six thousand, is not excessive, where it appears that the parties were engaged for two years, that defendant induced the plaintiff to remove from Montana to this state, where the wedding was to take place, that she was greatly humiliated, and the defendant admitted that he was worth twenty-five thousand dollars, and there was evidence that he was worth several times that amount: *Fisher v. Kenyon*, 56 Wash. 8, 20 Ann. Cas. 1264, 104 Pac. 1127.

As to what is excessive verdict, in breach of promise action, see note in 16 Ann. Cas. 981.

As to the rule of damages in such cases, see note in 10 L. R. A. 585.

In an action for breach of promise of marriage, the question of the promise is for the jury, where the evidence is conflicting and the course of conduct strongly corroborates the plaintiff: *Fisher v. Kenyon*, 56 Wash. 8, 20 Ann. Cas. 1264, 104 Pac. 1127.

In an action for breach of marriage promise, in which there was evidence tending to show that the plaintiff was in good health when the promise was made but became too ill to marry, and that the marriage had been

postponed from time to time for three years on account of plaintiff's ill-health, and finally abandoned for that reason, the defendant is entitled to have the jury instructed to the effect that if the plaintiff became too ill to enter into the marriage relation, and the defendant had waited a reasonable time and she had not recovered, the defendant would have a right to withdraw from the engagement, ill-health on the part of a woman healthy when the promise was made being a good defense to the action: *Travis v. Schnebly*, 68 Wash. 1, 40 L. R. A., N. S., 585, 122 Pac. 316.

As to disease affecting plaintiff as defense in breach of promise case, see note in 12 Ann. Cas. 197.

All presumptions both of law and fact will aid findings of fact in support of the validity of a marriage: *Thomas v. Thomas*, 53 Wash. 297, 101 Pac. 865.

While a common-law marriage is not valid in this state, cohabitation and reputation raises a rebuttable presumption of a valid ceremonial marriage: *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822.

As to presumptions flowing from marriage ceremony, see note in 16 L. R. A., N. S., 98.

As to presumption in support of a second marriage, see note in 89 Am. St. Rep. 198.

As to presumption as to validity of subsequent marriage, see note in 17 Ann. Cas. 680.

Evidence of cohabitation between a white man and an Indian woman, and of reputation and declarations of the husband that they were married, and of the manner in which they lived together and the opinion of friends and neighbors, is admissible to raise the presumption of a ceremonial marriage, and to supplement evidence of a marriage ceremony performed by an Indian chief assuming to act as a minister: *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822.

As to marriage between whites and Indians, see note in 79 Am. St. Rep. 382.

§ 7151.

This section, prohibiting marriage between persons nearer of kin than second cousins, was not impliedly repealed by section 2455, defining incest, or by sections 7153, 7164, 7165, relating to and prohibiting marriages in certain other specified cases: *State v. Nakashima*, 62 Wash. 686, Ann. Cas. 1912D, 220, 114 Pac. 894.

§ 7154. Who may Solemnize.

The following named officers and persons are hereby authorized to solemnize marriages, to wit: judges of the supreme court, judges of the

superior courts, any regularly licensed or ordained minister or any priest of any church or religious denomination anywhere within the state, and justices of the peace within their respective counties. [L. '13, p. 92, § 1.]

Lack of authority of one officiating as a minister in a marriage ceremony is admissible upon an issue as to whether the authority was exercised: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078.

§ 7155.

A marriage ceremony wherein a white man and an Indian woman agreed to take each other as husband and wife, performed by an Indian chief who was a Christian of the Presbyterian faith, and who assumed to be a minister, and to have authority to unite people in marriage, is within this and the next section: *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822.

As to necessity and form of contract of marriage, see note in 124 Am. St. Rep. 107.

As to what constitutes marriage, see note in 69 Am. Dec. 615.

§ 7161.

The testimony of an Indian woman that she was married to a white man, with whom she had intimate relations, is overcome where the preponderance of the evidence is to the effect that no ceremony was performed and that they did not live together as man and wife; the man described himself in many conveyances as a single man; and any presumption from cohabitation is overcome by evidence of the previous bad character of the woman and of similar relations with other men: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078.

As to the competency and sufficiency of evidence of marriage, see note in 57 Am. Rep. 451.

§ 7162.

This section authorizing the annulment of a marriage for fraud is merely jurisdictional and refers to the force or fraud of the unwritten law of marriage contracts: *Thorne v. Farrar*, 57 Wash. 441, 135 Am. St. Rep. 995, 27 L. R. A., N. S., 385, 107 Pac. 347.

A marriage entered into by a man in order to secure his release from arrest on a charge of seduction will not be annulled on the ground of duress, where the charge was not made maliciously or without probable

cause, and he did not aver and prove the falsity of the charge: *Thorne v. Farrar*, 57 Wash. 441, 135 Am. St. Rep. 995, 27 L. R. A., N. S., 385, 107 Pac. 347.

As to marriage procured by fraud, see note in 79 Am. St. Rep. 372.

As to effect of duress, generally, to avoid marriage, see note in 43 L. R. A. 814. See, also, note in 27 L. R. A., N. S. 803.

Duress as ground for annulment of a marriage must be shown by clear, satisfactory, and convincing evidence; and the evidence is insufficient where it appears that the plaintiff, a young man twenty-six years of age, upon demand of an attorney and a police officer, accompanied them to defendant's home, where he was charged with the paternity of defendant's unborn child, and threatened by defendant's mother with a criminal prosecution if he refused to marry; that he then agreed to meet them the next morning to go to another city and marry the defendant, which arrangement was carried out; that he did not see the officer or attorney after the agreement and had ample time before the marriage to consult relatives or an attorney; and that at the trial he exercised his privilege of refusing to answer as to whether he had carnally known the defendant, and was apparently persuaded to marry by the promptings of conscience rather than by threats of prosecution: *Thorne v. Farrar*, 57 Wash. 441, 135 Am. St. Rep. 995, 27 L. R. A., N. S., 385, 107 Pac. 347.

As to right to avoid marriage entered into to escape prosecution for seduction, see note in 14 Ann. Cas. 869. See, also, note in 16 L. R. A., N. S., 938.

§ 7163.

Upon an issue as to the performance of a marriage ceremony, the absence of a license and failure to make any return as required by law are proper facts to be considered, but not conclusive as they do not invalidate a marriage otherwise valid: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1078.

As to the validity of marriage without license required by statute, see notes in 7 Ann. Cas. 784 and 14 Ann. Cas. 953.

TITLE LVIII.

MILITIA.

CHAPTER II.

ORGANIZATION OF NATIONAL GUARD.

§ 7179. Composition and Strength of the National Guard.

The National Guard of Washington shall include at all times an adjutant general's department, an infantry branch of not less than twelve companies, a coast artillery branch of not less than four companies and a cavalry branch of not less than one troop. The commander-in-chief may authorize and cause to be organized within the National Guard of Washington such additional departments, corps, branches, arms and organizations as he shall deem necessary, but in times of peace the total strength of the land forces shall not be in excess of four thousand officers and men. The strength and composition of departments excepting the adjutant general's department, corps, branches, arms and tactical and administrative subdivisions shall be prescribed from time to time in orders or regulations by the commander-in-chief, in the cases of tactical and administrative subdivisions at all times conforming as nearly as practicable to the laws and regulations of the United States pertaining to the militia. Subject to the limitations imposed by law the commander-in-chief shall have power at will to alter, divide, consolidate, disband, muster out or reorganize departments, excepting the adjutant general's department, corps, branches, arms and tactical or administrative subdivisions either now existing or hereafter created. Nothing in this section shall be construed as affecting the present status of now existing organizations. [L. '13, p. 224, § 1.]

§ 7179-1. Naval Militia—Organization.

There is hereby authorized, in addition to and as a part of the organized forces of the National Guard of the state of Washington, a Naval Militia, which shall consist of not more than five hundred officer and men. Said militia to bear the same relation to the United States navy as the land forces of the National Guard bear to the United States army, and the Naval Militia of the state shall be organized and governed by the rules, regulations, and articles for the government of the United States navy in the same manner and to the same extent as the land forces of the National Guard of the state are now organized and governed by the rules, regulations and articles of war of the United States army. [L. '11, p. 491, § 1.]

§ 7179-2. Officers of Naval Militia.

The line officers of the Naval Militia shall consist of a captain who shall be the commanding and ranking officer, not to exceed four lieutenant-commanders, one of whom may be detailed as executive officer, one as navigating officer, one as chief engineer; a lieutenant, a lieutenant junior grade, and an ensign for each division organized, and such other line officers as may be expedient or sufficient to make up a ship's company of the first class in con-

formity with the articles, laws, customs and regulations governing the United States navy. In addition to the line officers there may be commissioned a surgeon and a paymaster with rank of lieutenant-commander, a chaplain with rank of lieutenant, and such other staff officers as may be necessary or sufficient to complete a ship's company in conformity with the articles and regulations of the United States navy. [L. '11, p. 492, § 2.]

§ 7179-3. Annual Duty.

The Naval Militia, or such portion as the commanding officer may select, may be required to perform cruise duty annually on the United States vessels or vessel loaned this state by the United States for at least five consecutive days, or such further time as the commander-in-chief may order. [L. '11, p. 492, § 3.]

§ 7179-4. Naval Militia Regiment.

For the purpose of business and military administration the Naval Militia shall be considered as a regiment; and a division of Naval Militia, consisting of not more than sixty nor less than forty enlisted men, shall be considered as a company of infantry. [L. '11, p. 492, § 4.]

§ 7179-5. Election of Officers—Rank.

The law governing the election and appointment of officers in the National Guard, and the relative rank as recognized in the army and navy of the United States shall apply to the Naval Militia: Provided, however, That the examining boards for officers of the Naval Militia shall be composed so far as practicable of officers of the United States navy detailed for that purpose by the secretary of the navy upon the request of the commander-in-chief: Provided, further, That the first commission issued to any officer shall be for a probationary period of six months, at the expiration of which time the commission may be regularly issued at the discretion of the commander-in-chief: And provided further, that previous military or naval service shall not be required of a candidate for appointment as a lieutenant commanding a division. [L. '11, p. 492, § 5.]

§ 7182. When Commander-in-chief may Order Out National Guard.

In event of war, insurrection, rebellion, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of this state, or the United States, or in case of imminent danger of the occurrence of any of said events, or in event of public disaster resulting from flood, conflagration, tempest or cataclysm, the governor shall have power to order the National Guard of Washington or any part thereof into the active service of the state, and to cause them to perform such duty as he shall deem proper. The governor shall also have power to order out the National Guard or any part thereof to preserve order and keep people within bounds at any large public assemblage, provided that such action shall be taken only upon written request of the mayor of the city and the sheriff of the county within which said assemblage is to occur. [L. '13, p. 225, § 2.]

§ 7193. The Adjutant General's Department.

The adjutant general's department shall consist of the adjutant general, one assistant adjutant general who shall be designated as adjutant general, one chief clerk, one stenographer, one storekeeper and such other civilian employees as shall be authorized by the commander-in-chief. The salary of the adjutant general shall be twenty-five hundred (\$2500.00) dollars per year. [L. '13, p. 226, § 3.]

§ 7194. Same—Terms—Salaries—Bonds—Duties.

The adjutant general shall be ex-officio chief of staff, and in the absence of orders from the commander-in-chief to the contrary, he shall be the acting chief of all staffs, corps, and departments not otherwise provided for in this act. He shall hold office until his successor is detailed and qualified. He shall appoint the chief clerk, stenographer and storekeeper and may remove any of them in his discretion.

The expenses of the adjutant general's department, necessary to the military service, shall be audited, allowed and paid as other military expenditures are audited, allowed and paid. Before entering upon his official duties, the adjutant general must execute an official bond running to the state of Washington in the penal sum of twenty thousand (\$20,000.00) dollars conditioned upon the faithful performance of his duties, said bond to be submitted to the attorney general for approval, and when approved to be filed in the office of the secretary of state, the cost of said bond to be paid from the military fund of the state. The adjutant general shall obtain and pay for, from the military fund, a surety company bond or bonds running to the state of Washington covering all of the officers of the National Guard of Washington responsible to the state for money or military property, such bond or bonds to be approved and filed in the same manner as the adjutant general's bond.

(1) The adjutant general shall keep posters of all active and retired officers of the militia of the state, and keep in his office all records and papers required to be kept and filed therein, and shall submit to the commander-in-chief during October of each even numbered year a printed biennial report of the operations and conditions of the National Guard of Washington.

(1½) On the first day of January, of each year, he shall make a statement of the condition of the military fund, showing the amount thereof and setting forth in detail all receipts from whatsoever source and all expenditures of whatsoever nature and the unexpended balance thereof. A copy of said statement shall be furnished to each commissioned officer of the active list.

(2) He shall cause the military law, the regulations of the National Guard and the articles of war of the United States, and such other military publications as may be necessary for the military service to be printed, indexed and bound at the expense of the state and distributed to the commissioned officers of the National Guard.

(3) He shall keep and preserve the books, arms, accoutrements, ammunition and other military property belonging to the state, not properly issued.

(4) He shall keep just and true accounts of all monies [moneys] received and disbursed by him.

(5) He shall attest all commissions issued to military officers of this state.

(6) He shall make out and transmit all militia reports, returns and communications prescribed by acts of Congress or by direction of the secretary of war.

(7) He shall have a seal, and all copies, orders, records and papers in his office, duly certified and authenticated under said seal, shall be evidence in all cases in like manner as if the originals were produced. The seal now used in the office of the adjutant general shall be the seal of his office and shall be delivered by him to his successor. All orders issued from his office shall be authenticated with said seal.

(8) He shall make such regulations pertaining to the preparation of reports and returns and to the care and preservation of property, in possession of the state for military purposes, whether belonging to the state or to the United States, as in his opinion the conditions demand.

(9) He shall attend to the care, preservation, safekeeping and repairing of the arms, ordnance, accoutrements, equipment and all other military property belonging to the state, or issued to the state by the government of the United States for military purposes, and keep accurate accounts thereof. All military property of the state, which after proper inspection, shall be found unsuitable for use of the state shall be disposed of in such manner as the commander-in-chief shall direct and the proceeds thereof paid into the military fund of the state.

(10) He shall issue such military property as the necessity of the service requires and make purchases for that purpose. No military property shall be issued or loaned except upon an emergency to persons or organizations other than those belonging to the National Guard, except to such portions of the reserve militia as may be called out by the governor.

(11) He shall keep on file in his office the reports and returns of troops and heads of military departments, and all other writings and papers required to be transmitted to and preserved at the general headquarters of the state militia.

(12) He shall keep all records of Washington volunteers commissioned or enlisted for the war of the Rebellion, Indian wars, Spanish-American war, and all other wars or insurrections and of individual claims of citizens of Washington for service rendered in these wars or insurrections.

(13) He shall establish and maintain as part of his office a bureau of records of the services of the Washington troops during said wars, and he shall be the custodian of all records, relics, trophies, colors and histories relating to such wars now in possession of, or which may be acquired by the state of Washington, and such records, relics, trophies, colors and histories shall be catalogued and arranged or filed for general reference or protection in the office of the adjutant general.

(14) The duties of the assistant adjutant general, chief clerk, stenographer and storekeeper shall be prescribed by the adjutant general and in the absence or incapacity of the adjutant general, the assistant adjutant general shall perform the duties prescribed for the adjutant general. [L. '13, p. 226, § 4.]

§ 7195.

Repealed. See L. '13, p. 229, § 5.

§ 7198. Selection of Officers.

All commissioned officers of the National Guard of Washington shall be appointed and commissioned by the commander-in-chief, and, except as otherwise provided in this act, they shall be chosen as follows: Whenever a vacancy shall occur in the office of the adjutant general of the state, the commander-in-chief shall detail for that position from the active list of the National Guard of Washington some officer not below the rank of captain, who shall during the continuance of such detail hold the rank of brigadier-general. No person shall be eligible for detail as adjutant general who shall have served as an officer less than three years in the aggregate in the National Guard of Washington or the regular army of the United States. The assistant adjutant general shall be an officer of the active list of the National Guard of Washington detailed for that purpose.

Vacancies created by detail of officers to the adjutant general's department, or any other staff, corps or department, shall be promptly filled precisely as though created through resignation or promotion, but officers on such details shall not lose their places in lineal rank in the branches from which they shall have been detailed. Whenever a vacancy occurs in the organization from which an officer on detail with the adjutant general's department, or any other staff, corps, or department, shall have been detailed, for which vacancy such officer would have been eligible in the absence of such detail, such officer shall, although continuing on such detail, be promoted to the grade of such vacancy, or, if holding an increased rank and grade by virtue of such detail, shall be deemed to have received such promotion to take effect upon termination of such detail, with rank from the date of the occurrence of such vacancy.

Whenever an officer shall be relieved from duty with the adjutant general's department, or any other staff, corps or department, he shall be reassigned to the organization from which he was detailed upon the occurrence of the first vacancy therein of his rank and grade.

Whenever a vacancy occurs in the captaincy or first lieutenancy of a company, the officer next in rank in such company shall be ordered before an examining board, and upon passing the required examination, shall be appointed, commissioned and assigned to fill such vacancy: Provided, That any officer of appropriate rank and grade originally on duty with such company and serving on detail with any staff, department or corps or on waiting orders may be relieved of duty with such staff, department or corps and assigned to duty with such company, or assigned to duty with such company from the list of waiting orders; and thereupon the senior officer in such company, if there be a vacancy, shall be ordered before an examining board and upon passing the required examination shall be appointed, commissioned and assigned to fill such vacancy.

Whenever a vacancy occurs in the office of second lieutenant of any company, the commander-in-chief, except as hereinbefore provided, shall order a competitive examination for which every enlisted man in such organization shall be eligible, and the successful candidate recommended by the examining board shall be appointed, commissioned and assigned to fill such vacancy. Any noncommissioned staff officer shall be eligible to take a competitive exam-

ination for second lieutenantcy in the company of which he was originally a member.

Whenever a vacancy shall occur among the field officers of a regiment, the senior officers of the next lower grade in the regiment shall, upon passing a proper examination, be appointed, commissioned and assigned to fill the same.

Vacancies in staff officers of the grade of second lieutenant shall be filled by assignment, or by examination, promotion and assignment of a noncommissioned staff officer, and any vacancy in a staff office of a grade higher than second lieutenant shall be filled either by assignment of an officer of the proper grade or by examination, promotion and assignment of an officer of the next lower grade, as the commander-in-chief shall direct.

No person shall be commissioned as an officer in the National Guard of Washington unless he is a citizen of the United States, and of this state, twenty-one years of age or more.

Whenever a commissioned officer shall have been examined for promotion under this act and shall fail to be recommended for promotion by the examining board, he shall be honorably discharged, and the vacancy so created shall be filled in the manner prescribed by law.

For the purpose of this act the word company or companies shall apply to and include the cavalry, infantry, coast artillery reserve and signal corps. [L. '13, p. 229, § 6.]

§ 7205. New Companies—How Admitted.

New companies and organizations of the National Guard of Washington not in excess of the limits prescribed by law, may be organized and mustered in at such times and in such manners as the commander-in-chief shall direct. [L. '13, p. 231, § 7.]

§ 7221. Allowances for Incidental Expenses.

Each commanding officer shall be entitled to receive an allowance for the incidental expenses of his command payable quarterly in advance according to the following schedule: companies, troops, batteries and like units not to exceed twenty-five (\$25.00) dollars per month; bands not to exceed fifteen (\$15.00) dollars per month; battalions and like units not to exceed ten (\$10.00) dollars per month; regiments and like units not to exceed twenty-five (\$25.00) dollars per month.

For the first quarter of each biennial period each officer entitled to a quarterly allowance under this section shall be entitled to receive in advance the maximum allowance in full, but with his claim therefor he shall make remittance of the balance, if any, remaining unexpended from the last previous quarter, such remittance to be transmitted by the adjutant general to the state treasurer, and for each succeeding quarter of each biennial period, each such officer shall be entitled to receive such sum, not more than the maximum allowance above prescribed, as he shall have expended for authorized expenses of his command during the next preceding quarter. Each claim for quarterly allowance shall include an account current showing the items of expenditure and shall be accompanied by subvouchers for all items, each voucher stating definitely the nature and amount of the expenditure evidenced thereby. [L. '13, p. 232, § 8.]

§ 7222. Military Auditors.

The board of military auditors shall consist of the adjutant general and two officers of the active list of the National Guard of Washington to be selected by the state auditor and detailed by the commander-in-chief, which board shall audit and pass upon all claims against the military appropriation. The board shall meet at the call of the adjutant general. [L. '13, p. 232, § 9.]

The fact that false claims against the state were audited and allowed by the board of military auditors, under this and the next section, does not preclude defenses to warrants in the hands of an innocent holder, there being nothing in such sections to indicate an intent to make the warrants negotiable: State ex rel. Olympia Nat. Bank v. Lewis, 62 Wash. 266, 113 Pac. 629.

A state warrant issued in payment of fraudulent claims based upon false and forged vouchers is void, even in the hands of an innocent holder, since a state warrant is not negotiable in the sense of ex-

cluding inquiry into the legality of its issue or defenses thereto: State ex rel. Olympia Nat. Bank v. Lewis, 62 Wash. 266, 113 Pac. 629.

It is the duty of the state treasurer to refuse payment of warrants illegally issued upon fraudulent claims: State ex rel. Olympia Nat. Bank v. Lewis, 62 Wash. 266, 113 Pac. 629.

As to enforcement of obligation incurred by a state, see note in 13 L. R. A. 170.

As to what claims constitute valid demands against the state, see note in 42 L. R. A. 33.

§ 7224. Pay and Allowance.

Commissioned officers while on duty requiring pay shall receive the same pay and allowance as commissioned officers of the United States of the same grades and terms of service: Provided, That for travel only actual necessary expenses shall be allowed.

For the purpose of pay and allowance as an officer of the National Guard, service with the First Washington Volunteer Infantry, as an officer or enlisted man until muster out of that organization shall be considered equivalent to three years' service in the National Guard of Washington. For the purpose of pay and allowance of an officer in the National Guard, service as an enlisted man in the National Guard of Washington shall be considered equivalent to service as an officer, provided that said service as an enlisted man and officer be continuous.

For all duty requiring pay enlisted men in the National Guard of Washington shall receive pay at rates equivalent to twice those allowed for corresponding grades in the regular services of the United States: Provided, That the pay of cooks and bandsmen shall be three (\$3.00) dollars per day. For each re-enlistment, after serving a full term of three years, there shall be added ten per cent. For the purpose of pay and allowance, service for a full term of enlistment in the regular or volunteer army of the United States, or in the First Washington Volunteer Infantry until muster out of that organization shall be equivalent to a full enlistment. Enlisted men proving such service shall be allowed ten per cent additional on their pay.

This schedule of pay shall apply only to the first thirty days of any tour of duty and after the thirtieth day of any such tour, officers and men shall receive the pay allowed officers and men in the regular services of the United States of corresponding organizations, grades, and terms of service.

No additional pay shall be allowed for service in the National Guard of Washington unless such service shall have been continuous.

Extra duty pay to men detailed as clerks and on similar duty may be allowed by the commanding officers of troops on duty, but in no case shall pay and extra pay exceed two and 50-100 (\$2.50) dollars per day.

Upon completion of his enlistment, or upon discharge by proper authority, each enlisted man shall receive in addition to the pay above mentioned, the sum of fifty cents for each day of state paid service not exceeding fifty days, less all proper deductions for fines or lost property. [L. '13, p. 233, § 10.]

§ 7225. Transportation and Subsistence.

There shall be provided by the state transportation for all officers and transportation and subsistence for all enlisted men who shall be ordered out for encampment, field duty, or stated parades, or assembled for duty in case of riot, tumult, breach of the peace, war, insurrection, invasion or imminent danger thereof. Necessary transportation, quartermasters' stores and subsistence for troops when ordered on duty shall be contracted for by the proper officers and paid for as other military bills. There shall be allowed from the military fund for each day's service the sum of two (\$2.00) dollars per man for each horse for every mounted officer, and mounted orderly, and all members of such other organizations of the National Guard of Washington as are required to be mounted. Horses not furnished by officers or men shall be rented by the state at a cost not exceeding two (\$2.00) dollars per day for each horse. For mounted organizations the adjutant general may in his discretion cause horses to be purchased and maintained from the appropriation for maintenance. [L. '13, p. 234, § 11.]

§ 7228. Drills.

At each station each company and similar unit of the National Guard shall meet at least twice in each month for drill and instruction and the commanding officer of any organization may require the officers and enlisted men of his organization to meet for drill and instruction at such times and places as he may appoint: Provided, That no pay shall be allowed for such duty. [L. '13, p. 234, § 12.]

§ 7313.

See notes to § 481.

§ 7334.

This section, authorizing the leasing of state armories for purposes other than military, upon recommendation of the officer in charge, does not relinquish the state's governmental functions or amount to the assumption of a private enterprise, where the armory was constructed for governmental purposes and there is nothing in the military code showing any intent that the state shall engage in conducting a hall for entertainment purposes as a business venture, the lease being a matter of grace and accommodation to the public rather than a business enterprise: *Riddoch v. State*, 68 Wash. 329, 42 L. R. A., N. S., 251, 123 Pac. 450.

In the absence of voluntary assumption of the obligation, the state is not liable for the torts or negligence of its officers or agents; and this applies to personal injuries to a spectator, sustained through a defective railing in a state armory, negligently constructed by a state commission created for the purpose, and leased for a compensation to private parties by the state officer in charge of it for the purpose of giving a public exhibition, since the state's immunity from liability is not confined to the discharge of purely governmental functions of the state, the sovereignty of the state extending to any private enterprise taken over or administered by the state: *Riddoch v. State*, 68 Wash. 329, 42 L. R. A., N. S., 251, 123 Pac. 450.

TITLE LIX.

MINES AND MINERALS.

CHAPTER I.

MINING CORPORATIONS.

§ 7347.

This section, permitting mining claims to be transferred to such corporation in full payment of the capital stock without the necessity of stock subscriptions, does not apply to coal mining companies, the stock-

holders of which are accordingly liable to creditors upon unpaid stock subscriptions as provided by constitution, article 12, section 4, and Remington and Ballinger's Code, section 3698: *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

CHAPTER II.

LOCATION AND POSSESSION OF MINING LODES.

§ 7353.

In an action to recover possession of unpatented mining claims, the better title prevails, and the rule that the plaintiff must recover, if at all, on the strength of his own title does not apply: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

As between two claimants to a mineral location, the better title lies with the one who for years spent large sums of money in a good faith endeavor to develop a mine, even if there was a forfeiture by failure to do assessment work, as against another who entered in the absence of the first claimant with the sole purpose of appropriating the fruits of the other's labor, and who failed to comply with the mineral laws as to relocations, there having been no abandonment by the first claimant: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

In an action to recover possession of a mining claim, the defendant cannot base any right upon amended relocation notices posted by him after the commencement of the action: *Knutson v. Fredlund*, 56 Wash. 634, 106 Pac. 200.

As to what constitutes diligent prosecution of work, within mining laws, see note in 139 Am. St. Rep. 187.

In an action to recover possession of a mining claim, a defendant holding under an invalid relocation is not entitled to attack plaintiff's title by reason of his failure to do assessment work, as such failure did not work a forfeiture until valid relocation was made: *Knutson v. Fredlund*, 56 Wash. 634, 106 Pac. 200.

As to respective rights of one who relocates mining ground before and one who relocates it after the abandonment or forfeiture of the senior location, see note in 16 L. R. A., N. S., 162.

ACTIONS TO DETERMINE AND ESTABLISH RIGHTS.—The ordinary allegation of title generally is sufficient in an action to recover the possession of a mining claim, without stating the facts necessary to show a valid location under the mineral laws, which are matters of evidence: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

§ 7354.

The building and construction of roads intended to be used in the general development of mining property in an unorganized mining district, although done outside the boundaries of the claim, is the doing of assessment work on the claim, within the meaning of the mining law: *Sexton v. Washington Min. & Milling Co.*, 55 Wash. 380, 104 Pac. 614.

As to performance of assessment work, see note in 87 Am. St. Rep. 408.

As to what amounts to diligent prosecution of work, see note in 139 Am. St. Rep. 187.

A resumption of assessment work prior to the lawful inception of intervening rights saves a forfeiture for failure to do the required work: *Knutson v. Fredlund*, 56 Wash. 634, 106 Pac. 200.

As to the effect of resumption of assessment work before relocation, see note in 87 Am. St. Rep. 414.

§ 7355.

See notes to § 7366.

§ 7358.

See notes to § 7366.

Descriptions of a mining claim in location notices and in a complaint are sufficiently definite, where the defendant was

not misled and knew the boundaries from plaintiff's long possession: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

As to notice of appropriation in locating mining claim, see note in 7 L. R. A., N. S., 774.

A mineral relocation notice is insufficient and inadmissible in the evidence under this section, where it fails to state the length claimed on each side of the discovery, the general course of the lode, or to identify the claim by reference to natural monuments as required by that act, since compliance with state laws not inconsistent with the federal statutes is essential to a valid relocation: *Knutson v. Fredlund*, 56 Wash. 634, 106 Pac. 200.

As to relocation of mining claim, see note in 68 L. R. A. 833.

§ 7359.

See notes to § 7366.

The locator of a mining claim who fails to erect monuments or define the boundaries assumes the risk of intervening rights of third parties: *Protective Min. Co. v. Forest City Min. Co.*, 51 Wash. 643, 99 Pac. 1033.

§ 7365.

Under this section, to relocate a forfeited mining claim it is necessary to sink a new discovery shaft or sink the original shaft ten feet deeper; and this requirement is not excused by section 9, providing that the "provision herein relating to discovery shafts shall not apply to any location west of the summit of the Cascade mountains," in case of an attempt to take advantage of a forfeiture: *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

§ 7366.

Relocators of abandoned mining claims west of the summit of the Cascade mountains need not sink a discovery shaft, under this section, since the exception is not confined to sections 7358 and 7259, prescribing the duties of the discoverer of an original claim and providing that he shall sink a discovery shaft, but applies also to section 7355 of the act which provides that the relocation of forfeited or abandoned quartz or lode claims shall only

be made by sinking a new discovery shaft and fixing new boundaries as required in making a new location, or the relocater may sink the original discovery shaft ten feet deeper than it was (overruling 54 Wash. 517): *National Milling & Min. Co. v. Piccolo*, 57 Wash. 572, 107 Pac. 353.

There is sufficient evidence of the discovery of a vein of ore (understood by miners to be a body of mineral-bearing substance bounded on each side by the country rock, of varying width and length) where a miner testified that the deposit of ore was what he called a moraine ledge, and explained that the ledge was in permanent place but had been moved or shoved down with the whole country, since there appeared to be a well-defined ledge kept in place by country rock, even if the whole mountain had been moved to one side by some force of nature: *State v. Praul*, 57 Wash. 198, 106 Pac. 763.

§ 7367.

The evidence fails to show a legal establishment of placer mining claims, where it is evidence that no actual discovery was made, the locations were not properly perfected nor labor done in compliance with the requirements of this section, the claims were abandoned more than one year prior to the commencement of an action to recover possession, and from the whole record it appears that the attempted location was a speculative venture to prevent the use and development of a water power by others: *Spokane Portland Cement Co. v. Larson*, 71 Wash. 301, 128 Pac. 641.

The fact that the major part of defendant's improvements were made after plaintiff's action was commenced is immaterial, where no attempt was made by plaintiff to prevent extensive improvements made in good faith: *Spokane Portland Cement Co. v. Larson*, 71 Wash. 301, 128 Pac. 641.

As to sufficiency of discovery of mineral to support location of mining claim, see note in 15 Ann. Cas. 628.

§ 7371.

This section applies only to organized mining districts: *Sexton v. Washington Min. & Milling Co.*, 55 Wash. 380, 104 Pac. 614.

CHAPTER III.

PROTECTION OF COAL MINERS.

§ 7372. Appointment, Bond, etc., of Inspectors.

The governor shall, upon the recommendation of a board to be by him selected and appointed for the purpose of examining candidates to be appointed to the office of mine inspector under the provisions of this act, appoint a properly qualified person to fill the office of state mine inspector.

The state mine inspector so appointed shall, with the consent of the governor, appoint a deputy inspector. The inspector and his deputy shall be citizens of the state of Washington, and shall have had at least five years' practical experience in coal mining. They shall devote their entire time to the duties of their respective offices, and shall possess other qualifications at present defined by the laws of the state of Washington and not inconsistent with the provisions of this act. The state mine inspector and his deputy shall before entering upon the discharge of their duties each take an oath to discharge their duties impartially and with fidelity to the best of their knowledge and ability. The salary of the state mine inspector shall be twenty-four hundred dollars per annum, and the salary of the deputy inspector shall be eighteen hundred dollars per annum, and both the inspector and his deputy shall be allowed their actual and necessary traveling expenses while in the performance of their duties under the provisions of this act; and the auditor of the state is hereby authorized and directed to draw his warrant on the state treasurer in favor of the inspector or his deputy for the amount due them for their salaries monthly, and also for their expenses upon proper vouchers to be paid out of any moneys in the state treasury not otherwise appropriated. The state mine inspector shall hold his office for the term of four years, and his deputy shall hold office during the pleasure of the inspector. The inspector shall at all times be subject to removal from office by the governor for neglect of duty or malfeasance in the discharge of his duties. The board herein provided for shall consist of one practical coal miner, one owner or operator of a coal mine and one mining engineer, all of whom shall be sworn to the faithful discharge of their duties. The governor shall consult with such board before appointing the mine inspector herein provided for. [L. '11, p. 333, § 1.]

§ 7381.

There is sufficient proof of failure to comply with this section, requiring sufficient circulation of air in a coal mine, where a brattice for the purpose of deflecting air into a certain room was torn and defective, and one man therein lost his life and a boy became sick from inhaling poisonous gases: *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341.

The evidence sufficiently shows that the owner of a mine failed to perform the imperative and continuing duty to cause air to circulate in the working places in a coal mine, imposed by this section, where there was black damp in plaintiff's working place, the foreman instructed him to continue working there and said the falling of the rock would bring ventilation, and the plaintiff testified that he would have broken through the wall to good air in about an hour and a half: *Nalewaja v. Northwestern Improvement Co.*, 63 Wash. 391, 115 Pac. 847.

There was sufficient evidence that the presence of black damp in a coal mine was the proximate cause of an injury from falling rock, where the plaintiff's lights were put out by the black damp and he was struck by a rock falling from the face of the coal, two to eight feet distant from

the place where plaintiff was timbering, and he might have seen the rock and avoided the injury if he had had a light: *Nalewaja v. Northwestern Improvement Co.*, 63 Wash. 391, 115 Pac. 847.

As to the duty of mine owners to prevent injury to their employees, see note in 87 Am. St. Rep. 557.

§ 7382.

Under this section prohibiting the driving of a heading in a coal mine more than sixty feet from the face of each chamber without written permission from the inspector, the burden of proof, after proof of such extension, is upon the coal mine owner to show the fact of written permission therefor: *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341.

§ 7384.

It is negligence per se to fail to comply with the requirement of the coal mine law intended to provide a reasonably safe place for the men to work; and the duty is a nondelegable one: *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341.

The provisions of the coal mine act of 1888, page 41, section 15, expressly limited to "violations of this act" if not

superseded has no application to later acts on this subject: *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341.

§ 7394.

This section, providing that the owner shall send down into the mine to be delivered at the working place sufficient timbers and props, in the act on the sub-

ject of "coal mines," relating particularly to the extra-hazards of that business, has no application to prospecting tunnels in which no coal was being mined and which was not part of a coal mine, the language indicating that the legislature had in mind the extra-hazards peculiar to coal mining: *Hemmingson v. Carbon Hill Coal Co.*, 62 Wash. 28, 112 Pac. 1111.

§ 7402-1. Powder and Other Explosives—Distributing Magazine—Penalty.

Each person, firm or corporation engaged in coal mining, requiring the use of powder or other explosives, shall provide (subject to the approval of the state mine inspector), at or near the entrance of each coal mine operated, at some suitable place near such work, a suitable distributing magazine for the storage of such powder or other explosives. There shall be posted upon such magazine a notice, printed in letters not less than three inches in height, that such magazine contains explosives. No person shall store or keep in any magazine mentioned in this section any powder or other explosive in excess of one ton. In the case of coal mines such powder or other explosive shall be issued daily in quantities not to exceed the average used by each workman in one day, in proper receptacles. Any person or corporation violating or failing to comply with the provisions of this section shall be guilty of a gross misdemeanor. [L. '11, p. 336, § 1.]

§ 7402-2. Quantity of Powder Stored.

Any person who shall store or keep any powder or other explosive in a quantity greater than one pound in any occupied dwelling-house or residence or in any outhouse appertaining thereto within three hundred feet of any dwelling shall be guilty of a misdemeanor. [L. '11, p. 336, § 2.]

TITLE LX. MUNICIPAL CORPORATIONS.

CHAPTER II. BOUNDARIES, ANNEXATION, ETC.

§ 7443.

The boundaries of cities are extended by this section, and hence authorizes the levy of city taxes upon property situated within the extended limits: *Pacific American Fisheries v. Whatcom County*, 69 Wash. 291, 124 Pac. 905.

An act extending the boundaries of all cities to the middle of navigable waters adjacent to their boundaries is not violative of the constitutional provisions inhibiting the incorporation or alteration of cities by special laws, or the enactment of any private or special laws granting corporate powers or privileges: *Pacific American Fisheries v. Whatcom County*, 69 Wash. 291, 124 Pac. 905.

The title, an act extending the powers and jurisdiction of cities into the navigable waters adjacent to their boundaries, sufficiently expresses the purpose of the act to extend the boundaries of the city for all purposes: *Pacific American Fisheries v. Whatcom County*, 69 Wash. 291, 124 Pac. 905.

As to navigable rivers as boundaries, see note in 10 Am. Dec. 385.

§ 7444.

Under the general election laws which require the division of a county into election precincts and the designation of one

voting place in each precinct, and which make residence within the precinct a necessary qualification of an elector, a city election for the annexation of territory is void where no voting places were designated in several of the precincts, since the electors therein were thereby disfranchised: *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386.

As to irregularities in respect of establishing election districts, see note in 90 Am. St. Rep. 49.

Where an ordinance for the annexation of an adjoining city provided that no property within either former city shall ever be taxed for any portion of any prior indebtedness of the other, and after annexation the city passed an ordinance making an appropriation out of its general fund "for the purpose of retiring certain outstanding warrants" of the annexed territory, and it appears from the ordinance that it was not the intention to extinguish the indebtedness or retire the warrants so as to relieve the property, but to refund them by a bond issue, the actual payment of the warrants of the annexed city with such funds did not extinguish the indebtedness as a charge against the property in the annexed city; and the issuance of funding bonds chargeable on such property was authorized: *Fisher v. Seattle*, 55 Wash. 396, 104 Pac. 655.

CHAPTER V. CLASSIFICATION.

§ 7479.

See notes to § 7507.

§ 7488.

After a town of the first class is raised to a city of the third class, the councilmen of the old corporation continue to act and have power to pass ordinances until the organization of the new corporation by the election and qualification of new officers at the next general election, pursuant to the provisions of this section and section 7489, providing that the old officers shall

act until the next annual municipal election and officers of the new corporation are elected and qualified: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

As to continuity of existence of municipal council, see note in Ann. Cas. 1912D, 269.

As to who are city officers, see note in 14 L. R. A. 646.

As to power of public officers to contract so as to bind their successors, see note in 16 L. R. A. 257.

CHAPTER VII.

CITIES OF FIRST CLASS, GENERAL PROVISIONS.

§ 7493-1. Powers of Cities of First Class.

The form of the organization and the manner and mode in which cities of the first class shall exercise the powers, functions and duties which are or may be given by law to such cities, with respect to their own government shall be as provided in the charters thereof. [L. '11, p. 54, § 1.]

§ 7493-2. Recall of Elective Officers.

Any such city may provide in its charter for the recall of elective officers and for direct legislation by the people upon any matter within the scope of such powers, functions or duties of any such city by the initiative and referendum. [L. '11, p. 54, § 2.]

§ 7493-3. Act Applies to Any Charter.

This act shall apply to any charter of any such city heretofore adopted or approved by the electors thereof at an election duly held. [L. '11, p. 54, § 3.]

§ 7494.

Charters adopted by cities of the first class are subject to and controlled by general laws, and this is the only constitutional restriction therein: *Walker v. Spokane*, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

The only limitation on the powers of a city government to enact laws through the medium of a charter is that they shall be in accordance with general laws, and a charter establishing the commission form of government, with the initiative, referendum, and recall does not violate any statutory law: *Walker v. Spokane*, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

As to right of municipality to adopt commission form of government, see note in Ann. Cas. 1912C, 999.

As to initiative and referendum, see note in 11 L. R. A., N. S., 1092.

Under constitution, article 11, section 10, authorizing a city of twenty thousand inhabitants to frame a charter for its own government, consistent with and subject to the laws of the state, a city may, subject to such limitation, adopt the initiative and referendum plan of government: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

As to constitutionality of initiative and referendum provisions in municipal charters, see note in 11 Ann. Cas. 920.

The question of the necessity of holding an election to choose freeholders to frame a city charter at an earlier time than one year in the future is usually a political question not susceptible of proof in a court: *State ex rel. Lambert v. Superior Court*, 59 Wash. 670, 110 Pac. 622.

§ 7498.

The amendment to the city charter of Seattle creating a municipal plans commission, does not violate constitution, article 11, section 10, guaranteeing local self-government, in that part of the members of the commission are to be appointed by associations, clubs, and public service corporations, some of which are nonresidents of the state and of the United States, since the commissioners are all required to be citizens of the city, and are appointive, not elective, officers, with only advisory powers, whose plans are to be submitted to a vote of the people, and no legislative authority is delegated to it: *Bussell v. Gill*, 58 Wash. 468, 137 Am. St. Rep. 1070, 108 Pac. 1080.

Such amendment is not objectionable by reason of conferring authority upon the commission to approve vouchers for all expenditures incurred, and requiring the comptroller to issue warrants to be paid out of the municipal plans commission fund, raised by a tax levy therefor: *Bussell v. Gill*, 58 Wash. 468, 137 Am. St. Rep. 1070, 108 Pac. 1080.

Such amendment does not violate constitution, article 1, section 12, providing that no law shall grant special privileges to any citizen or class of citizens, in that certain designated associations and corporations are granted the privilege of participating in the selection of the commission, since the right simply of recommendation is not such a right or privilege as comes within the prohibition of the constitution: *Bussell v. Gill*, 58 Wash. 468, 137 Am. St. Rep. 1070, 108 Pac. 1080.

As to the providing by a municipal corporation for a commission to act as agent, see note in 137 Am. St. Rep. 1076.

An election to choose fifteen freeholders to prepare a new city charter for cities of the first class, under this section, must be called by the city council within a reasonable time after due petition therefor is filed, in view of the failure of the statute to fix the time, and of section 7499, requiring the proposed charter to be submitted at an election to be called "immediately"; hence, the provision of section 7502 that the election may be general or special only vests in the council a discretion to fix upon the next general election in case the same is to occur within a rea-

sonable time: *State ex rel. Lambert v. Superior Court*, 59 Wash. 670, 110 Pac. 622.

Where a city council is petitioned on May 24th to call an election to choose fifteen freeholders to prepare a new city charter, under this section, it is an abuse of discretion for the city council to fix the date therefor upon the next general election to be held on the first Tuesday of May, 1911; and mandamus lies to compel the council to fix upon a reasonable time: *State ex rel. Lambert v. Superior Court*, 59 Wash. 670, 110 Pac. 622.

§ 7502.

See notes to § 7498.

§ 7502-1. Canvass of Returns.

Within five (5) days after the date of any general or special municipal election in any city of the first class, the legislative body of any such city shall convene at the hour fixed by its rules for regular meetings and shall open and canvass the returns of such election and shall declare and certify the result of such election. [L. '11, p. 110, § 1.]

§ 7502-2. No Change in Charters.

Nothing herein shall be deemed to affect any provision now or hereafter incorporated in any charter or ordinances of any such city providing a manner for the canvass of, and declaration of the result of, the votes cast at such elections. [L. '11, p. 111, § 2.]

§ 7504.

See notes to § 7517.

This section, authorizing electors of cities of the first class to frame and adopt a city charter, does not repeal section 7517, providing that the legislative powers of such city shall be vested in a mayor and city council, although it modifies and grants larger and more extensive legislative powers than those granted by section 7517: *Walker v. Spokane*, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

§ 7507.

See notes to § 6264.

The city council of Seattle has exclusive power to license the sale of liquor without submitting the question to a vote of the people under the initiative and referendum amendment to the charter of the city covering "any ordinance dealing with any matter within the realms of local affairs or municipal business," and under the concurrent amendment No. 11, especially conferring upon the city council the power to license and regulate the sale of liquor, since special concurrent laws obtain as against a conflicting general law: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

As the power to "regulate" the sale of intoxicating liquor implies the power of

partial prohibition, an anti-treating ordinance prohibiting the sale of intoxicating liquor in licensed saloons to be drunk on the premises by any other person than the one buying the same is within the power conferred by this section: *Tacoma v. Keisel*, 68 Wash. 685, 40 L. R. A., N. S., 757, 124 Pac. 137.

An ordinance having for its purpose the prohibition of treating in licensed saloons is not an unreasonable regulation of the liquor traffic, under the power to regulate such traffic and to make regulations necessary for the preservation of public morality, the decision of the city authorities being controlling upon the courts unless the unreasonableness of the ordinance is free from doubt: *Tacoma v. Keisel*, 68 Wash. 685, 40 L. R. A., N. S., 757, 124 Pac. 137.

As to the police powers of municipalities with reference to the regulation of liquor dealing, see note in 114 Am. St. Rep. 298.

The maintenance by a social club of a room wherein to furnish liquors to members to be drunk on the premises is the conducting a barroom, within the meaning of an ordinance regulating the liquor business and barrooms, especially where the law makes drugstores the only exception: *Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14.

The serving of intoxicating liquors by a social club exclusively to its members, and not for profit, at a price fixed by the club, which is charged to the account of the members, is a sale within the meaning of an ordinance to regulate the sale of liquors and prohibiting their sale without first obtaining a license, since the matter of making a profit is immaterial and the principal object of the law is regulative: *Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14.

As to statutes regulating liquor dealing in cities, and the application to social clubs, see note in Ann. Cas. 1912A, 1088.

As to what is a "hotel" within the meaning of laws regulating the sale of liquors, see note in Ann. Cas. 1913B, 1030.

The legislature may delegate to cities and towns, as a revenue measure, the power to license peddlers: *McKnight v. Hodge*, 55 Wash. 289, 40 L. R. A., N. S., 1207, 104 Pac. 504.

As to who is a "peddler" within a licensing statute or ordinance, see note in Ann. Cas. 1912D, 1289.

Police power to regulate the frequency of street-car service is conferred upon a city by constitution, article 11, section 11, providing that a city may enforce police regulation not in conflict with general law, and this section, subdivision 9, authorizing the city to control its streets and regulate the operation of street railroads, and subdivision 36, granting it the right to provide for the punishment of practices dangerous to the public safety and to make necessary regulations for public health, peace and order, and punish persons violating any of the ordinances: *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661.

As to regulating by municipality of routing of street railways, see note in Ann. Cas. 1912B, 1024.

As to power of municipality to require street-cars to stop at certain points, see note in 17 Ann. Cas. 552.

An ordinance granting a franchise to maintain a wharf commencing at the foot of a street and extending along the line of the street extended into tide water is not a franchise to use a public street: *State ex rel. Port Angeles v. Morse*, 56 Wash. 654, 106 Pac. 147.

As to grant by municipality to individual of use of street for private purpose, see note in 125 Am. St. Rep. 346.

An ordinance purporting to grant a franchise to maintain a wharf on city waterfront property for a term of years, reserving rent and right of re-entry, is a lease and not a franchise, and the remedy of the city for nonpayment of rent is by an ordinary action, and not by quo warranto for usurpation of a franchise: *State ex rel. Port Angeles v. Morse*, 56 Wash. 654, 106 Pac. 147.

As to lease as quasi franchise, see note in 35 Am. St. Rep. 402.

A city of the first class is not authorized to grant a franchise to a railroad company to encroach upon or use a material portion of a city street to the exclusion of the public therefrom: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

Power to grant to a railroad company the right to tunnel under, and use land under, the surface of the street, does not include the right to grant the exclusive use of part of a street for the purpose of descending to the grade under the street: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

Power to alter streets, change grades, and exercise general control over streets does not include the power to surrender the use of any part of the surface thereof: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

Power to authorize the location of a railroad "in" a street does not imply or mean power to grant an exclusive right to use the street: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

As to the general nature and kinds of franchises, see note in 131 Am. St. Rep. 862.

As to use of street, by railroad, see notes in 1 L. R. A. 493 and 8 L. R. A. 453.

As to power of municipality in the absence of express legislative authority to grant street franchises, see note in 22 L. R. A., N. S., 925.

A railroad franchise in city streets, granted by ordinance, may be forfeited by a resolution of the city council, in the absence of statutory or charter provisions requiring the forfeiture to be by ordinance: *State ex rel. Sylvester v. Superior Court*, 60 Wash. 279, 111 Pac. 19.

As to liability of municipality for injury due to improper use of street which it has expressly permitted, see note in 9 Ann. Cas. 828.

The power conferred upon the legislative authority of municipal corporations to grant franchises for the use of the streets is purely legislative and cannot be controlled by the courts: *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

As to judicial inquiry into motives prompting enactment of legislative ordinance, see note in Ann. Cas. 1912A, 1236.

As to obligation on municipality to impose conditions when consenting to occupation of street by railroad, see note in 36 L. R. A. 33.

The right to occupy a public street to the exclusion of the public cannot be granted to a railroad company by a city, under this section, providing that the city may authorize the locating and construction of any railroad in any street and prescribe the terms; nor under section 7479, granting practically the same powers to cities of the first class by an act entitled

an act granting "additional authority" as to the location of railroads, in, along, over or across any street, which act regulates the granting of franchises for such use of the streets without giving any material additional powers: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

As to obstruction of street as a nuisance, see note in 1 Am. St. Rep. 840.

A city of the first class has authority to construct in a city street extending to deep water across the harbor area, between the inner and outer harbor lines, a gridiron wharf for use as a public landing and convenience to navigation in connection with the use of the street, under its general powers conferred by this section, providing that it may construct and maintain public landing places, wharves, and docks, and extend its streets across tide lands and harbor areas in such manner as will best promote the interests of commerce: *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 117 Pac. 232.

As to right of municipality, in absence of statute, to erect free wharf at point where street abuts upon waterfront, see note in 14 Ann. Cas. 1135.

This section, subdivision 5, granting to a city power to issue bonds in place of, or to supply means to meet maturing bonds or for the consolidation or funding of bonds, does not authorize a city, upon the issuance of bonds, to pay for a public improvement costing eight hundred and seventy-five thousand dollars, to issue additional bonds in the sum of one hundred and twenty-five thousand dollars to be placed in a sinking fund and preserved inviolate for fifty years for the purpose of

redeeming and paying the other bonds then to become due, since a sinking fund is to be applied to the extinguishment of a principal debt and cannot be created as part of the debt itself: *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476.

As to municipal bonds and upon what their validity depends, see note in 51 Am. St. Rep. 823.

This section, authorizing a city to open, establish, grade and plank streets and other public places, and to construct and keep in repair bridges, authorizes the city to construct a bridge or elevated roadway: *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920.

Under this section, providing that a city may authorize or prohibit the maintenance of a railroad in streets and prescribe the conditions thereof, the granting of a franchise to a public service railway corporation to cross a street at a specified height, and changes of street grades in the vicinity to meet the necessities of the railroad grade, are for a public use, notwithstanding that the railroad company agreed to pay all condemnation awards against the city: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

A retail liquor license is property which passes to personal representatives on the death of the holder, as against third persons unlawfully converting the same to their own use, where the city charter and ordinances provides for transfers by and with the consent of the city council or to bona fide purchasers: *Jaffe v. Pacific Brewing & Malting Co.*, 69 Wash. 308, 124 Pac. 1122.

As to liquor license as asset, see note in 4 L. R. A., N. S., 626.

§ 7507-1. Power to Lease Wharf Privileges.

The legislative authorities of any city of the first class in this state are authorized and empowered to rent or lease the whole or any part of any wharf or privileges thereon owned by such city, in such manner as may be prescribed by general ordinance, for periods not exceeding one year. [L. '11, p. 338, § 1.]

§§ 7513-7516.

Repealed. See L. '11, p. 481, § 71.

§ 7517.

See notes to § 7504.

This section, vesting the legislative power of cities in a mayor and council, does not prevent the adoption of a charter providing for the initiative and referendum form of government, because it would be impliedly repealed thereby: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

The initiative and referendum plan of government adopted pursuant to constitution, article 11, section 10, authorizing a city to frame its own charter, is not inconsistent with this section, vesting the

legislative power of cities in a mayor and council, since such section applies only to powers provided for in the charter: *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

A provision in a city charter adopted by a city of the first class under constitution, article 11, section 10, for the recall of a city councilman is authorized by this section providing that the city council shall have the powers, and shall be elected at the times, in the manner, and for the terms prescribed in the charter: *Hilzinger v. Gillman*, 56 Wash. 228, 21 Ann. Cas. 305, 105 Pac. 471.

Under this and the next section, and section 7504, providing that the voters may amend the charter in any matter within the realm of local affairs or municipal busi-

ness, a city may adopt the commission form of government vesting all legislative and executive power in five commissioners who shall constitute the council, one of whom shall be mayor, each to be in charge of an independent department, since the same does not go beyond the realms of local affairs and municipal business: Walker v. Spokane, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

As to right of municipality to adopt the commission form of government, see note in Ann. Cas. 1912C, 999.

This section, providing that the legislative powers of cities of the first class shall be vested in a mayor and city council, without limiting or specifying his duties as an executive officer, does not imply that the mayor must be an officer possessed of the distinguishing characteristics of a mayor, or that he shall be an executive officer, since other mandatory provisions of the statutes are to the effect that he shall perform the duties prescribed by the charter: Walker v. Spokane, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

§ 7517-1. Recall of Elective Officials—Nomination of Candidates.

Whenever any city of the first class has heretofore, or shall hereafter, include in its city charter any provision for the recall of elective city officials, or any of them, at an election to be held for that purpose, if said charter provisions shall not specifically prescribe the method of nomination and placing the names of candidates upon the official ballot for use at said election, then and in that case, such candidates may be nominated in the following manner:

By filing a certificate of nomination with the city comptroller or clerk of such city, signed by electors of said city equaling in number not less than five per cent of the total vote cast for the incumbent against whom the recall is directed, which said certificate of nomination shall be substantially in the following form:

"CERTIFICATE OF NOMINATION."

We, the undersigned duly qualified citizens, voters and electors in and of the city of —, in — county, state of Washington, do hereby nominate —, of — county, Washington, engaged in the — business, and whose address is —, — as —, candidate for the office of — of the city of —, — county, Washington to be voted for at a special election to be held in the city of — on the — day of —, A. D. 19—.

We hereby certify that we, and each of us, undersigned, do and have hereby made the foregoing nomination, and that the said nominee is a duly qualified elector and voter in and of said city, county and state.

Name	Residence	Business	Address	Street	Number.
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Provided, That said signatures need not be all appended to one paper. Each elector signing a certificate of nomination shall add to his signature his place of residence, including street and number, his business and address. Said certificate of nomination shall be filed with the city comptroller or clerk of said city, at least ten days before the election to be held, and when so filed the comptroller or city clerk shall put the name of the nominees or candidates upon the official ballot, and in all cases the name of the incumbent of the office against whom the recall election is directed shall be printed upon the said official ballot at the head of the list of names thereon, without any petition in his behalf, unless in writing he should notify the city comptroller or city clerk to the contrary, and all the names upon said official ballot shall be printed without party or political designation, And provided, Nothing in this act contained shall be held to prevent any city which had the right to make or amend its own charter from making and prescribing in such charter any provision for a system of nomination at recall elections which shall thereupon, control and

direct its city officials in the preparation of the official ballot for use at such elections. [L. '11, p. 1, § 1.]

§ 7517-2. Challengers for Recall Elections.

Whenever any city has heretofore, or shall hereafter, include in its city charter any provision for the recall of elective city officials, or any of them, at an election to be held for that purpose, each candidate at such election shall have the right to designate a challenger or challengers at each polling place: Provided, however, That this act shall not affect the right to have or to be challengers as otherwise provided by law. [L. '11, p. 7, § 1.]

§ 7517-3. Rights and Privileges.

Such challenger or challengers shall have the right to be within the polling place as fully as the election officers and during the whole time the polls are open and until the ballots are all counted, including the right to examine the ballot-box before any ballot is deposited therein: Provided, however, That there shall be no more than one challenger for each candidate in a polling place at any one time. [L. '11, p. 7, § 2.]

§ 7518.

See notes to § 7517.

CHAPTER VIII.

FIRST CLASS CITIES, LOCAL ASSESSMENTS.

§§ 7529-7578.

Repealed. See L. '11, p. 481, § 71.

§ 7529.

A deficiency in the sums collected on a public improvement cannot be made up by a radical change in the plans, throwing a larger per cent of the cost of excavations upon owners excavating their own lots to street level by private contract, but only by apportionment upon all the property according to benefits: *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393.

As to assessment of cost of local improvement made under municipal authority against abutting owner who had made improvement on his own initiative, see note in 22 L. R. A., N. S., 877.

A party is not estopped to question an invalid change in the plans for a public improvement, when notified thereof by the contractor, where he did not mislead the contractor into the belief that he would assent, and shortly after notified him that the matter would be investigated before assent would be given: *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393.

As to change of ordinance requiring fire-escapes after compliance therewith, see note in 2 L. R. A., N. S., 398.

It is within the discretion of city authorities to make a public improvement wholly at the expense of the property benefited, instead of partly at the expense of the public; and the courts have no power

to control such discretion: *Powell v. Walla Walla*, 64 Wash. 582, 117 Pac. 389.

As to public improvements, and the assessment therefor by the front-foot rule, see note in 28 L. R. A., N. S., 1124.

The judgment of municipal officers specially authorized to determine the amount of the benefits from a public improvement and assess the same upon specific property benefited is conclusive, and courts will not interfere unless it is so grossly excessive as to amount to a practical confiscation of the property: *Powell v. Walla Walls*, 64 Wash. 582, 117 Pac. 389.

As to finality of decisions pertaining to local improvements, see note in 19 L. R. A., N. S., 382.

As a public park cannot be assessed for benefits from a street improvement, the courts will enjoin an improvement of streets by a city where part of the cost was assessed against a public park, and the city had already reached its constitutional limit of indebtedness: *Powell v. Walla Walla*, 64 Wash. 528, 117 Pac. 389.

As to power of municipality to contract for periodical payments throughout term of years when aggregate payments exceed debt limit, see note in Ann. Cas. 1913B, 1177.

A leasehold interest in state tide lands is assessable for local improvements under laws passed since the execution of the lease, since the common-law rule of an implied covenant in a lease that the lessor

shall pay the taxes has no application to a lease of public lands the fee of which is not subject to taxation: *Trimble v. Seattle*, 64 Wash. 102, 116 Pac. 647.

As to "owner" as including tenant for years, see note in Ann. Cas. 1912A, 456.

Where a railroad company has a mere easement or right of way to maintain tracks in a street, it cannot be assessed for benefits from the improvement of the street, required to be assessed against abutting property benefited thereby, especially where its franchise compelled it to make a substantial cash contribution toward the expense of the improvement: *In re Westlake Avenue*, 66 Wash. 277, 119 Pac. 798.

The franchise of a street railway is not assessable for benefits from a public improvement from the fact that the company was benefited thereby: *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70.

As to liability of railroad right of way to assessment for local improvement, see notes in 2 Ann. Cas. 587; 12 Ann. Cas. 635; 40 L. R. A., N. S., 935.

§ 7532.

Repealed. See L. '11, p. 481, § 71.

In a proceeding to assess the benefits to property by reason of the condemnation of a public street through the tract, in which it appeared that a reasonable grade would require a cut, but no grade had been established, confirmation of the assessment without inquiry into the effect of the grade is error: *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

The hearing in the superior court upon the confirmation of a city assessment-roll for public improvements is not the trial of an action at law in which findings of fact are required: *Brown v. Seattle*, 57 Wash. 314, 106 Pac. 1113.

Under this section, providing that the city council shall confirm an assessment as corrected by resolution or ordinance, in conformity with the charter, a city council may confirm an assessment by resolution, although another ordinance provides that all orders of confirmation shall be by ordinance, since the power of the council depends upon the general law and the charter; hence an appeal from a resolution confirming an assessment is not premature: *Real Estate Inv. Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057.

Under this section, providing that the regularity, validity and correctness of a local assessment must be challenged when the roll is before the city council for confirmation and all objections not so made are conclusively waived, and section 7533, providing that the assessment becomes conclusive in all things upon all parties not appealing therefrom, an objection to an assessment in that it exceeds fifty per cent of the assessed valuation of the property,

in violation of the city charter, is waived if the objection is not made before the city council and appeal taken: *Rucker Brothers v. Everett*, 66 Wash. 366, 38 L. R. A., N. S., 582, 119 Pac. 807.

As to nature of proceedings to collect improvement taxes, see note in 133 Am. St. Rep. 930.

§ 7550.

Repealed. See L. '11, p. 481, § 71.

This section, providing that on appeal from a decision of a city council upon the confirmation of an assessment, the appellant shall execute and file a bond, is sufficiently complied with to give jurisdiction of the appeal, where a bond purporting to be given in behalf of appellant "and others," was signed by one of the appellants and a surety, the condition being broad enough to hold the surety on account of any of the appellants, and the notice of appeal being signed by the proper parties: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Upon appeal from an assessment, the appellant cannot allege error in excluding evidence of benefits which was offered by a property owner not appealing: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

§ 7551.

Repealed. See L. '11, p. 481, § 71.

Where the court reduced an assessment against the leasehold and charged part against the fee, the lessee cannot complain that the court had no power to originate an assessment against the fee, the owner of the fee not complaining, and this section, providing that the court on appeal may correct or modify the assessment: *Seattle Mattress & Upholstery Co. v. Seattle*, 69 Wash. 666, 125 Pac. 1013.

§ 7552.

Repealed. See L. '11, p. 481, § 71.

See notes to § 7905.

The assessments of benefits from a local improvement, made by the commission appointed for that purpose, will not be disturbed on appeal where there were differences of opinion and conflicting evidence; and it is immaterial that the ownership of several lots was taken into consideration if the commission arrived at the correct result: *In re Elliott Avenue and Milwaukee Street, Seattle*, 54 Wash. 297, 103 Pac. 20.

As to appealable judgments and orders in eminent domain proceedings, see note in 16 Ann. Cas. 1004.

An assessment ordered by the court against property benefited by a local improvement will not be reduced as excessive unless the evidence so clearly pre-

ponderates against the finding as to indicate arbitrary action: *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121.

As to assessments that exceed benefits, see note in 28 L. R. A., N. S., 1172.

A special assessment will not be disturbed as unequal or unjust, where it rests upon opinion and the evidence is conflicting: *In re Pine Street, Seattle*, 57 Wash. 178, 106 Pac. 755.

The confirmation of a local municipal assessment will not be set aside upon appeal upon conflicting testimony evenly balanced, especially where there is nothing to indicate unfairness or partiality, and the city council spent much time in equalizing the assessments: *Brown v. Seattle*, 57 Wash. 314, 106 Pac. 1113.

An assessment of benefits from the condemnation of land for street extensions through unplatted property should be set aside for manifest abuse of discretion, where the commissioners assessed the unplatted property at about ten times as much as platted property, irrespective of its relation to the streets or the benefits received, arbitrarily assuming that the same was benefited greatly in excess of platted property; and it is an abuse of discretion for the trial judge to select commissioners who will, or influence them to, make such an assessment: *In re Everett*, 61 Wash. 493, 112 Pac. 658.

As to vacation of eminent domain proceedings on account of misconduct of commissioners, see note in 20 Ann. Cas. 711.

An apportionment of benefits by the eminent domain commissioners will not be disturbed on appeal on the ground that it was not according to the benefits, where there was a diversity of opinions by the witnesses and the evidence was not sufficient to overcome the report: *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112.

The limits of a special assessment district fixed by the commission, and the amount taxed against the general fund, will not be disturbed on appeal, where the limits do not appear to be unreasonable and the entire cost might have been assessed against the property: *In re Pine Street, Seattle*, 57 Wash. 178, 106 Pac. 755.

Upon an appeal from the confirmation of an assessment for a local improvement, findings as to the boundaries of the lands benefited, and the amount of the benefits, will not be disturbed in the absence of any abuse of discretion: *In re Sixth Avenue West, Seattle*, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

Upon appeal from the confirmation of an assessment for a local improvement, where about half of the land was exempt,

and the proportion appears of record, the supreme court will order a proportionate reduction: *In re Sixth Avenue West, Seattle*, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

A notice of appeal from the confirmation of an assessment by a city council may be informal, and is sufficient if it is made to appear that the owner protests against the costs as excessive and disproportionate to the value of the property, and because the benefit is not in proportion to the cost, it only being necessary to clearly state the grounds of the objection: *Real Estate Inv. Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057.

§ 7571.

Repealed. See L. '11, p. 481, § 71.

Where a city of the first class has provided itself with a general plan for the improvement of streets, under the privileges so to do granted by section 7573, the restriction of section 7571, limiting assessments to fifty per cent of the value of the land assessed, has no application, in view of the optional clause expressly authorizing the city to "avail itself of this act, . . . but it shall not be construed as a taking away" from such city any power possessed under its charter or any state law: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Under this section, a property owner cannot complain of an improvement the cost of which exceeds fifty per cent of such valuation, where no more than such fifty per cent is assessed against the benefited property and the balance is provided by the city from its general fund or other sources: *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965.

This section, limiting assessments for local improvements to fifty per cent of the valuation of the real estate within the improvement district, does not limit each assessment to fifty per cent of the value of each lot assessed, nor the total assessment to fifty per cent of the value of all the lots assessed; but the limit of the assessable cost is fixed by the total valuation of the real estate within the entire district, even if some of the property therein is not benefited and not subject to assessments: *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965.

As to waiver of objection that assessment exceeds the percentage limited by charter or statute, see note in 38 L. R. A., N. S., 582.

§ 7573.

See notes to § 7571.

CHAPTER X.

VIADUCTS, ETC., IN CITIES OF THE FIRST CLASS.

§ 7579. Authorized—Contiguous Property Benefited may be Assessed.

Any city of the first class shall have power to provide for the construction, maintenance and operation upon public streets and upon the extensions and connections thereof over intervening tide lands to and across any harbor reserves, waterways, canals, rivers, natural watercourses and other channels, any bridges, drawbridges, viaducts, elevated roadways and tunnels or any combination thereof together with all necessary approaches thereto, with or without street railway tracks thereon or therein, and to make any and all necessary cuts, fills, or other construction, upon, in or along such streets and approaches as a part of any such improvement, and to order any and all work to be done which shall be necessary to complete any such improvement. The word "approaches" as used in this section shall include any arterial highway or highways or street connecting with any such bridge, drawbridge, viaduct, elevated roadway or tunnel, or combination thereof, which are necessary to give convenient access thereto or therefrom from any portion of the improvement district which may be specially benefited by such improvement and which is liable to assessment for such improvement.

Whenever it is desired to pay the whole or any portion of the cost and expense of any such improvement by special assessments, the council or other legislative body of such city shall in the ordinance ordering such improvement fix and establish the boundaries of the improvement district, the property within which is to bear such assessment, which district shall include as near as may be, all the property specially benefited by such improvement. [L. '11, p. 493, § 1.]

§ 7580. Assessment District—Hearing.

Any such improvement may be initiated by the city council, or other legislative body of such city, by a resolution, declaring its intention to order such improvement, which resolution shall set forth the nature and territorial extent of such proposed improvement, shall specify and describe the boundaries of such proposed improvement district and notify all persons who may desire to object thereto to appear and present such objections at a meeting of the council specified in such resolution and directing the board of public works, or other proper board, officer or authority of such city, to submit to such council at or prior to the date fixed for such hearing the estimated cost and expense of such improvement, and a statement of the proportionate amount thereof which should be borne by the property within the proposed improvement district, and a statement of the aggregate assessed valuation of the real property exclusive of improvements, within said district, according to the valuation last placed upon it for purposes of general taxation. Such resolution shall be published in at least two (2) consecutive issues of the official newspaper of such city, the date of the first publication to be at least thirty days prior to the date fixed by such resolution for hearing before such council.

Upon such hearing, or upon any adjournment thereof, such council shall have power to amend, change, extend, or contract the boundaries of such proposed improvement district as specified in such resolution, and to consider

and determine all matters in relation to such proposed improvement, and, upon the conclusion of such hearing, or any adjournment thereof, shall have power by ordinance to order such improvement to be made and to adopt, fix and establish the boundaries of the improvement district. The action of such council in ordering such improvement, or in abandoning the same, and in fixing and establishing the boundaries of such improvement district shall be final and conclusive. Any such ordinance may be passed upon majority vote of the council or other legislative body of such city. Such ordinance may provide for the construction of such improvement in sections, the letting of separate contracts for each such section, and, in case the same is made in sections, separate assessment-rolls to defray the cost and expense of any such section of such improvement may be prepared, and the amounts thereon appearing as finally determined, may be levied and assessed against real property within such improvement district. The provisions of law, charter and ordinance of any such city, relating to supplemental assessments, reassessments and omitted property shall be applicable to any improvement authorized in this act.

The city council, or other legislative body of such city, shall by general ordinance, make provision for hearing any objections in writing, to any assessment-roll for such improvement filed with the city clerk or comptroller at a prior date to the hearing thereon. Any right of appeal to the superior court now provided by law to be taken from any local improvement assessment levied and assessed by any such city, may be exercised, within the time and in the manner therein provided, by any person so objecting to any assessment levied and assessed for any improvement authorized in this act. [L. '11, p. 494, § 2.]

CHAPTER XI.

SECOND CLASS CITIES.

§ 7612-1. Publicity Fund in Cities of Less Than Eighteen Thousand Inhabitants.

Any city of the second class under 18,000 inhabitants of the state of Washington is hereby empowered to create a special fund to be known as a publicity fund, to be used exclusively for exploiting and advertising the general advantages and opportunities of such city and vicinity. Whenever the city council or other governing body in any such city shall decide to create a publicity fund under this act, such council or governing body of such city shall do so by ordinance, and thereupon the council or other governing body of such city shall have authority to levy annually for the creation and maintenance of such fund a special tax on all of the taxable property of such city, not exceeding two and one-half mills on the dollar of the assessed valuation of the taxable property of such city. All moneys derived from such tax levy shall be paid into such publicity fund and shall be devoted exclusively to the use herein stated, and shall be paid out only upon warrants drawn against the same and signed by at least two members of the publicity board hereinafter provided for. [L. '13, p. 175, § 1.]

§ 7612-2. Expenditures—Publicity Board.

All expenditures from said fund shall be made under the direction of a publicity board of three members to be nominated by a recognized commercial

organization of such city, then appointed by the mayor and confirmed by the council or other legislative body of the city by two-thirds vote; the members of such board shall serve without remuneration and must be actual residents and voters in such city and property owners therein; and the recognized commercial organization herein referred to must be representative and public and devoted exclusively to the work usually devolving on such organizations, and must have no less than two hundred bona fide dues paying members, and must be incorporated under the laws of the state of Washington; if there be more than one organization meeting these qualifications in any city, then the oldest of such organizations shall be the one recognized within the meaning and provisions of this act. Members of the publicity board may be appointed in the manner herein provided any time after this act goes into effect and the first members appointed shall hold office until the second Monday in January following their appointment, or until their successors shall have been appointed and qualified, and thereafter the members of such publicity board shall be appointed at the first regular meeting in December of the city council or other governing body of such city and the terms of office of such members shall be for one year beginning on the second Monday in January after their appointment and until their successors are appointed and qualified. Members of the board, duly appointed and confirmed, shall qualify prior to the beginning of their term by taking the oath of office and by giving a bond to the city in the sum of \$1,000, conditioned upon the faithful performance of their duties. Any member of the board shall be removed by the mayor on request of the recognized commercial organization making the nomination, as hereinbefore stated, when it is shown that a majority vote of the entire membership of such recognized organization favoring such removal has been cast at any regular meeting of such organization. No part of said publicity fund shall ever be paid to any newspaper, magazine or periodical published within the city or county where such city is situated, for advertising or write-ups or for any other service or purpose whatsoever, and no part of such fund shall be expended for the purpose of making any exhibits at any fair, exposition or the like. [L. '13, p. 176, § 2.]

§§ 7621-7634.

Repealed. See L. '11, p. 481, § 71.

§ 7623.

A complaint to enjoin an assessment for a street improvement in a city of the second class states a cause of action where it is alleged that the city is proceeding to make the assessment without giving the plaintiff property owners notice or opportunity for a hearing upon the equalization of the assessments, as required by this section, and that the city has included large sums not a part of the cost of the improvement and not properly chargeable to the property benefited, without an opportunity to be heard: *Coats Shingle Co. v. Hoquiam*, 55 Wash. 690, 105 Pac. 141.

As to validity of eminent domain statute which fails to provide for notice to land

owner of proceedings to condemn, see note in Ann. Cas. 1913A, 1256.

§§ 7656-7662.

Repealed. See L. '13, p. 303, § 9.

§ 7656.

Under constitution, article 4, section 1, vesting judicial power in certain courts, and such inferior courts as the legislature may provide, and article 4, section 12, providing that the legislature shall prescribe the jurisdiction and powers of such inferior courts, the legislature had power, by section 7656, to create police courts in cities of the second class, and by section 7657, to confer on them jurisdiction of petit larceny committed within the city: *State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384.

less than twenty thousand to adopt the commission form of city government, does not restrict its application to any particular city or special territory, as the court takes judicial notice that there are many cities within the limitation: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A. 802, 116 Pac. 651.

Laws of 1911, page 521, authorizing the adoption of the commission form of city government, is not an unwarranted delegation of legislative power, in violation of constitution, article 21, section 1, since it is complete in itself and may properly leave to a local board the determination of when or whether it will go into operation: State

ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section is not unconstitutional because of its optional features: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section does not violate constitution, article 11, section 10, requiring classification of cities by general laws in proportion to population, although it creates a new classification for this purpose within the old classes, since the constitution does not require uniformity of general laws relative to municipal corporations, and the act is general and of uniform operation: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

§ 7670-2. Petition—Election.

Upon petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall by proclamation, submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within sixty days after said petition is filed. If said plan is not adopted at the special election called, the question of adopting said plan shall not be resubmitted to the voters of said city for adoption within two years thereafter.

At such election the proposition to be submitted and printed on the ballot shall be: "Shall the proposition to organize the city of (name of city), under chapter (naming the chapter containing this act) of the acts of the twelfth legislature of the state of Washington, be adopted?" and there shall be printed on the official ballots of said election the above proposition, followed by the words:

"For organization as a city under commission —."

"Against organization as a city under commission —" and the election thereupon shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections. If the majority of the votes cast shall be in favor thereof, the city shall proceed to the election of a mayor and two commissioners, as hereinafter provided. [L. '11, p. 521, § 2.]

This section is not void in that constitution, article 11, section 10, authorizes existing cities to become organized under general laws whenever a majority of the electors voting at a general election shall so determine, since the provision for a "special" election may be rejected as surplusage and the election held at the city's general election; neither does the constitutional provision make general the election held for such purpose, but merely fixes the time for holding it: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section, authorizing the adoption of a commission form of city government, and

leaving in force all existing laws not inconsistent with the act, is not violative of constitution, article 2, section 37, providing that no act shall be revised or amended without reference to its title, setting forth the amended section in full, and section 38, providing that amendments shall not be allowed which shall change the scope or object of the bill, since those sections of the constitution do not apply to the modification of existing laws by acts complete in themselves or by supplemental acts not altering the original act: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

his court for that month in which the city may be interested and file the same with the city clerk. [L. '13, p. 303, § 6.]

§ 7656-7. Absence—Police Judge Pro Tempore.

In the event of the police judge's inability to act, or during any temporary absence, or if he should be disqualified, the mayor shall appoint from among the practicing attorneys and qualified electors of the city, a police judge pro tempore, who, before entering upon the duties of such office, shall take and subscribe an oath as other judicial officers, and while so acting, he shall have all the power of the police judge: Provided, however, Such appointment shall not continue for a longer period than the absence or inability of the police judge. Such police judge pro tempore shall receive compensation for such services at the rate of five dollars per day, to be paid by the city. [L. '13, p. 303, § 7.]

§ 7656-8. Must be Attorney—Election.

No person shall be eligible to hold the office of police judge who is not a practicing attorney under the laws of this state. In all cities of the second class, except such as have a commission form of government, a police judge shall be elected annually at the general municipal election and shall hold his office until his successor is elected and qualified. [L. '13, p. 303, § 8.]

§ 7657.

Repealed. See L. '13, p. 303, § 9.

This section, expressly conferring on police courts jurisdiction of petit larceny committed in the city, and limiting the jurisdiction in the case of misdemeanors to those punishable by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, does not oust the court of jurisdiction in the case of petit

larceny upon a subsequent change of penalty: State ex rel. Fugita v. Milroy, 71 Wash. 592, 129 Pac. 384.

§ 7664.

Repealed. See L. '13, p. 303, § 9.

§ 7666.

Repealed. See L. '13, p. 303, § 9.

CHAPTER XI-A.

COMMISSION FORM OF GOVERNMENT.

§ 7670-1. Population for Commission Form of Government.

Any city, now or hereafter, having a population of two thousand five hundred and less than twenty thousand, as shown by the last state or federal census or by any special census taken by the city in the manner prescribed in section 7485, Remington and Ballinger's Annotated Codes and Statutes of Washington, may become organized as a city under the provisions of this act by proceeding as hereinafter provided. [L. '11, p. 521, § 1.]

A city charter establishing the commission form of government, with the initiative, referendum, and recall, does not abolish the republican form of government guaranteed by article 4, section 4, of the federal constitution, since the guaranty applies only to the state governments, and means only a representative form of government subject to the will of the people: Walker v. Spokane, 62 Wash. 312, Ann. Cas. 1912C, 994, 113 Pac. 775.

Constitution, article 2, section 28, subdivision 8, prohibiting the enactment of special laws to incorporate any city or amend a city charter, is not violated by this section authorizing the cities of a specified population to adopt the commission form of city government: State ex rel. Hunt v. Tausick, 64 Wash. 69, 135 L. R. A., N. S., 802, 116 Pac. 651.

This section, authorizing cities having a population of two thousand five hundred and

less than twenty thousand to adopt the commission form of city government, does not restrict its application to any particular city or special territory, as the court takes judicial notice that there are many cities within the limitation: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A. 802, 116 Pac. 651.

Laws of 1911, page 521, authorizing the adoption of the commission form of city government, is not an unwarranted delegation of legislative power, in violation of constitution, article 21, section 1, since it is complete in itself and may properly leave to a local board the determination of when or whether it will go into operation: State

ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section is not unconstitutional because of its optional features: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section does not violate constitution, article 11, section 10, requiring classification of cities by general laws in proportion to population, although it creates a new classification for this purpose within the old classes, since the constitution does not require uniformity of general laws relative to municipal corporations, and the act is general and of uniform operation: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

§ 7670-2. Petition—Election.

Upon petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall by proclamation, submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within sixty days after said petition is filed. If said plan is not adopted at the special election called, the question of adopting said plan shall not be resubmitted to the voters of said city for adoption within two years thereafter.

At such election the proposition to be submitted and printed on the ballot shall be: "Shall the proposition to organize the city of (name of city), under chapter (naming the chapter containing this act) of the acts of the twelfth legislature of the state of Washington, be adopted?" and there shall be printed on the official ballots of said election the above proposition, followed by the words:

"For organization as a city under commission —."

"Against organization as a city under commission —" and the election thereupon shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections. If the majority of the votes cast shall be in favor thereof, the city shall proceed to the election of a mayor and two commissioners, as hereinafter provided. [L. '11, p. 521, § 2.]

This section is not void in that constitution, article 11, section 10, authorizes existing cities to become organized under general laws whenever a majority of the electors voting at a general election shall so determine, since the provision for a "special" election may be rejected as surplusage and the election held at the city's general election; neither does the constitutional provision make general the election held for such purpose, but merely fixes the time for holding it: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

This section, authorizing the adoption of a commission form of city government, and

leaving in force all existing laws not inconsistent with the act, is not violative of constitution, article 2, section 37, providing that no act shall be revised or amended without reference to its title, setting forth the amended section in full, and section 38, providing that amendments shall not be allowed which shall change the scope or object of the bill, since those sections of the constitution do not apply to the modification of existing laws by acts complete in themselves or by supplemental acts not altering the original act: State ex rel. Hunt v. Tausick, 64 Wash. 69, 35 L. R. A., N. S., 802, 116 Pac. 651.

§ 7670-3. Time for Holding Elections.

All regular elections under this act shall be held triennially on the first Monday in December, at which time there shall be elected a mayor and two commissioners who, together, shall constitute and be known as the "City Commission," and who shall serve for a term of three years and until their successors shall be elected and qualified: Provided, That the first election hereunder shall be held within sixty days after the adoption of the proposition to organize under this act as provided for herein: And provided further, That the commission elected at the first election shall serve until the third Monday in December following such first election, and for three years thereafter. [L. '11, p. 522, § 3.]

§ 7670-4. Application of Act—Effect of Change.

All existing laws governing cities of the second class or applicable thereto, not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act. All by-laws, ordinances and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed under the provisions of this act. The territorial limits of such city shall remain the same as under its former organization, and all rights and property of every description which were vested in any city under its former organization, shall vest in the same under the organization herein contemplated, and no right or liability either in favor of or against it, existing at the time, and no suit or prosecution of any kind, shall be affected by such change unless otherwise provided for in this act. [L. '11, p. 522, § 4.]

§ 7670-5. Vacancy—How Filled.

If any vacancy occurs in the city commission the remaining members of said commission shall, by appointment, fill such vacancy for the unexpired term.

All of said officers shall be nominated and elected at large. They shall qualify and their terms of office shall begin on the second Monday after their election. The terms of office of the mayor or councilmen or aldermen of such city under the former organization shall terminate at the beginning of the term of office of the city commission elected under the provisions of this act, and the terms of office of all other officers of such city under such former organization, except as hereinafter provided, shall terminate as soon as the commission shall by resolution declare. [L. '11, p. 523, § 5.]

§ 7670-6. Bond of Commissioners.

Each member of the city commission shall, before qualifying, give a good and sufficient bond to the city in a sum equivalent to five times the amount of his annual salary, conditioned upon the faithful performance of the duties of his office, which said bond shall be approved by a judge of the superior court of the state of Washington for the county in which said city is located and filed with the clerk of said court. And said commission may, by resolution, require any of its appointees to give bond to be fixed and approved by said commission, and filed with the mayor. [L. '11, p. 523, § 6.]

§ 7670-7. City Elections—Nominations.

Candidates to be voted for at the first and at all regular municipal elections, under the provisions of this act, shall be a mayor and two commissioners, who shall be nominated at a primary election; and no other names shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. The primary election for such nomination shall be held on the second Monday preceding the municipal election. The officers of election appointed for the municipal election shall be the officers of the primary election, which shall be held at the same place, so far as practicable, and the polls shall be opened and closed at the same hours as are required for the municipal election.

Any person desiring to become a candidate for mayor or commissioner shall, not less than fifteen nor more than twenty-five days prior to said primary election, file with the city clerk a statement of such candidacy accompanied with the filing fee required by law, in substantially the following form: State of Washington, County of —, ss.

I, —, being first duly sworn, say that I reside at — street, city of —, county of —, state of Washington; that I am a qualified voter therein; that I am a candidate for nomination to the office of — of the city of —, to be voted upon at the primary election to be held on Monday, the — day of December, 19—, and I hereby request that my name be printed upon the official primary ballot for nomination by such primary election for such office.

(Signed) — —.

Subscribed and sworn to (or affirmed) before me by — on this — day of —, 19—. .

(Signed) — —.

He shall at the same time file therewith the petition of at least one hundred qualified voters requesting such candidacy. Each petition shall be verified by one or more persons as to the qualifications and residence, with street number, of each of the persons so signing the said petition, and the said petition shall be in substantially the following form:

PETITION ACCOMPANYING NOMINATION STATEMENT.

The undersigned, duly qualified electors of the city of —, and residing at the places set opposite our respective names hereto, do hereby request that the name of (name of candidate) be placed on the ballot as a candidate for nomination for — at the primary election to be held in such city on Monday, the — day of December, 19—. We further state that we know him to be a qualified elector of said city and a person of good moral character and qualified, in our judgment, for the duties of such office.

Names of qualified electors — —.

Number —.

Streets —.

Immediately upon the expiration of the time for filing the statements and petitions for candidates, the city clerk shall cause to be published over his signature for three successive days in all the daily newspapers published in the city, in proper form, the names of the persons as they are to appear upon the primary ballot, and if there be no daily newspapers, then in two issues of any other newspaper that may be published in said city. The said clerk shall

thereupon cause the primary ballot to be printed. Upon the said ballot and under the ballot heading as hereinafter provided, the names of the candidates for mayor, arranged alphabetically, shall first be placed, with a square at the right of each name, and immediately above shall appear the words "Vote for one." Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for commissioners, with a square at the right of each name, and immediately above shall appear the words "Vote for two." The ballots shall be printed upon plain, substantial white paper and shall have no party designation or mark whatever. The ballots shall be in substantially the following form:

OFFICIAL PRIMARY BALLOT.

Candidates for nomination for mayor and commissioners of — at the
PRIMARY ELECTION.

(Date) — —.

Place a cross in the square opposite the names of the parties you favor as candidates for the respective positions.

MAYOR.	Vote for One.
.....	<input type="checkbox"/>
.....	<input type="checkbox"/>
COMMISSIONERS.	Vote for Two.
.....	<input type="checkbox"/>
.....	<input type="checkbox"/>

Having caused said ballots to be printed, the said city clerk shall cause to be delivered to each polling place a number of said ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor. The persons who are qualified to vote at the general municipal election shall be qualified to vote at such primary election. The law applicable to challenges at a general municipal election shall be applicable to challenges made at such primary election. The officers of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precinct for each of the candidates, and make return thereof to the city clerk, upon proper blanks to be furnished by the said clerk, within six hours of the closing of the polls. On the day following the said primary election the said city clerk shall canvass said returns so received from all the polling precincts, and shall make and publish in all the newspapers of said city, at least once, the result thereof. Said canvass by the city clerk shall be publicly made. The two candidates receiving the highest number of votes for mayor, and the four candidates receiving the highest number of votes for commissioners, shall be placed upon the ballot as the candidates for mayor and commissioners, respectively, at the general municipal election.

All electors of cities under this act who by the laws of the state of Washington would be entitled to vote for the election of officers at any general municipal election in such cities, shall be qualified to vote at all elections under this act and the ballot at such general municipal election shall be in the same general form as for such primary election, so far as applicable, and in all elections in such city the election precincts, voting places, method of

conducting election, canvassing the votes and announcing the results shall be the same as by law provided for election of officers in such cities, so far as the same are applicable and not inconsistent with the provisions of this act. [L. '11, p. 523, § 7.]

§ 7670-8. Grafting—Penalty.

Any person who shall agree to perform any service in the interest of any candidate for any office provided for in this act, in consideration of any money or other valuable thing for such services performed in the interest of any candidate, shall be punished by a fine not exceeding three hundred dollars (\$300) nor less than twenty-five (\$25.00) or be imprisoned in the county jail not exceeding thirty (30) days, nor less than five (5) days, or by both such fine and imprisonment. [L. '11, p. 527, § 8.]

§ 7670-9. Soliciting—Bribing—Accepting—Penalty.

Any person giving or offering to give a bribe, either in money or other thing of value, to any elector for the purpose of influencing his vote at any election provided for in this act, or any elector who shall solicit, receive or accept, such bribe or other thing of value, or any person making false answer under any of the provisions of this act relative to his qualifications to vote at said election, or any person willfully voting or offering to vote at such election, who knowing himself not to be a qualified elector of such precinct where he offers to vote; or any person knowingly procuring, aiding or abetting any violating hereof, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined a sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) and be imprisoned in the county jail not less than ten (10) nor more than ninety (90) days. [L. '11, p. 527, § 9.]

§ 7670-10. Vote of Commission.

Each member of the city commission shall have the right to vote on all questions coming before the commission. Two members of the commission shall constitute a quorum, and the affirmative vote of two members shall be necessary to adopt any motion, resolution or ordinance, or pass any measure, unless a greater number is provided for in this act. Upon every vote, the yeas and nays shall be called and recorded, and every motion, resolution or ordinance shall be reduced to writing and read before the vote is taken thereon. The mayor shall preside at all meetings of the commission; he shall have no power to veto any measure, but every resolution or ordinance passed by the commission must be signed by the mayor, or by two members of the commission, and be filed and recorded within five days after its passage, and the same shall be in effect from and after thirty days after its passage, except as otherwise provided. [L. '11, p. 527, § 10.]

§ 7670-11. Powers Conferred—Departments.

Cities organized under the provisions of this act shall have all the powers which cities of the second class now have, or hereafter may have conferred upon them; all which said powers shall inhere in and be exercised by the commission provided for in this act. The executive and administrative powers, authority and duties in such cities under commission, shall be distributed into and among three departments, as follows:

- I. Department of public safety.
- II. Department of finance and accounting.
- III. Department of streets and public improvements.

The commission shall determine by ordinance the powers and duties to be performed in each department; shall prescribe the powers and duties of officers and employees; may assign particular officers and employees to one or more of the departments; may require an officer or employee to perform duties in two or more departments, and may make such other rules and regulations as they may deem necessary or proper for the efficient and economical conduct of the business of the city. [L. '11, p. 528, § 11.]

§ 7670-12. Duties of Mayor—Removal.

The mayor shall be superintendent of the department of public safety, and the commission shall, at the first regular meeting after election of its members, designate by majority vote one commissioner to be superintendent of finance and accounting; and one to be superintendent of the department of streets and public improvements; but such designation may be changed whenever it appears that the public service would be benefited thereby.

The commission shall, at said first meeting, or as soon as practicable thereafter appoint by majority vote, a city clerk, and such other officers and assistants as shall be provided for by ordinance: Provided, That any officer or assistant, elected or appointed by the commission, may be removed from office at any time by vote of a majority of the members of the commission, except as otherwise provided in this act: Provided further, That any member of the commission may perform the duties pertaining to any and all appointive officers in his department, but without additional compensation therefor. [L. '11, p. 528, § 12.]

§ 7670-13. Change of Compensation.

The commission shall have power from time to time to create, fill and discontinue offices and employments other than those herein prescribed, according to their judgment of the needs of the city; and may, by majority vote of all the members, remove any such officer or employees, except as otherwise provided for in this act; and may by resolution, or otherwise prescribe, limit or change the compensation of such officers or employees. [L. '11, p. 529, § 13.]

§ 7670-14. Salaries.

The commission shall have and maintain an office at the city hall, or such other place as the city may provide, and their total compensation shall be as follows: In cities having a population of two thousand five hundred (2,500) and less than five thousand (5,000) the annual salary of the mayor shall be five hundred dollars (500), and that of each of the commissioners two hundred fifty dollars (\$250); in cities having a population of five thousand and less than eight thousand (8,000), the annual salary of the mayor shall be twelve hundred dollars (\$1,200), and that of each of the commissioners one thousand dollars (\$1,000); in cities having a population of eight thousand (8,000) and less than fourteen thousand (14,000), the annual salary of the mayor shall be two thousand dollars (\$2,000), and that of each of the commissioners eighteen hundred dollars (\$1,800); and in cities having a population of fourteen thousand (14,000) and less than twenty thousand (20,000), the annual salary of

the mayor shall be twenty-five hundred dollars (\$2,500), and that of each commissioner two thousand dollars (\$2,000). Such salaries shall be payable in equal monthly installments.

Every other officer or assistant shall receive such salary or compensation as the commission shall fix by ordinance and shall be payable monthly or at such shorter periods as the commission shall determine. [L. '11, p. 529, § 14.]

§ 7670-15. Regular Meeting.

Regular meetings of the commission shall be held on the second Monday after the election of the commission, and thereafter at least once each week. The commission shall provide by ordinance for the time of holding regular meetings, and special meetings may be called from time to time by the mayor or two commissioners. All meetings of the commission, whether regular or special, shall be open to the public.

The mayor shall be president of the commission and preside at its meetings, and shall oversee all departments and report and recommend to the commission for its action all matters requiring attention in any department. The superintendent of the department of finance and accounting shall be vice-president of the commission, and in the absence or inability of the mayor, shall perform the duties of the mayor. [L. '11, p. 530, § 15.]

§ 7670-16. Franchises.

Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or granting any franchise or right to occupy or use the streets, highways, bridges or public places in the city for any purpose, shall be complete in the form in which it is finally passed, and remain on file with the city clerk for public inspection at least one week before the final passage or adoption thereof. No franchise or right to occupy or use the streets, highways, bridges or public places in any city shall be granted, renewed or extended, except by ordinance; and every franchise or grant for interurban or street railways, gas or water works, electric light or power plants, heating plants, telegraph or telephone systems, or other public service utilities within said city, must be authorized or approved by a majority of the electors voting thereon at a general or special election. [L. '11, p. 530, § 16.]

§ 7670-17. Contracts—Special Privileges.

No officer or employee elected or appointed in any such city shall be interested, directly or indirectly, in any contract or job for work or materials, or claims or demands of any kind or nature whatsoever, or the profits thereof, or services to be furnished or performed for the city; and no officer or employee shall be interested directly or indirectly, in any contract or job for work or materials, or the profits thereof, or service to be furnished or performed for any person, firm or corporation operating interurban railways, street railways, gasworks, waterworks, electric light or power plant, heating plant, telegraph line, telephone exchange, or other public utility within the territorial limits of said city. No such officer or employee shall accept or receive directly or indirectly, from any person, firm or corporation operating within the territorial limits of said city, any interurban railway, street railway, gas works, waterworks, electric light or power plant, heating plant, telegraph line or telephone exchange, or other business using or operating under

a public franchise, any frank, free ticket or free service, or accept or receive, directly or indirectly, from any such person, firm or corporation, any other service upon terms more favorable than is granted to the public generally. Any violation of the provisions of this section shall be a misdemeanor, and every such contract or agreement shall be void.

Such prohibition of free transportation shall not apply to policemen or firemen in uniform; nor shall any free service to city officials provided for by any franchise or ordinance be affected by this section. Any appointive officer or employee of such city who, by solicitation or otherwise, shall exert his influence to induce other officers or employees of such city to favor any particular candidate for any city office, or who shall in any manner contribute money, labor, or other valuable thing to any person for city election purposes, shall be discharged from his office by the commission. [L. '11, p. 531, § 17.]

§ 7670-18. Print Statement.

The commission shall each month print in pamphlet form a detailed itemized statement of all receipts and expenses of the city and a summary of its proceedings during the preceding month, and furnish printed copies thereof to the state library, the city library, the newspapers of the city, and to persons who shall apply therefor at the office of the city clerk. At the end of each year the commission shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants, and shall publish the result of such examination in the manner above provided for publications of statements of monthly expenditures. [L. '11, p. 532, § 18.]

§ 7670-19. May Revise Appropriations.

If, at the beginning of the term of office of the first commission elected in such city under the provisions of this act, the appropriations for the expenditures of the city government for the current fiscal year have been made, said commission shall have power, by ordinance, to revise said appropriations. [L. '11, p. 532, § 19.]

§ 7670-20. Recall—Procedure.

The holder of any elective office may be removed at any time after six months of incumbency by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least thirty-five per centum of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing such petition the

city clerk shall examine and, from the registration books and the returns of the preceding municipal election, ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the commission shall allow him extra help for that purpose; and he shall attach to said petition his certificate, showing the result of such examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the commission without delay, and the commission shall order and fix a date for holding the said election, not less than thirty days nor more than sixty days from the date of the clerk's certificate to the commission that a sufficient petition is filed: Provided, however, That in any case where the clerk shall find that the petition is insufficient, or in any case where the commission shall refuse to order an election, then in either of such cases any taxpayer may petition the superior court of such county, and such court shall forthwith examine the petition and, if it shall find the petition sufficient, then the court shall order that such election shall be held and the commission shall be required by the order of the court to hold such election.

The commission shall make, or cause to be made, publication of notice and all arrangements for holding such election, and the same shall be conducted, returned and the result thereof declared, in all respects as are other city elections.

The commission shall call a special primary election for the purpose of nominating one candidate to oppose the incumbent sought to be removed, which said primary election shall be conducted, as nearly as may be, in the same manner as other primary elections under this act. The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed shall be a candidate to succeed himself, unless he formally resigns his office, thereby creating a vacancy, and the city clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election, if the candidate opposing the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor, which said qualification shall take place within ten days after receiving notification of election, otherwise the office shall be deemed vacant. If the incumbent receives the highest number of votes he shall continue in office and shall not be subject to recall under the provisions of this section during the remainder of his term of office. The same method of removal shall be cumulative and additional to the methods heretofore provided by law. [L. '11, p. 532, § 20.]

§ 7670-21. Ordinances—Special Elections.

Any proposed ordinance may be submitted to the commission by petition signed by electors of the city equal in number to the percentage hereinafter

required. The signatures, verification, authentication, inspection, certification, amendment and submission of such petition shall be the same as provided for petitions under section 7670-20.

If the petition accompanying the proposed ordinance be signed by electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding general election, and if it contains a request that the said ordinance be submitted to a vote of the people, unless passed by the commission, it shall thereupon be the duty of the commission to either:

(a) Pass said ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition; or

(b) Forthwith after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the commission shall call a special election, unless a general municipal election will occur within ninety days thereafter, and at such special or general election such ordinance shall be submitted without alteration to the vote of the electors of said city.

The ballots used for voting upon said ordinance shall be similar to those used at the general municipal election, and shall contain these words: "For the ordinance" (stating the nature of the proposed ordinance); and "Against the ordinance" (stating the nature of the proposed ordinance). If a majority of the qualified voters voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city, and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people, and on the margin of the record of such ordinances the city clerk shall write the words "Ordinance by petition No. ——" or "Ordinance by vote of the people," as the case may be.

Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section, but there shall not be more than one special election in any period of six months for such purpose.

The commission may submit a proposition for the repeal of any such ordinance or for amendments thereto, to be voted upon at any such succeeding general city election, and should such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly. Whenever any ordinance or proposition is required by this act to be submitted to the voters of the city at an election, the city clerk shall cause such ordinance or proposition to be published once in each of the daily newspapers in said city, such publication to be not more than twenty or less than five days before the submission of such proposition or ordinance to be voted on: Provided, That if no daily newspaper is published in such city, then such publication shall be made in each of the weekly newspapers published therein.

All ordinances repealed or amended shall have placed on the margin of the record of said ordinance by the city clerk the words "repealed (or amended) by ordinance No. ——" or "repealed (or amended) by vote of the people," as the case may be. [L. '11, p. 534, § 21.]

§ 7670-22. Becomes Effective, When.

No ordinance passed by the commission, except when otherwise required by the general laws of the state of Washington or by the provisions of this act,

except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by unanimous vote of the commission, shall go into effect before thirty days from the time of its final passage, and if during said thirty days a petition signed by electors of the city equal in number to at least twenty-five per centum of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, protesting against the passage of such ordinance be presented to the commission, said ordinance shall thereupon be suspended from going into operation, and it shall be the duty of the commission to reconsider such ordinance and if the same is not entirely repealed, the commission shall submit the ordinance as is provided by subsection "b" of section 7670-21, to the vote of the electors of the city, either at the general election or at a special municipal election to be called for that purpose; and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. Said petition shall be in all respects in accordance with the provisions of section 7670-21, and be examined and certified to by the clerk in all respects as therein provided: Provided, This section shall not apply to ordinances providing for local improvement districts. [L. '11, p. 536, § 22.]

§ 7670-23. Abandonment of Organization.

Any city which shall have operated for more than six years under the provisions of this act may abandon such organization hereunder and accept the provisions of the general law of the state of Washington applicable to cities of its population.

Upon the petition of not less than twenty-five per centum of the electors of such city a special election shall be called, to which the following proposition only shall be submitted: "Shall the city of (name of city) abandon its organization as a city under commission and become a city under the general laws governing of like population?"

If a majority of the votes cast at such special election be in favor of such proposition the said city shall become organized under the general law and the first election of city officers under the general law shall be held on the date of the next general city election of cities of its class; but such change shall not in any manner or degree affect the property, rights, or liabilities of any nature of such city, but shall merely extend to such change in its form of government.

The sufficiency of such petition shall be determined, the election ordered and conducted, and the results declared, generally as provided by section 7670-20, in so far as the provisions thereof are applicable. [L. '11, p. 537, § 23.]

§ 7670-24. Petition by Legal Voters.

Petitions provided for in this act shall be signed by none but legal voters of the city. Each petition shall contain, in addition to the names of the petitioners, the street and house number in which the petitioner resides, his age and length of residence in the city. It shall also be accompanied by the affidavit of one or more legal voters of the city stating that the signers thereof were at the time of signing, legal voters of said city, and the number of signers at the time the affidavit was made. [L. '11, p. 537, § 24.]

CHAPTER XII.

THIRD CLASS CITIES—GENERAL PROVISIONS.

§ 7678.

This section in the act entitled an act providing for the organization and government of municipal corporations, has reference only to municipal elections, and therefore does not conflict with section 4798,

which provides that the county commissioners shall divide the county, including all cities except cities of the first class, into election precincts, based on the number of votes cast at the last general election: *Hillyard v. Board of County Commrs.*, 69 Wash. 423, 125 Pac. 363.

§ 7685. General Powers.

The city council of such city shall have power—

(1) To pass ordinances not in conflict with the constitution and laws of this state or of the United States;

(2) To purchase, lease or receive such real estate and personal property as may be necessary or proper for municipal purposes (and to purchase and plat land for the purpose of cemeteries and to provide by ordinance for the regulation thereof), to control, dispose of and convey the same for the benefit of the city: Provided, That they shall not have the power to sell or convey any portion of any waterfront, but may rent such waterfront for a term not exceeding ten years, and may improve part of such waterfront by building inclines or wharves for the accommodation of shippers, and to charge and collect for the use of the same such amounts as will compensate the city for the expenses incurred and the repairs needed from time to time; to prevent and regulate the running at large of any or all domestic animals within the city limits or any part thereof, and to cause the impounding and sale of any such animals;

(3) To contract for supplying the town with water for municipal purposes, or to acquire, construct, repair and manage pumps, aqueducts, reservoirs or other works necessary or proper for supplying water for the use of such town or its inhabitants or for irrigating purposes therein;

(4) To establish, build and repair bridges, to establish, lay out, alter, keep open, open, widen, vacate, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city, and to drain, sprinkle and light the same; to remove all obstructions therefrom; to establish the grades thereof; to grade, plank, pave, macadamize, gravel and curb the same, in whole or in part, and to construct gutters, culverts, sidewalks and crosswalks therein or upon any part thereof; to cause to be planted, set out and cultivated shade trees therein; and generally to manage and control all such highways and places;

(5) To establish, construct and maintain drains and sewers, and shall have power to compel all property owners on streets along which sewers shall have been constructed to make proper connections therewith, and to use the same for proper purposes, and in case the owners of property on such streets shall fail to make such connections with the time fixed by such council, they may cause such connections to be made and to assess against the property in front of which such connections are made the costs and expenses thereof;

(6) To provide fire engines and all other necessary or proper apparatus for the prevention and extinguishment of fires;

(7) To impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: Provided, That any member of a volunteer fire company in such city shall be exempt from such tax;

(8) To impose and collect an annual license not exceeding two dollars on every dog owned or harbored within the limits of the city (and may provide for the killing of all dogs not duly licensed found at large);

(9) To levy and collect annually a property tax, which shall be apportioned as follows: For the general fund, not exceeding sixty cents on each one hundred dollars; for street fund, not exceeding thirty cents on each one hundred dollars, and for sewer fund, not exceeding ten cents on each one hundred dollars. The levy for all purposes for any one year shall not exceed one dollar on each one hundred dollars of the assessed value of all real and personal property within such city;

(10) To license, for purposes of regulation and revenue, all and every kind of business, including the sale of intoxicating liquors, authorized by law, and transacted and carried on in such city, and all shows, exhibitions and lawful games carried on therein and within one mile of the corporate limits thereof, to fix the rate of license tax upon the same, and to provide for the collection of the same by suit or otherwise;

(11) To improve rivers and streams flowing through such city, or adjoining the same, to widen, straighten and deepen the channel thereof, and remove obstructions therefrom; to improve the waterfront of the city, and to construct and maintain embankments and other works to protect such city from overflow; to purify and prevent the pollution of streams of waters, lakes or other sources of supply, and for this purpose shall have jurisdiction over all streams, lakes or other sources of supply, both within and without the city limits. Such city shall have power to provide by ordinance and to enforce such punishment or penalty as the city council may deem proper for the offense of polluting or in any manner obstructing or interfering with the water supply of such city or source thereof;

(12) To erect and maintain buildings for municipal purposes;

(13) To permit, under such restrictions as they may deem proper, the laying of railroad tracks, and the running of cars drawn by horses, steam or other power thereon, and the laying of gas, steam-heating and water pipes in the public streets, and to construct and maintain, and to permit the construction and maintenance of telegraph, telephone and electric lines therein;

(14) In its discretion to divide the city, by ordinance, into a convenient number of wards, not exceeding six, to fix the boundaries thereof, and to change the same from time to time: Provided, That no change in the boundaries of any ward shall be made within sixty days next before the date of such general municipal election, nor within twenty months after the same shall have been established or altered. Whenever such city shall be so divided into wards, the city council shall designate by ordinance the number of councilmen to be elected from such ward, apportioning the same in proportion to the population of such wards. And thereafter the councilmen so designated shall be elected by the qualified electors resident in such ward or by a general vote of the whole city, as may be designated in such ordinance: Provided further, That when ad-

ditional territory is added to the city that it thereafter, by act of the council, be annexed to contiguous wards without affecting the right to redistrict at the expiration of twenty months after the last previous division;

(15) To appoint and remove such policemen and other appointed officers as they may deem proper, and to fix their duties and compensations;

(16) To impose fines, penalties and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars nor the term of such imprisonment exceed the term of three months;

(17) To cause all persons imprisoned for violation of any ordinance to labor on the streets, or other public property or works within the city;

(18) To establish fire limits, with proper regulations;

(19) The city council may appropriate from the general fund an amount not exceeding one-fourth of one mill of the taxable property of the city for the purpose of establishing and maintaining a public library;

(20) To punish the keepers and inmates and lessors of houses of ill-fame, gamblers and keepers of gambling tables;

(21) To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the corporation and its trade, commerce and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter, and to exact and enforce within the limits of such city all other local, police, sanitary and other regulations as do not conflict with general laws. [L. '13, p. 313, § 1.]

See notes to § 2925.

Ballinger's Code, section 938, authorizing cities of the third class to sell, dispose of or rent "waterfront" refers only to waterfront property to which the city has title, and not to waterfront of which it has control as a public street: *State ex rel. Port Angeles v. Morse*, 56 Wash. 654, 106 Pac. 147.

§ 7702.

The purchase of supplies by a contractor for city work, from the mayor, only avoids his contract with the city pro tanto, under this section, providing that any claim for supplies furnished, "in which any such officer is interested," shall be void and that the officer shall forfeit his office, and does not bar an action by the contractor as holder of a warrant against a special fund to compel a reassessment to provide the fund: *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 28 L. R. A., N. S., 735, 104 Pac. 272.

As to right of contractor, who has failed to comply with the contract, to recover from the municipality value of public improvement, see note in *Ann. Cas.* 1912D, 419.

A city can pass one or separate ordinances and let one or separate contracts for the construction of a water distributing system: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

In the absence of a showing of fraud, a contract for public improvements cannot be attacked because not let to the lowest bidder: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

As to the duty to let contract to lowest bidder, see note in 50 Am. St. Rep. 490.

Under this section, providing that no officer of any city shall be interested directly or indirectly in any contract with such city, a contract between a city and a reclamation company for a public water supply is void, where the contract provided that the water company should supply to land owners in a reclamation district outside the city an extra six inches of water per acre, free of charge, and three of the councilmen whose votes are necessary to authorize the contract were among such land owners and were benefited by the contract, since it was impossible to segregate their interests and leave the contract unimpaired: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

As to liability of municipality under executed contract in which municipal officer is interested, see note in 3 *Ann. Cas.* 672.

Where a reclamation company had agreed to supply water to subscribers who were owners of property in a reclamation district outside of a city, which agreed supply was inadequate to properly irrigate the land, a contract between the city and the

reclamation company for a public water supply for the city, in which the reclamation company agreed to furnish an extra six inches of water per acre to such subscribers, free of charge, is against public policy and

void, since the city would be paying for the free water furnished to land owners outside the city: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

CHAPTER XIII.

THIRD CLASS CITIES—LOCAL ASSESSMENTS.

§§ 7705—7718.

Repealed. See L. '11, p. 481, § 71.

§ 7705.

The hearing on an assessment for sewers levied under this act may be continued for more than four weeks, since section 7945, prohibiting continuance for such length of time applies only to the act of March 10, 1891 (Laws 1891, p. 406), relating to drainage by cities of the second, third, and fourth classes: *Stewart v. Chehalis*, 53 Wash. 213, 101 Pac. 841.

Failure to publish the initial resolution for an assessment twice, as required by this section, is waived by parties appearing to protest against the assessment, where no objection was made at the time to the sufficiency of the notice, since the notice is not jurisdictional in the absolute sense that it could not be waived: *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293.

§ 7706.

Repealed. See L. '11, p. 481, § 71.

The fact that the statute provides for objections to proceedings before a city council to provide for public improvements under the special assessment plan, with the right

of appeal to the courts, does not deprive a court of equity of jurisdiction to determine, in an injunction suit, whether the city council had power to enter into a contract under its proceedings for such an improvement: *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

As to right of nonconsenting abutting owner to injunction against use of highway for street railway authorized by public, see note in 28 L. R. A., N. S., 1053.

§ 7710.

Repealed. See L. '11, p. 481, § 71.

The fact that a municipal improvement was estimated to cost only six thousand dollars does not of itself make an assessment for nearly fifteen thousand dollars void for want of jurisdiction to make it, or because it operated as a fraud upon the property owners, in view of a statute requiring the court to enforce the lien "to the extent of the proper proportion of the value of the work," according to the benefits received, regardless of irregularities or defects, since the failure to make a proper estimate was a mere defect in the proceeding, and not a fraud upon the property owners: *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768.

CHAPTER XIV.

THIRD CLASS CITIES—DRAINS AND SEWERS.

§ 7713.

Repealed. See L. '11, p. 481, § 71.

Under this section, providing that a petition of one-fourth of the property owners may be filed with the city council for the construction of a sewer, the petition is not a jurisdictional prerequisite, and the lack of a petition is a mere irregularity that is waived by failure to protest before the city council, or is immaterial under section 7716, allowing a recovery for the proportion of the value of the work properly chargeable upon any lot, notwithstanding any irregularity or defect in the proceedings: *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

The same is true of the lack of plans and specifications required to be filed by section 7714: *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

§ 7714.

See notes to § 7713.

A sewer ordinance declaring that the improvement was for the especial and exclusive use of property abutting upon and approximate to the designated streets and alleys, by reference to which the limits of the district were fixed, and declaring that the cost would be assessed against the property benefited, is equivalent to a declaration that the property abutting and approximate was the property benefited, within the requisites of this section, and a statement that each lot will be assessed sixty dollars may be rejected as surplusage: *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

Under this section, providing for the preliminary publication of an estimate of the cost of a proposed sewer, fixing a time for

the hearing of protests thereon, the city council is estopped to levy an assessment exceeding the estimated cost, as the property owner has a right to rely on the published notice: *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

As to the necessity that local improvement assessments be collected in strict conformity with statute, see note in 133 Am. St. Rep. 929.

The wrongful inclusion and assessment of property not mentioned in the preliminary

proceedings for sewers is not ground for setting aside the assessment upon other property, where the cost of the work done on the sewers for such property can be segregated and does not increase the assessment upon the other property: *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

§ 7716.

See notes to § 7713.

CHAPTER XV.

FOURTH CLASS CITIES OR TOWNS.

§ 7720.

Under this section it is not required that one of the justices of the peace be appointed police justice from the fact that cities of the first class are limited to two justices of the peace, one of whom must be appointed as police justice, and that section 7700 also authorizes the selection of a police justice from the two justices of the peace in towns

or cities, since "may" is not to be construed as "must" unless a duty is imposed making a permissive construction repugnant to the intent or leading to an absurdity: *State ex rel. Purdin v. Gault*, 56 Wash. 140, 105 Pac. 242.

As to "may" in statute, see note in 6 L. R. A., 162.

As to "may" and "shall" occurring in the same statute, see note in 4 Ann. Cas. 420.

§ 7721. Election and Appointment of Officers—Terms.

The mayor, members of the council and treasurer shall be elected by the qualified electors of said town at the general municipal election to be held therein on the first Tuesday after the first Monday in December in each year. The treasurer shall hold office for the period of one year from and after the second Tuesday in January next succeeding the date of such election and until his successor is elected and qualified. The mayor and members of the council shall hold office for the period of two years from and after the second Tuesday in January next succeeding the day of such election and until their successors are elected and qualified: Provided, That the first council elected under the provisions of this act shall at their first meeting so classify themselves by lot as that three of their number shall go out of office at the expiration of one year and two at the expiration of two years. The mayor shall appoint a marshal, police justice and clerk. The city council may provide by ordinance for the appointment by the mayor of an attorney, poundmaster, superintendent of streets, a civil engineer and such police and other subordinate officers as in the judgment of the city council may be deemed necessary and may by ordinance fix their compensation. No appointment of any officer provided for herein shall be subject to confirmation by the city council. All officers appointed by the mayor as provided for in this act shall hold office during his pleasure. [L. '11, p. 111, § 1.]

§ 7730.

Under this section, an amendment of a franchise ordinance on the day of its passage by the substitution of the name of a railroad company, its successors and assigns, as grantee, in place of a mill company, its successors and assigns, is not such a change in the subject matter of the ordinance as to render it a new or different ordinance, the

purpose of the franchise being to permit the hauling of cars from the mill to the railroad, and being for the joint benefit of both companies: *State ex rel. Northern Pac. R. Co. v. Hughes*, 53 Wash. 651, 102 Pac. 758.

§ 7731.

A town upon its incorporation does not acquire any such vested right to the control

of its streets in virtue of its authority over streets, granted by this section, as would prevent the legislature from legalizing prior franchises: *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202.

A city may grant a franchise to a railroad company to occupy a portion of a city street where the same does not exclude the public therefrom; and a franchise prohibiting an exclusive use at present or at any time in the future is valid: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

Authority to grant to a railroad company a franchise to lay tracks lengthwise in a street is conferred by this section, subdivi-

sion 13, authorizing permits to lay railroad tracks and run cars drawn by horses, steam, or other power thereon: *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487.

§ 7735½.

See notes to § 46.

§ 7737.

Repealed. See L. '11, p. 481, § 71.

§ 7748.

See notes to § 1774.

CHAPTER XVII.

EMINENT DOMAIN BY CITIES.

§ 7767.

Owners of lots abutting on a street have a special interest in the use of the street which is distinct from that of the public generally and which constitutes property: *State v. Seattle*, 57 Wash. 602, 27 L. R. A., N. S., 1188, 107 Pac. 827.

As to streets and the rights thereto of abutting owners, see note in 125 Am. St. Rep. 344.

Semble, that parties to a proceeding to condemn land for a city street who fail to object that the ordinance for condemnation was duplicitous cannot raise the objection on appeal from the assessment of damages: *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

§ 7768.

The original grading of a city street is not a taking or damaging of property, within constitution, article 1, section 16: *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

An abutter upon a street, whose interests are being condemned by a railroad company seeking to use the street for railroad purposes, after its franchise therefor has been forfeited by the city council, has such an interest in abating the public nuisance in the street as to entitle it to raise the point in the condemnation proceeding that the company has no franchise to use the street: *State ex rel. Sylvester v. Superior Court*, 60 Wash. 279, 111 Pac. 19.

The city council is the proper authority for deciding the necessity of condemning land for a public street: *Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791.

Where a city has jurisdiction to extend its streets over tide lands, the decision of the proper municipal officers as to public use and necessity is conclusive, in the absence of fraud: *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827.

As to the acquisition of tide lands by eminent domain, see note in 66 L. R. A. 297.

As to water apart from land as subject of eminent domain, see note in 13 Ann. Cas. 72.

When the city council has determined by ordinance that the taking of certain property is necessary for the purposes of a public street, and directed its condemnation, the court must find that the taking is for a public use, although constitution, article 1, section 16, makes the question a judicial question only: *Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791.

When the city council, by due ordinance, directed the improvement of streets, the court must determine that the improvement was a public necessity and for a public use: *In re Mercer Street*, 55 Wash. 116, 104 Pac. 133.

What is, or is not, a taking or damaging of private property is a judicial question, and the courts are not bound by a legislative declaration to the effect that the filling of low lands shall not be considered a taking or damaging within the constitutional meaning of those terms: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

Under constitution, article 7, section 9, providing that the legislature may vest the municipal authorities with power to make local improvements by special assessment or taxation, it is not necessary that a jury be impaneled in order to levy the assessment, and sections 7768, 7790 et seq., are not unconstitutional in authorizing assessments by commissioners, subject to review by the courts, without any jury trial: *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112.

In eminent domain proceedings by a city, it is discretionary, under this section, to consolidate actions against the owner and the lessee, and the ruling will not be

reviewed unless prejudice is clearly shown: In re Western Avenue, 57 Wash. 290, 106 Pac. 901.

An order adjudging a public use and necessity in condemnation proceedings, brought by a city under this section, is reviewable on appeal from the final judgment, and therefore is not appealable prior thereto, since section 1716, subdivision 1, authorizes the review, on appeal from the final judgment, of any order made before judgment, and section 7818 provides for appeals in condemnations as in other civil actions: Tacoma v. Nisqually Power Co., 54 Wash. 292, 103 Pac. 49.

As to the effect of appeal in condemnation proceedings, see note in 2 L. R. A., N. S., 313.

Since a municipal power plant for electric lighting must provide for the peak load, or maximum power required on the shortest day of the year, the sale by the city of current for heating and cooking devices and running small machines such as lathes, etc., in the meantime, is so insignificant and incidental to the main public use as not to defeat the right to condemn property for the maximum public use required: Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199.

An assessment for a local improvement made under this section, which requires that each lot shall bear its proportion of the expense according to benefits received, and section 7782, requiring the jury to offset benefits against damages, is invalidated by an agreement made between the city and certain property owners whereby an agreed verdict was to be returned allowing one dollar for land taken, one dollar for damages to land not taken, and one dollar for damages by reason of change of grade, where the agreement was carried out in the assessment of benefits by the jury, which was advised that there was no contest as to the lots of such own-

ers: In re Third, Fourth, and Fifth Avenues, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862.

Where it is necessary to exercise the power of eminent domain in order to make a municipal improvement, the entire proceedings need not be completed under this section, which was designed solely to ascertain and assess the compensation; and the city may order the work done and levy the assessment under its charter provisions and ordinances, and not in the condemnation proceedings: Brown v. Seattle, 57 Wash. 314, 106 Pac. 1113.

Under this act, the assessment for local improvements of lots, blocks, tracts or parcels of land "or other property," the franchise of a street railway company to use a street is not ejusdem generis or assessable, but is an easement only, and of an intangible quantity; and such statutes will not be enlarged by construction: In re Third Avenue, Seattle, 54 Wash. 460, 103 Pac. 807.

As to liability of railroad right of way to assessment for local improvements, see note in 12 L. R. A., N. S., 112.

This section is not unconstitutional in providing for the condemnation of lands granted by the United States to the state for school purposes, since the sale of school lands is authorized by constitution, article 1, section 16, providing that the same shall not be disposed of except for the full market value: Roberts v. Seattle, 63 Wash. 573, 116 Pac. 25.

The determination by the city council of the necessity for extending or widening streets being conclusive on the courts, no prejudice results from an ex parte order of court declaring the necessity, or from an order striking answers setting up a lack of public necessity, the city council having determined the question: Tacoma v. Brown, 69 Wash. 538, 125 Pac. 940.

§ 7770. Petition to Superior Court.

Whenever any such ordinance shall be passed by the legislative authority of any such city for the making of any improvement authorized by this act or any other improvement that such city is authorized to make, the making of which will require that property be taken or damaged for public use, such city shall file a petition in the superior court of the county in which such land is situated, in the name of the city, praying that just compensation, to be made for the property to be taken or damaged for the improvement or purpose specified in such ordinance, be ascertained by a jury or by the court in case a jury be waived. [L. '13, p. 7, § 1.]

§ 7771.

In proceedings by a city to condemn land for a street, under this section, the petition need not describe land damaged or the whole tract out of which the land is taken, but only the land taken: Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.

While a city cannot condemn property where the use is for commingled public and private purposes, an allegation in the city's petition that it has, since 1893, been furnishing facilities for lighting, heating and power purposes "public and private," will not defeat the proceeding, since the

test is the ultimate purpose now sought, and not what was done in the past: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

In condemnation proceedings by a city under this section, no answer offering an issue is necessary: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

As to necessity for defendant in condemnation proceedings to appear and answer, see note in 9 Ann. Cas. 476.

After an adjudication of public use and necessity in a condemnation proceeding, an answer alleging that the appropriation was sought for other and ulterior purposes is irrelevant, and it is error to refuse to strike it out, where its manifest purpose and tendency was to prejudice the jury: *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091.

As to what constitutes public use for which property may be taken by eminent domain, see notes in 102 Am. St. Rep. 813; Ann. Cas. 1912D, 1002; 2 Ann. Cas. 50; 14 Ann. Cas. 803; 22 L. R. A., N. S., 35.

As to right of defendant in condemnation proceedings, to question public character of use, see note in 2 Ann. Cas. 133.

§ 7774.

It being immaterial that defendant, in condemnation proceedings, was a public service corporation, it is not reversible error to instruct that it was not: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

It is not so prejudicial as to require a reversal that, upon an issue as to the value of land condemned, the owner was asked on cross-examination what he paid for it, where defendant had asked a witness what had been paid for similar land, and there was other evidence as to the value, supplemented by a view by the jury: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

As to admissibility in evidence in eminent domain proceeding, of admission or declaration of owner as to value of property condemned, see note in Ann. Cas. 1912D, 289.

As to viewing premises by jury, see note in 12 L. R. A. 611.

Upon an issue as to the value of land condemned, it is not error to refuse to allow witnesses to approximate the value by reference to platted property, where the property was not platted, and the owner had shown it to be especially valuable for factory purposes and special uses: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

As to opinion evidence of value of property taken, see note in 19 Am. St. Rep. 460.

As to adaptability of property taken for special purpose, see notes in 85 Am. St. Rep. 297; 124 Am. St. Rep. 536.

In condemnation proceedings by a municipal corporation of the property of a

public service corporation, it is not error to exclude evidence showing that the defendant was a public service corporation, where the court was extremely liberal in allowing the value of the land to be shown, and witnesses were permitted to fix great values based upon every possible use and adaptability of the property: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

In condemnation proceedings, evidence of the possible profits of a business that might be carried on on the property taken is inadmissible for the purpose of showing the value of the property: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

As to compensation allowable in eminent domain proceedings as affected by adaptability of property for uses other than that to which it is put by owner, see note in 15 L. R. A., N. S., 679.

In condemnation proceedings, error in instructing the jury that they should fix the values from their observations of the property assisted by the testimony, is harmless where other instructions gave the jury proper rules for determining the values, and stated that their view of the premises was to enable them to better understand the testimony: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

In eminent domain proceedings by a city, the land owner may give evidence of consequential damages, although the only part of the land to be taken is described: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

As to consequential damages in eminent domain proceedings, see note in 4 Ann. Cas. 1185. And see note in 85 Am. St. Rep. 298.

In eminent domain proceedings to appropriate lands for a storage basin, non-expert evidence that a ridge one thousand feet wide, proposed to be used as one of the retaining walls, would be insufficient for the purpose and would permit leakage, is inadmissible as conjectural, for if ineffectual, damages could be ascertained and recovered: *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940.

In eminent domain proceedings, where all the witnesses testified as to the value of the property as it was at the time of the trial, it will be presumed that the verdict included the value of cement walks that had been laid, and it is not error to exclude evidence of the cost of the walks: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

In eminent domain proceedings, it is not error to fail to instruct the jury as to damages which the owner might suffer if a building on the premises were removed, where the matters were covered by the general instructions: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

As to injury to, or cost of removing building as elements of damage in eminent domain proceeding, see note in 85 Am. St. Rep. 96.

In eminent domain proceedings by a city, it is discretionary, under this section, to refuse separate trials to owners of the property, to be reviewed only for abuse of discretion: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

In eminent domain proceedings by a city, all the owners may be joined as defendants, and abuse of discretion in refusing one a separate trial does not appear unless he is deprived of a fair trial and makes an affirmative showing of prejudice: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

RECORD.—The refusal, in eminent domain proceedings, to allow evidence that the land had been leased, will be presumed correct when a copy of the lease offered in evidence is not in the record: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

In condemnation proceedings to assess the damages from the elevation of F. street, evidence as to damages from the obstruction of an alley by a change of D. street is not admissible, not being an issue: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

In condemnation proceedings to assess the damages to an abutting lot by reason of a change of street grade elevating the street through the entire block, it is error to confine the evidence of damage to that part of the street immediately in front of the lot: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

§ 7775.

An abutting owner cannot be deprived of his right to the use of the full width of the street without just compensation: *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155.

The interest of an abutting property owner in the maintenance of the street is property of which he cannot be deprived until just compensation has been paid: *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

Injury inflicted upon property in the neighborhood of a street by a regrade and diverting of travel is *damnum absque injuria*, where the property does not abut on the regraded street, and is not within constitution, article 1, section 16, prohibiting the damaging of property without just compensation, since the injury differs not in kind but only in degree from that suffered by the public generally: *In re Fifth Avenue etc.*, 62 Wash. 218, 113 Pac. 762.

As to power of municipality, as against abutting owner, to vacate street or part of street and devote the property to private purposes, see note in 22 L. R. A., N. S., 530. And see notes in 2 L. R. A., N. S., 269; also 30 L. R. A., N. S., 637, and 36 L. R. A., N. S., 693.

Where the verdict for the value of land taken for a street improvement recites that the remainder was not damaged by the taking, the same is not exempt from assessment for special benefits as it would have been if found to be damaged by the taking: *In re Pine Street*, 57 Wash. 178, 106 Pac. 755.

Where a jury in condemnation proceedings for land taken for an improvement found generally that lands not taken were not damaged, the same may be assessed for benefits; and it cannot be shown that the jury merely found that the lands were not damaged in excess of benefits, by oral evidence to the effect that at the trial before the jury it was stipulated that the only issue was whether the lands were damaged in excess of the benefits and that witnesses for the city admitted damage and the jury were instructed that the damage must exceed the benefits, since such evidence and the general verdict, in the absence of special finding, does not necessarily imply that the jury found any actual damage: *In re Blewett Street, Seattle*, 59 Wash. 485, 110 Pac. 29.

As to right of jury in eminent domain proceedings to disregard testimony of witnesses, see note in 3 Ann. Cas. 302.

Where proceedings to condemn land for the purpose of widening a street are conducted separately from a proceeding to regrade the same, a general verdict that the remainder of abutting lots were damaged one dollar by the taking more than they were benefited, and sustained no damage by reason of the regrade, does not exempt the lots from an assessment for benefits for the regrade, the implication being rather that the property would be benefited thereby: *Levy v. Seattle*, 61 Wash. 540, 112 Pac. 639.

The closing of a sixteen-foot alley by the change of grade of a street is a special damage to the property abutting on the alley: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

As to special and peculiar damage in eminent domain proceedings, see note in 109 Am. St. Rep. 909.

This section does not authorize an owner in condemnation proceedings to claim damages to a lot contiguous to the lot taken, where the lots were separate and appropriated to distinct uses: *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326.

As to lots separated by merely plat lines as susceptible to damage each by the taking of the other, see note in 57 L. R. A. 938.

In condemnation proceedings the verdict of the jury finding no damages to land not taken is supported by the evidence, and will not be disturbed on appeal, where one of the witnesses for the city testified that the northerly tract would not be damaged and that there might be about ten per cent damages to the southerly tract, and an-

other witness testified that the southerly portion would be just as valuable now as it was before, especially where the jury viewed the premises and the trial judge sustained the verdict: *Tacoma v. Hansen*, 59 Wash. 594, 110 Pac. 426.

Upon condemnation of property needed for a street improvement, a verdict for the value of land taken, reciting that the remainder of the lot is not damaged by reason of the taking, precludes the claim that an award of damages was made therefor: *In re Pine Street*, 57 Wash. 178, 106 Pac. 755.

§ 7777.

It is not error prejudicial to the owner to instruct the jury that they should determine the value of a building and add its cost to its removal, if it was damaged by its removal and could not be put in as good condition as before, although the instruction goes beyond this section, since it was error favorable to the owner: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

In proceedings to condemn a specified lot on which there was located a building, under this section, damages are not authorized for readjustment of the building to another contiguous lot which was a separate unit, put to a distinct use, and which was not taken or damaged: *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326.

This section is constitutional, it being within the power of the legislature to provide that such a removal is not a taking of property, where there was but one tract of land involved: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

§ 7778.

See notes to § 7784.

In eminent domain proceedings by a city, this section authorizes the assessment of one recovery of damages against the landlord and tenant, leaving it for division between the parties entitled thereto: *In re Western Avenue*, 57 Wash. 290, 106 Pac. 901.

As to the rights of tenants and reversioners in eminent domain proceedings, see notes in 4 Ann. Cas. 1011, and 15 Ann. Cas. 714; also note in 21 L. R. A. 212.

In condemnation proceedings, where damages were claimed by reason of the raising of surrounding streets, on two of which approaches were proposed, extending not exceeding four hundred feet, plans, drawings and the testimony of the city engineer that the approaches were to extend but one hundred and sixty-three feet, amount to a stipulation to that effect, and entitles the owner to have the restriction inserted in the judgment awarding damages by reason of the improvement with the approaches restricted to one hun-

dred and sixty-three feet: *In re Mercer Street, Seattle*, 55 Wash. 116, 104 Pac. 133.

§ 7782.

In eminent domain proceedings by a city, the jury is to determine only the damage to the land taken and the damages resulting to land not taken, although the court, in the language of this section, instructed them to further find the "gross damages" to any land or property not taken (other than damages to a remainder by reason of its severance from the part taken), since this covers the same thing or is meaningless: *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

Laws of 1907, page 321, section 15, providing that for improvements to be paid by special assessment upon property benefited, the compensation found by the jury shall be irrespective of any benefit from the improvement, does not require a city, on condemning land for opening a street, to include the improvement of the street or the establishment of a grade; hence the award of damages for compensation for merely opening a street does not bar an assessment for benefits in a subsequent proceeding to grade and plank the street: *Martenis v. Tacoma*, 66 Wash. 92, 118 Pac. 882.

In condemnations for street grade changes to meet grades of a railroad company, the railroad agreeing to pay all condemnation awards against the city, being for the public benefit and not solely in the interest of the company, and being prosecuted in the name of the city, the damages are to be assessed under this section and constitution, article 1, section 16, permitting cities to offset special benefits against the damage, and not under section 926, authorizing damages against a railroad company irrespective of any benefit to the property: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

As to special benefits as the justification and foundation of local assessments, see note in 28 L. R. A., N. S., 1168.

Condemnations for street grade changes to meet grades of a railroad company, which agreed to pay all condemnation awards against the city, are properly prosecuted in the name of the city: *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

§ 7783.

A judgment in condemnation proceedings by a city, upon the stipulation of city officers entitled to represent the city, is not void for want of authority of the officers to make the stipulation, where the court had jurisdiction of the subject matter and the parties, and cannot be repudiated by the adverse party for the city: *James v. Seattle*, 57 Wash. 318, 106 Pac. 1114.

Where a full fee simple is condemned by a city for a particular use, and the award is paid out of the general fund and accepted, the land does not revert to the owner upon the city's devoting it to some other use; and the former owner cannot complain if an easement therein is subsequently granted to a railroad company: *Reichling v. Covington Lumber Co.*, 57 Wash. 225, 135 Am. St. Rep. 976, 105 Pac. 777.

As to power of municipality as against abutting owner to vacate street or portion of street and devote the land to private purposes, see note in 22 L. R. A., N. S., 530.

Upon appeal from an order adjudging a public necessity for condemnation for a street extension outside of the city, the question of the power of the city to levy assessments on lands outside its limits to pay the award does not arise, as the award must be paid before the land is taken: *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827.

The verdict of a jury, awarding damages in a condemnation case, will not be disturbed on appeal when supported by any competent evidence and the jury viewed the premises: *In re Mercer Street, Seattle*, 55 Wash. 116, 104 Pac. 133.

A city cannot, after paying an award in condemnation proceedings into court, appeal therefrom, as the controversy has ceased, in view of this section, and section 7784, providing that, upon payment of the award, title shall vest in the city, and constitution, article 1, section 16, prohibiting the taking of private property until compensation therefor in money shall be first ascertained and paid into court: *Spokane v. Cowles*, 67 Wash. 639, 121 Pac. 463.

As to effect of appeal in condemnation proceedings, see note in 2 L. R. A., N. S., 313.

As to appealable judgments and orders in eminent domain proceedings, see note in 16 Ann. Cas. 1004.

In condemnation proceedings to regrade a street by making a deep cut and a slope of forty-five degrees on abutting property to meet the cut, an award of damages to the property covers only the damage to the lots arising from the cut in the street and the specified slope on the lots, and not damages for the removal of lateral support resulting from the fact that the nature of the soil was such that a slope of forty-five degrees was not sufficient to support the balance of the lot and prevent the remaining soil from falling into the street; and it is immaterial that the ordinance and petition required the condemnation of all lands and rights necessary to be taken, used, or damaged, since the city determined what slope was necessary and sufficient for lateral support, and that question will not be litigated in the condemnation proceedings: *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13.

§ 7784.

Where, through error and the wrongful action of attorneys, an award in condemnation is adjudged to be paid to persons having no interest therein, and the payment was made and the judgment satisfied, the city as relator is not liable to the true owners of the property, since under this section, the payment of the award immediately vests the title in the city, and under section 7778, the duty of making proper distribution is upon the court and not the city: *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111.

§§ 7785, 7786.

See notes to § 7790.

§ 7787.

Interest upon an award on condemnation of property needed for a street improvement may be included as part of the cost of the improvement to be assessed against the property benefited: *In re Pine Street*, 57 Wash. 178, 106 Pac. 755.

As to the consideration of benefits, see note in 109 Am. St. Rep. 910.

As to implied right to interest on assessment, see note in 6 L. R. A., N. S., 694.

This section authorizes the inclusion of costs of preparing and serving the condemnation proceeding, and of expert witnesses, engineers' expenses, etc.: *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

An assessment for local improvements may include the costs of the city attorney, expenses of the city engineer, and of the eminent domain commissioners, incurred in the proceeding: *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112.

As to power of municipality to assess cost of improvement against fee owner in cases of wharves, see note in 5 L. R. A., N. S., 289.

As to liability for costs on appeal from award in eminent domain proceedings, see note in Ann. Cas. 1912C, 533. See, also, note in 36 L. R. A., N. S., 624.

As to the validity of statute providing for recovery of attorneys' fees in action for recovery of special assessment, see note in 11 Ann. Cas. 811.

The amount of previous assessment is immaterial on the question of the reasonableness of an assessment: *In re Third, Fourth, and Fifth Avenues, Seattle*, 55 Wash. 519, 104 Pac. 799.

§ 7788.

The board of eminent domain commissioners created by this section are city officials, and not within constitution, article 11, section 5, requiring all county, township, precinct, or district officers to be elected: *In re Blewett Street, Seattle*, 59 Wash. 485, 110 Pac. 29.

§ 7790.

See notes to § 7552.

Laws of 1905, page 84, section 22, providing that, in assessments for benefits from a municipal improvement, it shall be the duty "of the superior judge" and the commissioners to examine the locality and to estimate the proportion of the total cost that will be of benefit to the property, etc., might be unconstitutional as delegating legislative power to the superior court, if construed literally to require the superior court judge to assist in making the assessment; and the inclusion "of the superior judge" in said action will be held an inadvertence, where it appears that the law viewed as an entirety limited the functions of the court to the appointment of commissioners and a judicial review of the assessment-roll; and the law is therefore not invalid as delegating the levying of assessments to the superior court, or to other than the corporate authorities: *Seattle v. Seattle & Montana R. Co.*, 50 Wash. 132, 96 Pac. 958.

The reasonable cost of preliminary surveys and advertising may be included in a local assessment: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

In eminent domain proceedings by a city, it is proper to instruct that benefits to adjacent property are to be deducted from the damages to such property, if the damage is in excess of the benefits, but if the benefits are equal, the jury must find the lands not damaged, regardless of the questions that may arise on the assessment of benefits: *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

As to equation of benefit and burden to particular pieces of property, see note in 28 L. R. A., N. S., 1172.

As to constitutionality of special assessment in excess of benefits, see note in 3 Ann. Cas. 11.

Under this section, eminent domain commissioners, upon assessing property benefited by a municipal improvement, must determine what proportion, if any, of the total cost will be of benefit to the public, and assess such amount to the city, and the balance to the property; and under sections 7795, 7796, upon appeal, the superior court may modify the assessment and adjust the assessments between the city and the property owners, and hear evidence thereon: *Spokane v. Gilbert*, 61 Wash. 361, 112 Pac. 380.

The eminent domain commissioners are vested with a discretion in determining the benefits from the opening of a street, and the opening of a city street through a tract of unplatted land is presumed to be a special benefit: *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

As to who determines what is a public use, see note in 102 Am. St. Rep. 821. And see note in 88 Am. St. Rep. 933.

As to criterion determining character of use as public or private, see note in 2 L. R. A. 681.

As to the right to make assessments according to benefits, see note in 8 L. R. A. 369.

Damage to abutting property by reason of previous improvements cannot be offset against an assessment for benefits from a later improvement: *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920.

Property found by the jury to be damaged by an improvement is not subject to an assessment for benefits: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

Under sections 7790, 7795, 7796, property can only be assessed if specially benefited, and it is not proper to include in an assessment district property that receives merely a general benefit: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

As to necessity of special benefit to sustain assessment for local improvement, see note in 14 L. R. A. 755.

A city cannot be generally assessed for a public improvement unless it is specially benefited, nor merely because it was negligent in improving a street for the benefit of a street railway company without exacting an agreement from the company to contribute to the expense: *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70.

As to what municipal corporations are liable for in respect of defect in streets and public places, see note in 108 Am. St. Rep. 139.

Under an ordinance for the improvement of a street, the cost and expense to be paid "wholly by special assessment upon the property to be benefited," the eminent domain commissioners have no power to assess the city generally for a portion of the expense, in view of section 7785, conferring upon the city council the power to determine whether the cost should be made wholly by special assessment upon property benefited, or partly from the general fund of the city, and section 7790, authorizing the city council to fix an assessment district which "shall be conclusive and binding" on the commissioners: *Spokane v. Curtiss*, 66 Wash. 55, 120 Pac. 70.

As to the binding quality of statutory rules of apportionment made under legislative discretion to prescribe them, see note in 28 L. R. A., N. S., 1160.

Under sections 7786, 7787, authorizing the city council to determine whether an improvement shall be made wholly or partly at the expense of abutting property, and section 7790, authorizing commissioners to apportion benefits between the city and abutting owners by a comparison of the public and private benefits to be derived from the improvement, it is within the power of the council to make the apportionment, and for the commissioners to act only when the council fails to do so;

and in any event, the benefit to the public must be a special and not a general benefit, and findings of the court or commissioners are conclusive on appeal: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

As to the effect of the legislature's omission to prescribe a rule of apportionment, see note in 28 L. R. A., N. S., 1166.

An assessment-roll returned by commissioners is admissible as evidence of the benefits received, and that property outside the district was not specially benefited, and overcomes the prima facie showing made by a reassessment arbitrarily ordered by the court: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

The unanimous opinion of commissioners that property should be excluded from an assessment district because not specially benefited, is conclusive on the courts, where it appears that the improvement was to gain easier grades and divert travel from the property in question, which was on higher ground and beyond the influence of the special benefits contemplated: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

Street improvements benefiting a street railway by enabling it to lay double tracks and reduce its curve are a benefit to the property in the district accessible thereto, although a part of the property in the district fronts upon another street-car line, such fact going to the amount and not to the fact of the benefits: *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70.

Under a proceeding to condemn land for the opening of a street pursuant to an ordinance which did not provide for an established grade or any improvement of the street, an award for damages precluding any assessment for benefits on account of the condemnation, does not bar an assessment for benefits in a subsequent proceeding to establish a grade and improve and plank the street; notwithstanding that the city attorney in the first proceeding went beyond the issues in propounding questions to the jury, who were instructed to award damages that will be sustained by the "construction of the proposed road," there having been no evidence thereon or on the question of damages by reason of any improvement of the roadway: *Martenis v. Tacoma*, 66 Wash. 92, 118 Pac. 882.

Upon the improvement of a street crossing a navigable waterway in contemplation of the erection of a bridge, raising the grade to make proper approaches for the bridge which would be useless for any other purpose, property abutting on the streets may be assessed for the benefits that will accrue by subsequently constructing the bridge, although not yet provided for, where the bridge is an essential part of the improvement and will materially benefit the property, and the evidence shows that the bridge will be erected at

that place: *In re Westlake Avenue*, 66 Wash. 277, 119 Pac. 798.

As to whether an assessment for benefits may rest upon prospective action in completing the improvement, see note in 28 L. R. A., N. S., 669.

Inequalities of a local assessment upon lands similarly situated will not avoid the assessment if the record does not show that the differences were arbitrary, or that the property assessed the highest did not receive a greater benefit: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

The fact that assessments are distributed in part by the zone system, at varying percentages of the cost where the lots are parallel to the street, while lots fronting on the street are assessed for the whole cost of that part, does not warrant the setting aside of the assessment as arbitrary, unless it is shown that the assessment is greater than the benefit: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Abutting owners within an assessment district cannot complain that the district improperly included the lands of others not subject to the assessment: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

The decision of the eminent domain commissioners determining the boundaries of a local improvement district to be assessed for benefits will not be disturbed on appeal because of differences of opinion as to the propriety thereof: *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112.

A local assessment for street improvement on abutting property to the depth of one hundred and twenty feet is properly limited to that portion of an irregular block which is within one hundred and twenty feet of the street: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

A local assessment ordinance for street improvements sufficiently describes the lots to be assessed as all the lots and land abutting on the designated portions of the street, to the depth of one hundred and twenty feet, without giving the block and lot numbers: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

The courts will not review the action of eminent domain commissioners in fixing the boundaries of improvement districts or in apportioning all the expenses to the property without charging the general fund of the city, where there is no showing of arbitrary action, fraud, or mistake: *In re Twelfth Avenue*, 66 Wash. 97, 119 Pac. 5.

While the courts will be slow to interfere with the discretion of eminent domain commissioners in fixing the limits of a special assessment district, yet an assessment will be set aside as arbitrary and an abuse of discretion, where one block was assessed for three times the depth of the block on the opposite side of the street, and twice the depth of other blocks on the same side of the street, in amounts pro-

portionally greater, apparently merely because it was all owned by one person, and without any possible suggestion that, from its situation or the lay of the land, it would receive any greater benefit from the improvement: *Spokane v. Kraft*, 67 Wash. 245, 121 Pac. 830.

As to the requirement that taxation must be uniform, see note in 28 L. R. A., N. S., 1137.

Upon reversing on appeal the confirmation of an assessment for a local improvement on the ground that one block was arbitrarily assessed an excessive amount, an entirely new assessment will be ordered, inasmuch as the amount to be deducted from the property in question could not be assessed to other owners without a new notice of the increase: *Spokane v. Kraft*, 67 Wash. 245, 121 Pac. 830.

An assessment is not invalidated by the failure to assess all the property within the assessment district, in the absence of an affirmative showing that the omitted property was specially benefited, the presumption being that it was not benefited: *Seattle Mattress & Upholstery Co. v. Seattle*, 69 Wash. 666, 125 Pac. 1013.

The mere fact that real estate omitted from assessment was contiguous to the improvement is not sufficient to overcome the presumption that it was omitted because not benefited: *Seattle Mattress & Upholstery Co. v. Seattle*, 69 Wash. 666, 125 Pac. 1013.

As to mode of assessment and rules of apportionment, see note in 8 L. R. A. 371.

A city cannot contract with part of the property owners in a contemplated improvement district to form the district and eliminate their property from assessment in consideration of their doing the necessary grading of certain streets, accepting a nominal sum as damages for their property taken or damaged by street extensions and changes of grade in the district, such contract being ultra vires and void: *Turner Investment Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426.

An irregular block not platted into lots, and used for railroad purposes is properly assessed for local improvements as unplatted land: *Shryock v. Hannen*, 61 Wash. 296, 112 Pac. 377.

An assessment for a local improvement may include accumulated interest pending the making of the assessment-roll, where the authorities proceeded with diligence in preparing the roll: *In re Twelfth Avenue*, 66 Wash. 97, 119 Pac. 5.

The fact that owners had put in part of the improvements provided for does not result in double assessments, where the ordinance provides for rebates in such cases, and no showing is made that a satisfactory settlement had been refused by the city: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

Where an ordinance required all common labor on public works to be paid a minimum wage, which was in excess of the ordinary wage for common labor, a property owner may object to the assessment in that free and open competition in letting the contract was restricted and the cost of the work increased; but the contract will not be held void, since the excess of cost resulting can be deducted from the assessment: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

A contract under a city ordinance requiring all common labor on public works to be paid a minimum wage, which was at a rate of from fifty to ninety cents higher for eight hours' labor than the wages paid in private employment, may be objected to by a property owner assessed for a special improvement as an arbitrary and unreasonable discrimination in favor of a class of citizens, and as improperly restricting competition or imposing an unwarranted burden by unreasonably increasing the cost of the work, where over fifty per cent of the cost of the improvement was for common labor, entitling the objecting owner to a reduction of the assessment figuring the labor at a reasonable wage: *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005.

Such an ordinance conflicts with a charter provision requiring the contract to be let upon competitive bids: *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005.

As to the duty to let contract for municipal work to lowest responsible bidder, see note in 50 Am. St. Rep. 490.

While the city is limited in making assessments for benefits to the amount of the published estimates of such part of the contemplated work as was actually done, it is error for the court, on appeal from the city council, to arbitrarily limit the assessment by reference to a bid upon segregated items which did not include necessary engineering work or overhaul at a certain rate, both included in the estimates and evidently taken into consideration by the city council in making the assessment: *Peabody v. Edmonds*, 68 Wash. 610, 123 Pac. 1018.

Under a power to improve any street, a city may in one proceeding provide an assessment district for the improvement of several streets, where the total cost is thereby reduced, and by a process of book-keeping the cost of each street is limited to and levied upon abutting property: *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

In an action to set aside a local assessment, the fact that the plaintiff had no notice of the assessment in time to object before the city council is immaterial, if the statutory notice was given, which will be presumed in the absence of allegations to the contrary: *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

As to validity of eminent domain statute which fails to provide for notice to land owners of proceedings to condemn (as distinguished from proceedings to fix compensation), see note in Ann. Cas. 1913A, 1256.

The power to levy special assessment for a street improvement is not exhausted by being once exercised: *Knickerbocker Co. v. Seattle*, 69 Wash. 365, 124 Pac. 922.

The city charter and statute authorizing improvements to be made by planking, a plank roadway is a "permanent" improvement and not repair work, for which an assessment can be made, where it was intended for use until it wears out: *Knickerbocker Co. v. Seattle*, 69 Wash. 365, 124 Pac. 922.

An elevated roadway resting on mud-sills, piles and stringers, is a "permanent" improvement for which the property may be assessed, where it was intended to use the same as long as it would last, although the city contemplated the making of a permanent fill later, and did in fact commence filling in underneath the structure shortly after it was built: *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920.

As to what are public improvements, see note in 12 L. R. A. 417.

As to meaning generally of local improvement for which special assessment may be levied, see note in 20 Ann. Cas. 339.

The fact that the actual cost of an improvement exceeds the original estimate does not affect the power of the city council to levy an assessment upon property to the extent of benefits received, within the limit allowed by law, where the estimate required by the charter was made by the board of public works to enable the council to act advisedly in ordering an improvement within the fifty per cent limit of the assessed valuations, and no notice to the property owners or hearing upon the amount of the estimate was required or given: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

An assessment for a permanent street fill, charging two-thirds of the cost against leaseholds and one-third against the fee, is sustained, where the lease had twenty-one years to run, with the preference right of renewal, the leaseholds received the whole of the present benefit and are relatively more enhanced in value than the fee, and the evidence as to the benefits was conflicting: *Seattle Mattress & Upholstery Co. v. Seattle*, 69 Wash. 666, 125 Pac. 1013.

§ 7791.

In proceedings by a city to levy assessments for a local improvement, where eminent domain commissioners have made up an assessment-roll and notice has been given to a property owner of the amount of benefits assessed against his property,

and the owner files no objections and does not appear, the court in confirming the assessment has no authority to increase the same, since its order has the effect of a default judgment, the hearing being conducted as in other proceedings, under sections 7791-7797: *In re Sixth Avenue West, Seattle*, 59 Wash. 41, Ann. Cas. 1912A, 1047, 109 Pac. 1052.

§ 7795.

See notes to § 7790.

Under this section, "may" should not be construed to mean "must," in view of other provisions of the statute authorizing the court to apportion part of the cost of the improvement to the city, and to change any assessment or recast the same according to the "principles" of the act, which appear to require each parcel of land to "bear its relative equitable proportion" of the costs: *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121.

§ 7796.

See notes to § 7790.

§ 7797.

Upon confirmation of an assessment-roll for a public improvement in a special district, the court must keep within the issues raised by the objections, and cannot direct a change in the district unless it is challenged by a property owner therein: *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70.

An assessment of special benefits, while a subject for judicial inquiry, will not be set aside on appeal as excessive, unless the evidence so preponderates as to indicate arbitrary action: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

Objections going to the regularity of an assessment for a local improvement are cured by confirmation of the assessment-roll, in the absence of appeal therefrom, and cannot be made the basis for an action to set aside the assessment: *Norman v. Spokane*, 67 Wash. 630, 122 Pac. 330.

§ 7798.

An act authorizing the assessment of property benefited by a local improvement relates to the taxing power, and not to the taking or damaging of private property for a public use without compensation, prohibited by constitution, article 1, section 16: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 7813.

Laws of 1895, page 270, limiting actions by municipal corporations to collect special assessments for any local improvement to ten years after delinquency of the assessment, applies to condemnation proceedings

by a county to acquire a right of way for a drainage ditch, under Laws of 1895, page 142, constructed under a prior unconstitutional act; since such proceeding is a mere incident to the power to institute proceedings for the purpose of obtaining money to pay the costs incurred under the void act: *Lewis County v. McCutcheon*, 53 Wash. 367, 101 Pac. 1083.

§ 7814.

Since the right to recover damages resulting from the original grading of city streets rests upon statute (Laws 1893, p. 207, sec. 47, and Laws 1907, p. 336, sec. 48), the repeal of the acts without any saving clause, after suit brought, bars a recovery and works a discontinuance of the suit: *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

§ 7815.

A city not being liable to property owners for damages from the original grading of streets, under this section, and surface water being an outlaw and common enemy against which anyone may defend himself, a city is not liable for damages from the impounding upon lots of surface waters through the construction of fills in streets and alleys in making initial grades: *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

As to liability of municipalities for defective streets, see note in 103 Am. St. Rep. 260. And in 108 Am. St. Rep. 139.

§ 7818.

See notes to § 7768.

CHAPTER XIX.

PLATS, STREETS AND ADDITIONS.

§ 7832.

Where a plat plainly marked the boundaries of two parallel streets of specified widths, and showed an intervening space of twenty feet between the streets, marked "R. R.," which was occupied at the time by a street railway, a dedication of the public streets as marked does not include the intervening space, since an intention to dedicate will not be presumed and does not appear; and a clause reserving from streets dedicated, the twenty-foot strip marked "R. R." will not defeat the expressed intent not to dedicate such strip: *Provident Trust Co. v. Spokane*, 63 Wash. 92, 114 Pac. 1030.

§ 7840.

A property owner, petitioning for the improvement of streets on certain conditions being performed, is not bound by his stipulation agreeing to a certain assessment upon his lots, or estopped from questioning the validity of the assessment, where it appears that the city did not perform the stipulated conditions but levied the assessments in entire disregard of the stipulation: *Lewis & Wiley v. Cook*, 57 Wash. 1, 106 Pac. 198.

Owners petitioning for a street to a certain width cannot object to confirmation of the assessment on the ground that the width was unnecessary: *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112.

The payment of taxes and local assessments upon a strip of land used adversely as a street, for the prescriptive period, under a dedication by estoppel and user, does not estop the city from claiming the same as a street by dedication and prescription: *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

As to presumption of dedication from user, see note in 6 L. R. A. 261.

Nor would the city be estopped by the fact that the city attorney, out of an excess of caution, included a portion of the strip in condemnation proceedings for the widening of streets, where the claimants in no wise altered their position by reason of the condemnations, especially in view of this section, providing an exclusive method for the vacation of streets: *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

A city council having obtained jurisdiction, by petition and notice, to vacate a street, jurisdiction is not lost by postponing the hearing without entering a continuance to a day certain or giving notice of the time: *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155.

City councils have no power to vacate streets except as delegated by the legislature, and the procedure therefor must be strictly followed: *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155.

The courts have power to set aside a vacation of a street, although the same is a legislative function, where the law or ordinance is invalid and an attempt to enforce it is made or threatened: *Smith v. Centralia*, 55 Wash. 537, 104 Pac. 797.

The vacation of a street is invalid where the petition was not signed by the owners of more than two-thirds of the private property abutting upon that part of the street, the notice was not given, and the ordinance vacated part of the street not described: *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

As to power of municipality to vacate streets, see note in 46 Am. St. Rep. 494.

The condemnation and improvement of a new street, covering part of, and to take the place of, an old street, the use of which

as a street has since been abandoned by the city, and which formerly gave the only access to plaintiff's abutting property, does not constitute a vacation of the old street so as to vest title to the old street in the plaintiff, in view of this section, providing the manner in which street vacations may be obtained by persons owning an interest in abutting property, as the same provides an exclusive remedy, without which the council has no power to vacate streets: *Heuston v. Tacoma*, 67 Wash. 92, 120 Pac. 872.

The vacation of a street will not be enjoined at the suit of citizens whose property does not abut on the vacated portion and access is not cut off, or who do not sustain special physical damage different in kind rather than in degree from that suffered by the public: *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

Mere inconvenience from the vacation of a street, where access to property is preserved over other streets, is not a taking of or damage to property not abutting on the vacated portion of the street: *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

The fact that vacated streets may be put to private uses, and that the vacation was instigated by private interests affected does not warrant interference with the city council's action in vacating the streets, the courts not inquiring into the motive for legislative action: *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

As to power of municipality, as against abutting owner, to vacate a street or portion of it, and devote the land to private purposes, see note in 2 Ann. Cas. 87, also note in 22 L. R. A., N. S., 530.

A franchise to a railroad company to occupy a part of a public street to the exclusion of the public cannot be upheld under the city's power to vacate the street, when it was not exercised in the manner prescribed by sections 7840-7843, for such vacations: *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576.

As to effect of city's permitting use of street by railroad, so as practically to exclude public, see note in 36 L. R. A., N. S., 790, 1115.

An abutting property owner on a street has an interest different in kind from that of the public, where the street is vacated so as to close or affect his access, and may maintain an action to set aside an illegal vacation: *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

An abutting property owner upon an alley, which he uses for access to his property, suffers a special damage by its obstruction which differs in kind from that suffered by the general public; and it is error to instruct the jury that he cannot recover if his damages were of the same character and kind as those sustained by owners of other

property on the alley, and the general public: *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843.

Such an instruction is not cured by recalling the jury and expressly refusing to change it, but adding that what was meant was that plaintiff could not recover if he suffered only the damages of inconvenience suffered by the general public: *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843.

As to rights of abutting owners, as distinguished from rights of others, in respect to stones, see note in 101 Am. St. Rep. 107.

The act of 1901, sections 7840-7843, providing a complete method for the vacation of streets and alleys in some respect inconsistent with the earlier law, repeals by implication section 7847, of the earlier act: *Rowe v. James*, 71 Wash. 267, 128 Pac. 539.

§ 7842.

The act of 1901 (section 7842), providing that, upon the vacation of a street, the fee should belong to the abutting owners, confers no rights where vested rights were acquired prior to the passage of the act, in view of section 7843, providing that no vested rights shall be affected by the act: *Rowe v. James*, 71 Wash. 267, 128 Pac. 539.

The general rule that abutters own the fee to the center of the street is controlled by the circumstances; and where an owner plats land bounded by a street included in the plat and owns nothing beyond the street, his conveyance of land abutting on the street carries the fee to the entire street; and vacation vests title to the entire street in such owner: *Rowe v. James*, 72 Wash. 267, 128 Pac. 539.

An abutting owner acquires no rights to the fee of a vacated street by reason of the payment of assessments for its maintenance and improvement: *Rowe v. James*, 71 Wash. 267, 128 Pac. 539.

§ 7853.

The fact that the platters in dedicating a street along the shore line of a lake, the center line of which was above high-water mark, excepted and reserved to their own use all water, riparian, and littoral rights, does not show an intent to reserve the fee to a thread of the street upon sale of lots abutting thereon thereby saving a preference right to purchase the shore lands; nor does the fact that they believed they owned the lands below high water show an intent to reserve the fee to a thread of the street beyond its center line: *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988.

A plat bordering on water is not to be construed as intended to cover only uplands, where it is evident that the platters assumed to own and platted part of the shore lands: *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252.

There is an implied irrevocable common-law dedication of a tract of land to a public use, where it appears that the tract was, with the owner's consent, used by the entire neighborhood for a burying ground from 1854 to 1884, no grant or particular ceremony being necessary: *Roundtree v. Hutchinson*, 57 Wash. 414, 27 L. R. A., N. S., 875, 107 Pac. 345.

As to what is necessary to effect a dedication of land as a cemetery or burial plat, see note in 27 L. R. A., N. S., 872.

As to dedication and abandonment of land for cemetery purposes, see note in 15 Ann. Cas. 172.

Where a street in a plat is dedicated along a lake shore to high-water mark, the purchaser of lots abutting on the street acquires the fee to the entire street, subject to the public easement: *Gifford v. Horton*, 14 Wash. 595, 103 Pac. 988.

Where fifty-foot lots and the streets as marked on the plat occupy the entire space between the north and south boundaries of the tract, any excess would be apportioned among the lots; and an excess or strip of four and one-half feet along a boundary line could not be claimed by the plat-tors or those claiming under them: *Booth v. Clark*, 59 Wash. 229, Ann. Cas. 1912A, 1272, 109 Pac. 805.

A dedicated addition did not extend to a river bank, where, between the line of ordinary high water and the nearest surveyed blocks, the lines of which were staked on the ground in accordance with exact dimensions, there intervenes a strip of land varying in width from eight to one hundred and fifty feet; and if the plat included the strip by reason of dedication of "all" of the govern-

ment subdivision, such fact would not dedicate or donate the strip to the public or to the purchasers of the contiguous blocks: *Spinning v. Pugh*, 65 Wash. 490, 118 Pac. 635.

A dedication of a city street by estoppel and user is shown where it appears that the owner removed his fences from a strip thirty feet wide, stating that he was throwing it open to the public, in 1889, and deeded the same to the city in 1892, a sidewalk was constructed thereon, the street used by the public for twenty years, and referred to in partition deeds of the heirs as Galer street, and used as a boundary line, the long-continued use by the public implying an acceptance by the city, although the deed was lost and the street was not worked: *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

§ 7854.

Under this section the council has no power to modify the proposed replat, but must approve or reject it in its entirety, and an order approving part of the vacation petitioned for is void: *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155.

§ 7857.

Under this section the city council can only approve or reject the petition in its entirety, and an order altering the proposed replat is void, the orders required by justice, etc., referring to the necessary assessments and awards, and not to modifications of the replat: *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155.

CHAPTER XX.

BRIDGES.

§ 7869.

Private individuals may, by consent of the federal and state governments, erect

structures in the navigable waters of the state: *Wilson v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 102, 127 Pac. 847.

CHAPTER XXI.

RENEWAL OF SIDEWALKS.

§§ 7870, 7871.

Repealed. See L. '11, p. 481, § 71.

§ 7873.

Under this section, providing that nothing in the act shall be construed to limit or

repeal any existing powers of cities with reference to such improvements, a city was authorized, after the enactment of the law, to levy special assessments under the pre-existing laws and ordinances of the city: *Olympia v. Turpin*, 70 Wash. 581, 127 Pac. 210.

CHAPTER XXIII.

SPECIAL ASSESSMENTS, GENERAL PROVISIONS.

§ 7892.

This section was intended to be retro-active, and removes the bar of the statute of limitations for the recovery thereof, where the same was passed at the next session of the legislature after a decision of the supreme court upholding the two-year

statute of limitations from the delinquency of the assessment as a reasonable one, the city having no moral right to the money, and the ascertainment of the amount often being postponed beyond the two-year period: State ex rel. McCullough v. Seattle, 60 Wash. 241, 110 Pac. 1008.

CHAPTER XXIII-A.

LOCAL IMPROVEMENTS.

§ 7892-1. May Provide for Local Improvements.

Any city or town in this state shall have power to provide for making local improvements and to levy and collect special assessments on property specially benefited thereby, for paying the cost and expense of the same or any portion thereof, as herein provided. [L. '11, p. 441, § 1.]

§ 7892-2. May Determine by Charter or Ordinance.

Any city or town shall have power to determine by charter or ordinance what work shall be done or improvements made at the expense, in whole or in part, of the property specially benefited thereby; and to provide the manner of making and collecting assessments therefor in pursuance of this act. [L. '11, p. 441, § 2.]

§ 7892-3. May Provide for Sewer, Drain and Water Systems.

Any city or town shall have power to provide for the sewerage, drainage and water supply thereof, and to establish, construct and maintain a system of sewers and drains and a system or systems of water supply, within or without the corporate limits of such city or town, and to control, regulate and manage the same. [L. '11, p. 441, § 3.]

§ 7892-4. May Provide for Protection from Overflow.

Any city or town shall have power to provide for the protection of such city or town, or any part thereof, from overflow, and to establish, construct and maintain dikes, levees, embankments or other structures and works, or to open, deepen, straighten or otherwise enlarge natural watercourses, waterways and other channels, including the acquisition or damaging of lands, rights of way, rights and property therefor, within or without the corporate limits of such city or town, and to manage, regulate and control the same. [L. '11, p. 441, § 4.]

§ 7892-5. Protection from Fire—Auxiliary Water Systems.

Any city or town shall have power to provide for the protection of such city or town, or any part thereof, from fire, and to establish, construct and maintain an auxiliary water system, or systems, or extensions thereof, or additions thereto, and the structures and works necessary therefor or forming a part thereof, including the acquisition or damaging of lands, rights of way, rights, property, water rights, and the necessary sources of supply of water for

such purposes, within or without the corporate limits of such city or town, and to manage, regulate and control the same. [L. '11, p. 442, § 5.]

§ 7892-6. Council to Order Improvements.

Whenever the public interest or convenience may require, the council, or other legislative authority of any such city or town, is hereby authorized and empowered to order the whole or any part of the streets, avenues, lanes, alleys, boulevards, park drives, parkways, public squares, and places within any such city or town to be graded or regraded, planked or replanked, paved or repaved, piled or repiled, capped or recapped, or otherwise improved, and to order sidewalks, drains, sewers, and all sewer appurtenances, culverts, bulkheads, retaining walls, water mains, hydrants or appurtenances, curbing and crosswalks, street lighting systems, together with the cost, and expense of furnishing electrical energy to said street lighting systems, auxiliary water systems, dikes and embankments, bridges and trestles and approaches thereto, or other local improvement whatsoever to be constructed, reconstructed, repaired or renewed therein, and to order the planting, setting out, cultivating, maintaining and renewing of shade or ornamental trees and shrubbery thereon; and to order any and all work to be done which shall be necessary to complete any such improvement; and to levy and collect special assessments to pay the whole or any part of the cost and expense of any such improvement. The city may require uniform setting out, planting, cultivating, maintenance and renewal of shade and ornamental trees and shrubbery on any street or highway. Any local improvement payable, in whole or in part, by special assessments, which shall include a charge for the cost and expense of furnishing electrical energy to any system of street lighting shall be initiated only upon petition signed by the owners of two-thirds of the lineal frontage upon the improvement to be made and two-thirds of the area within the limits of the proposed improvement district. [L. '11, p. 442, § 6; L. '13, p. 409, § 1.]

§ 7892-7. Method of Procedure.

Whenever any city or town shall make local improvements at the cost and expense, in whole or in part, of property specially benefited thereby, the proceedings for the same shall be had as provided in this act. [L. '11, p. 443, § 7.]

§ 7892-8. Resolution or Petition.

Any such improvement may be ordered only by ordinance of the council, or other legislative body of such city or town, either upon petition or resolution therefor. [L. '11, p. 443, § 8.]

§ 7892-9. Petition.

In case any such local improvement, the assessment district for which shall not extend beyond the termini of such improvement, shall be initiated upon petition, such petition shall set forth the nature and territorial extent of such proposed improvement, the mode of payment and the fact that the signers thereof are the owners, according to the records in the office of the county auditor, of property to an aggregate amount of a majority of the lineal frontage upon the improvement to be made and of the area within the limits of the assessment district to be created therefor. If any such property stands

in the name of a deceased person, or any person for whom a guardian has been appointed, the signature of the executor, administrator or guardian as the case may be, shall be equivalent to the signature of the owner of the property on such petition.

Such petition shall be presented to and filed with the city or town clerk, or with such officer, board or authority as may be designated by charter or ordinance. Upon filing such petition, the officer, board or authority required by charter or ordinance so to do shall ascertain if the facts set forth in said petition are true and shall cause an estimate of the cost and expense of such improvement to be made, and shall transmit the same to the council of such city or town, together with all papers and information in his or their possession touching such improvement, with the estimated cost thereof, and his or their recommendations thereof, together with a description of the boundaries of the district, and a statement of the proportionate amount of the cost and expense of such improvement which should be borne by property within the proposed assessment district and a statement of the aggregate assessed valuation of the real estate exclusive of improvements in said district according to the valuation last placed upon it for purposes of general taxation.

In case such petition shall be found sufficient, such board, officer or authority shall also transmit to the council a diagram or print, showing thereon the lots, tracts or parcels of land and other property which will be specially benefited thereby and the estimated amount of the cost and expense of such improvement to be borne by each such lot, tract or parcel of land or other property. [L. '11, p. 443, § 9.]

§ 7892-10. Resolution.

Any such improvement may be initiated directly by the city or town council by a resolution declaring its intention to order such improvement, setting forth the nature and territorial extent of such proposed improvement, and notifying all persons who may desire to object thereto to appear and present such objections at a meeting of the council at the time specified in such resolution; and directing the proper board, officer or authority to submit to the council at or prior to the date fixed for such hearing the estimated cost and expense of such improvement, and a statement of the proportionate amount thereof which should be borne by the property within the proposed assessment district, and a statement of the aggregate assessed valuation of the real estate, exclusive of improvements, within said district according to the valuation last placed upon it for the purposes of general taxation, together with a diagram or print showing thereon the lots, tracts and parcels of land and other property which will be specially benefited thereby and the estimated amount of the cost and expense of such improvement to be borne by each lot, tract, or parcel of land or other property. Such resolution shall be published in at least two consecutive issues of the official newspaper of such city or town, the date of the first publication to be at least fifteen (15) days prior to the date fixed by such resolution for hearing before the city council: Provided, That in any city or town not having an official newspaper, such publication may be made in any newspaper of general circulation published therein, or in case there be no such newspaper, then in a newspaper published in the county in which such city or town is located and of general circulation in such city or town. [L. '11, p. 444, § 10.]

§ 7892-11. Diagram not Conclusive.

The diagram or print herein directed to be submitted to the council, shall be in the nature of a preliminary determination by such administrative board, officer or authority upon the method and relative estimated amounts of assessments to be levied upon the property specially benefited by such improvement, and shall in no case be constructed as being binding or conclusive in any way upon any such board, officer or authority, in the preparation of the assessment-roll for such improvement, or upon the council upon any hearing affecting such roll. [L. '11, p. 445, § 11.]

§ 7892-12. Limit of Assessment.

The council shall have jurisdiction to proceed with any such improvement initiated by petition or resolution: Provided, That in any city of the first class it appears from the certificate of the board, officer, or authority designated by charter or ordinance to determine the same that the estimated cost and expense thereof does not exceed fifty per cent (50%) of the valuation of the real estate, exclusive of improvements thereon, within the proposed improvement district according to the valuation last placed upon it for purposes of general taxation: Provided, That this limit may be exceeded when any such improvement shall be petitioned for in the manner provided in section 7892-9, and such petition shall be signed by the owners of the area within the limits of the proposed improvement district, and shall specify a certain higher percentage up to which the property within such proposed improvement district may be assessed.

In the absence of fraud or gross mistake, such certificate of such board, officer or other authority shall be final and conclusive.

In computing the valuation of such property, any nonassessable property owned by the United States, state, county, city, town, school district or other public corporation, shall be valued at the same rate as assessed property similarly situated. [L. '11, p. 445, § 12.]

§ 7892-13. The Improvement District.

Every ordinance ordering any improvement mentioned in this act, payment for which shall be made in whole or in part by special assessments, shall establish a local improvement district to be called "Local Improvement District No. —," which district shall embrace as near as may be all the property specially benefited by such improvement. Except in the cases herein otherwise specifically provided for, and unless otherwise provided in the ordinance ordering such improvement, such district shall include all the property between the termini of said improvement abutting upon, adjacent, vicinal or proximate to the street, avenue, lane, alley, boulevard, park drive, parkway, public place or square proposed to be improved to a distance back from the marginal lines thereof to the center line of the blocks facing or abutting thereon: Provided, That in any case such distance back shall be at least ninety (90) feet: And provided further, That in case of unplatted property, the distance back shall be the same distance as that included in the assessment of the platted lands immediately adjacent thereto. All property included within said limits of such local improvement district shall be considered and held to be the property and to be all the property specially benefited by such local improvement, and shall be the property to be assessed to pay the cost and

expense thereof or such part thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited in accordance to the special benefits conferred on such property in proportion to area and distance back from the marginal line of the street, or other public way or area improved. Said local improvement district shall, for the purpose of ascertaining the amount to be assessed against such separate lot, tract, parcel of land or other property within said district be divided into subdivisions or zones paralleling the margin of the street, avenue, lane, alley, boulevard, park drive or parkway, public place or square to be improved, said subdivisions to be numbered respectively first, second, third, fourth and fifth. The first subdivision shall include all the lands within the district lying between the street margins and lines drawn parallel therewith and thirty (30) feet therefrom. The second subdivision shall include all lands within the district lying between lines drawn parallel with and thirty (30) feet and sixty (60) feet respectively from said street margins. The third subdivision shall include all lands within the district lying between lines drawn parallel with and sixty (60) feet and ninety (90) feet respectively from such street margins. The fourth subdivision shall include all lands, if any, within the district lying between lines drawn parallel with and ninety (90) feet and one hundred twenty (120) feet respectively from said street margins. The fifth subdivision shall include all lands, if any, within the district lying between a line drawn parallel with and one hundred twenty (120) feet from said street margin and the outer limit of said local improvement district as hereinbefore described.

The rate of assessment per square foot in each subdivision shall be fixed on the basis that the special benefits conferred on a square foot of land in subdivisions first, second, third, fourth and fifth, respectively, are related to each other as are the numbers 45, 25, 20, 10 and 5, respectively, and shall be ascertained in the following manner: The products of the number of square feet in subdivisions first, second, third, fourth and fifth, respectively, and the numbers 45, 25, 20, 10 and 5, respectively, shall be ascertained, and their sum taken, which sum shall be divided into the total cost and expense of such improvement. The products of the resultant quotient and the numbers 45, 25, 20, 10 and 5, respectively, shall be the separate rates of assessment per square foot for subdivisions first, second, third, fourth and fifth, respectively. The total assessment thus ascertained against each separate lot, tract, parcel of land, or other property within such district shall be entered upon the assessment-roll as the amount to be levied and assessed against each such separate lot, tract, parcel of land, or other property. [L. '11, p. 446, § 13.]

§ 7892-14. Enlarged District.

Whenever any local improvement shall be of such nature and character that the special benefits resulting therefrom extend beyond the boundaries of the local improvement district hereinbefore described and defined, the council may create an enlarged district, which shall include as near as may be all the property specially benefited by such improvement. In such case, the petition or resolution initiating such improvement shall state that it is proposed to create an enlarged district to pay the whole or a portion of the cost and expense of such improvement and shall specify and describe the

boundaries of such enlarged district, and shall specify a fixed amount of the cost and expense of such improvement to be assessed against that portion of the property within such enlarged district, lying between the termini of the proposed improvement and extending back from the marginal lines thereof to the middle of the block on each side thereof, in the mode prescribed in the preceding section hereof, and that such portion of the remainder of such cost and expense, as may not be borne by any general fund, shall be distributed and assessed against all the property included in the remainder of such enlarged district in accordance with special benefits.

The council in case it shall order such improvement, shall in the ordinance therefor specify and describe the boundaries of such district as defined in such petition or resolution. [L. '11, p. 448, § 14.]

§ 7892-15. Trunk Sewers and Water Mains.

Any city or town shall have power to provide for the construction of trunk sewers, and trunk water mains, and for the payment of all or any part of the cost and expense thereof by the levying and collecting of assessments upon property specially benefited thereby. In any such case the district created to bear such assessment shall be outlined in conformity with topographical conditions, and in case of trunk sewers, shall include as near as may be all the territory which can be sewerred or drained through such trunk sewer and the subsewers connected thereto, and in case of trunk water mains, shall include as near as may be all the territory in the zone or district to which water may be distributed from such trunk water main through lateral service and distribution mains and services. In distributing such assessments, there shall be levied against the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the street or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances, or water main and its appurtenances suited to the requirements of such territory in the mode prescribed in section 7892-13, and the remainder of the cost and expense of such improvement shall be distributed over and assessed against all of the property within the bounds of said entire district in accordance with the special benefits conferred thereon and in proportion to area. [L. '11, p. 449, § 15.]

§ 7892-16. Resolution and Ordinance for Trunk Sewers and Water Mains.

The council, before ordering the construction of any trunk sewer or trunk water main, shall pass a resolution declaring its intention to order such improvement, which resolution shall set forth the general nature of such improvement, describing the routes along which such trunk sewer, subsewer and branches, or trunk water main and laterals is to be constructed, and notifying all persons who may desire to object thereto to appear at a meeting of the council at a time specified in such resolution and present their objections thereto, and directing the proper board, officer or authority to report to the council at or prior to the date fixed for such hearing, the estimated cost and expense of such improvement. Such resolution shall be published in all respects the same as provided for the publication of resolutions mentioned in section 7892-10.

The council may order such improvement only by ordinance, which ordinance shall describe the routes along which such improvement is to be con-

structed, and established and fix the boundaries of the district to be assessed for such improvement. Maps, plans and specifications therefor shall be prepared in such manner as may be prescribed by ordinance, but shall be adopted by ordinance before the contract for such improvement shall be let. [L. '11, p. 449, § 16.]

§ 7892-17. Resolution and Ordinance for Dikes, Embankments, etc.

The council, before ordering the construction of any improvement provided for in section 7892-4, if the same or any part thereof is to be paid by special assessment as hereinbefore provided, shall first pass a resolution declaring its intention to order such improvement, which resolution shall set forth the general nature of such improvement, the place of commencement and ending thereof, the route to be used, the estimated cost and expense thereof, the boundaries of the special assessment district to be formed, and notifying all persons who may desire to object thereto to appear at a meeting of the council at a time specified in such resolution and present their objections thereto. Such resolution shall be published in all respects as other resolutions provided for in section 7892-10 are required to be published. If protests against such improvement are filed by the owners of property included in said proposed assessment district against such improvement, representing an aggregate amount of two-thirds of the area included in such proposed district, the council shall not proceed further with the work under such resolution.

The council may order such improvement only by ordinance, which ordinance shall describe the place of commencement and ending of such improvement, the route to be used, shall establish and fix the boundaries of such district and shall adopt the maps, plans and specifications for such improvement. [L. '11, p. 450, § 17.]

§ 7892-18. Resolution and Ordinance for Auxiliary Water System.

The council before ordering the construction of any improvement authorized in section 7892-5, shall first pass a resolution declaring its intention to order such improvement, which resolution shall set forth the general nature of such improvement, describing the routes along which such auxiliary water system, or extensions thereof or additions thereto, is to be constructed, specifying the structures or works necessary thereto or forming a part thereof, the estimated cost and expense thereof, the boundaries of the local improvement district to be formed to pay the whole or any portion of such cost and expense, and notifying all persons who may desire to object thereto to appear at a meeting of the council at a time specified in such resolution and present their objections thereto. Such resolution shall be published in all respects as other resolutions provided for in section 7892-10 are required to be published.

The council may order such improvement only by ordinance, which ordinance shall describe the route to be used, specify the structures or works necessary thereto or forming a part thereof, fix and establish the boundaries of such district, and adopt the maps, plans and specifications for such improvement. [L. '11, p. 451, § 18.]

§ 7892-19. Action of Council Conclusive.

The council may continue the hearing upon any petition or resolution provided for in this act and shall retain jurisdiction thereof until the same

be finally disposed of. The action and decision of the council as to all matters passed upon by it in relation to any such petition or resolution shall be final and conclusive. [L. '11, p. 451, § 19.]

§ 7892-20. The Assessment Lien.

The charge on the respective lots, tracts, parcels of land and other property, for the purpose of special assessments to pay the cost and expense, in whole or in part of any improvement authorized in this act, when assessed and the assessment-roll confirmed by the legislative body of such city or town in the manner therein provided by ordinance, shall be a lien upon the property assessed from the time said assessment-roll shall be placed in the hands of the officer authorized by law to collect such assessments. Said lien shall be paramount and superior to any other lien or encumbrance whatsoever, theretofore, or thereafter created except a lien for assessments for general taxes. [L. '11, p. 452, § 20.]

§ 7892-21. The Assessment-roll and Objections Thereto.

Whenever any assessment-roll for local improvements shall have been prepared as provided by law, such roll shall be filed with the clerk of such city or town. The council shall thereupon fix a date for hearing upon such roll before the council and direct the clerk to give notice of such hearing and the time and place thereof.

Such notice shall specify such time and place of hearing on such roll, and shall notify all persons who may desire to object thereto to make such objections in writing and to file the same with such clerk, at or prior to the date fixed for such hearing; and that at the time and place fixed and at such other times as the hearing may be continued to, the council will sit as a board of equalization for the purpose of considering such roll, and at such hearing, or hearings, will consider such objections made thereto, or any part thereof, and will correct, revise, raise, lower, change or modify such roll, or any part thereof, or set aside such roll and order that such assessment be made de novo, as to such body shall appear just and equitable, and then proceed to confirm the same by ordinance.

Such notice shall be published at least five (5) times in the official daily newspaper of such city or town or two (2) times in the official weekly newspaper of such city or town, or, in the case of any city or town not having an official newspaper, then in such other newspaper designated in section 7892-10: Provided, That at least fifteen (15) days must elapse between the date of last publication thereof and the date fixed for such hearing.

The council or other legislative body of such city or town, at the time fixed for hearing objections to the confirmation of said roll, or at such time or times as said hearing may be adjourned to, shall have power to correct, revise, raise, lower, change or modify such roll, or any part thereof, and to set aside such roll and order that such assessment be made de novo, as to such body shall appear equitable and just, and then shall confirm the same by ordinance. All objections shall state clearly the grounds of objections; and objections not made within the time and in the manner herein prescribed shall be conclusively presumed to have been waived.

Whenever any such roll shall be amended so as to raise any assessments appearing thereon, or to include omitted property, a new time and place for

hearing, and a new notice of hearing on such roll, as amended, shall be fixed and given as in the case of an original hearing: Provided, That whenever any property shall have been entered originally upon such roll and the assessment upon any such property shall not be raised, no objections thereto shall be considered by the council or by any court on appeal, unless such objections be made in writing at, or prior to the date fixed for the original hearing upon such roll. [L. '11, p. 452, § 21.]

§ 7892-22. Method of Appeal.

The decision of the council or other legislative body upon any objections made within the time and in the manner herein prescribed, may be reviewed by the superior court upon an appeal thereto taken in the following manner. Such appeal shall be made by filing written notice of appeal with the clerk of such city or town and with the clerk of the superior court in the county in which such city or town is situated within ten days after the ordinance confirming such assessment-roll shall have become effective, and such notice shall describe the property and set forth the objections of such appellant to such assessment; and, within ten days from the filing of such notice of appeal with the clerk of the superior court, the appellant shall file with the clerk of said court, a transcript consisting of the assessment-roll and his objections thereto, together with the ordinance confirming such assessment-roll, and the record of the council or other legislative body with reference to said assessment, which transcript, upon payment of the necessary fees therefor, shall be furnished by such city or town clerk and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript. Such fees shall be the same as the fees payable to the county clerk for the preparation and certification of transcripts on appeal to the supreme court in civil actions. At the time of the filing of the notice of appeal with the clerk of the superior court, the appellant shall execute and file with the clerk of the superior court a sufficient bond in the penal sum of two hundred dollars, with at least two sureties, to be approved by the judge of said court, conditioned to prosecute such appeal without delay and, if unsuccessful, to pay all costs to which the city is put by reason of such appeal. The court may order the appellant upon application therefor, to execute and file such additional bond or bonds as the necessity of the case may require. Within three (3) days after such transcript is filed in the superior court, as aforesaid, the appellant shall give written notice to the head of the legal department of such city or town, and to the city clerk, that such transcript is filed. Said notice shall state a time (not less than three (3) days from the service thereof) when the appellant will call up the said cause for hearing; and the superior court shall, at said time or at such further time as may be fixed by order of the court, hear and determine such appeal without a jury; and such cause shall have preference over all civil causes pending in said court, except proceedings under an act relating to eminent domain in cities and towns and actions of forcible entry and detainer. The judgment of the court shall confirm, correct, modify or annul the assessment in so far as the same affects the property of the appellant. A certified copy of the decision of the court shall be filed with the officer who shall have custody of the assessment-roll, and he shall modify and correct such assessment-roll in accordance with such decision. An appeal shall lie to the supreme court from the judgment of the

superior court, as in other cases: Provided, however, That such appeal must be taken within fifteen (15) days after the date of the entry of the judgment of such superior court; and the record and opening brief of the appellant in said cause shall be filed in the supreme court within sixty (60) days after the appeal shall have been taken by notice as provided in this act. The time for filing such record and serving and filing of briefs in this section prescribed may be extended by order of the superior court, or by stipulation of the parties concerned. And the supreme court, on such appeal may correct, change, modify, confirm or annul the assessment in so far as the same affects the property of the appellant. A certified copy of the order of the supreme court upon such appeal shall be filed with the officer having custody of such assessment-roll, who shall thereupon modify and correct such assessment-roll in accordance with such decision. [L. '11, p. 453, § 22.]

§ 7892-23. Proceedings Conclusive.

Whenever any assessment-roll for local improvements shall have been confirmed by the council or other legislative body of such city or town as herein provided, the regularity, validity and correctness of the proceedings relating to such improvement, and to the assessment therefor, including the action of the council upon such assessment-roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the council in confirming such assessment-roll in the manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor: Provided, That this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds (1) that the property about to be sold does not appear upon the assessment-roll, or (2) that said assessment has been paid. [L. '11, p. 455, § 23.]

§ 7892-24. Time of Payment, Interest, Penalty.

Any city or town shall prescribe by ordinance within what time such assessments, or installments thereof, shall be paid; and shall provide for the payment and collection of interest thereon, at a rate not to exceed eight per cent per annum. Assessments or installments thereof, when delinquent, in addition to such interest shall bear such penalty not less than five per cent as shall be by general ordinance prescribed. Interest and penalty shall be included in, and shall be a part of, the assessment lien. All local assessments becoming a lien upon any property in any city or town after this act shall become effective, shall be collected by the treasurer of such city or town, and all such liens shall be enforced in the manner herein prescribed: Provided, That in cities and towns other than cities of the first class, delinquent assessments, or delinquent installments thereof, shall be certified to the treasurer of the county in which such city or town is situate and by him entered upon the general tax-rolls and collected as other general taxes are collected. The county treasurer shall remit to the city treasurer on the tenth of each month

all sums so collected. All local assessments becoming a lien upon any property in any such city or town prior to the date this act shall become effective, shall be collected and such liens enforced in accordance with the laws in force and effect prior to the taking effect of this act: Provided, That in the enforcement of any such liens, any city or town may proceed under the provisions of this act, unless such proceedings shall have been already commenced. [L. '11, p. 456, § 24.]

§ 7892-25. Sale for Delinquent Assessments.

Any city or town may by general ordinance provide for the sale of property described in any local assessment-roll, after the assessment or any installment thereof shall have become delinquent, whether any such assessment became a lien after this act becomes effective, or prior thereto, for the amount of such delinquent assessment, or installment, together with penalty and interest accruing to date of sale, and for the costs of such sale; and for the execution and delivery by the treasurer of such city or town of certificates of sale to the purchaser, and for the execution by such treasurer of an assessment deed to the person thereunto entitled.

The treasurer shall give notice of such sales by publishing a notice thereof once a week for three consecutive weeks in the official newspaper of the city or town, or, in the case of any city or town not having an official newspaper, then in such newspaper specified in section 7892-10. Such notice shall contain a list of all property upon which such assessments are delinquent with the amount of the assessments, interests, penalties and costs to date of sale, including the cost of advertising such sale, together with the names of the owners of such property, or the words "Unknown Owners," as the same may appear upon said assessment-roll, and shall specify the time and place of sale, and that the property therein described will be sold to satisfy the assessments, interests, penalties and costs, due upon the same. All such sales shall be made between the hours of 10 o'clock A. M. and 4 o'clock P. M. and shall take place at the front door of the building in which the city or town council holds its sessions. Such sale shall be continued from day to day, omitting Sundays and legal holidays, until all the property described in said assessment-roll on which any such assessment, or installment thereof, is delinquent and unpaid, is sold. All such sales shall be public, and each lot, tract or parcel of land, or other property, shall be sold separately and in the order in which the same appears upon the assessment-roll, commencing at the beginning thereof.

All lots, tracts and parcels of land and other property sold for delinquent and unpaid local assessments, shall be sold to the first person at such sale offering to pay the amount due on each such lot, tract or parcel of land or other property. If there be no bidder for any lot, tract or parcel of land, or other property, for a sum sufficient to pay the delinquent and unpaid assessments thereon, or installment thereof, with interest, penalty and costs, the treasurer shall strike the same off to the city or town for the whole amount which he is required to collect by such sale. If any bidder to whom any property is stricken off at such sale does not pay the assessment, interest, penalty and costs before 10 o'clock A. M. of the day following the day of such sale, such property must then be resold, or if the assessment sale is closed, be

deemed to have been sold to the city or town, and a certificate of sale shall be issued to the city or town therefor. [L. '11, p. 457, § 25.]

§ 7892-26. Return of Sale.

Within fifteen days after the completion of the sale of all property described in such assessment-rolls, and authorized to be sold as aforesaid, the treasurer must make return to the comptroller, or other officer by whom the warrant was issued for such sale, with a statement of his action thereon, showing all the property sold by him, to whom sold and the sums paid therefor. [L. '11, p. 458, § 26.]

§ 7892-27. Certificate of Sale.

After receiving the amount of the assessment, penalty, interest, costs and charges, the treasurer shall make out a certificate, dated on the day of sale, stating (when known) the name of the owner as given on the assessment-roll, a description of the land or other property sold, the amount paid therefor, the name of the purchaser, that it was sold for the assessment, giving the names of the streets, or other brief designation of the improvement for which the assessment was made, and specifying that the purchaser will be entitled to a deed two years from the date of sale, unless redemption thereof be made. Such certificate shall be signed by the treasurer, and shall be delivered to the purchaser, and shall be by such purchaser recorded in the office of the county auditor in which the lands or other property is situated within three months from the date thereof. If not recorded within said time, the lien thereof shall be postponed to claims of subsequent purchasers and encumbrancers for value and in good faith who become such while the same is unrecorded.

The city or town comptroller, if there be such officer, and if not then the city or town clerk, shall be the custodian of all certificates for property sold to the city or town and shall at any time within two years from the date of such certificate, and before redemption of the property therein described, sell and transfer any such certificate to any person who will present to him the treasurer's receipt evidencing payment to the treasurer of the amount for which the property therein described was stricken off to the city, with interest subsequently accrued to date of such payment thereon, and such comptroller or clerk may, if so authorized by the council, sell and transfer any such certificate in like manner after the expiration of such period of two years from the date of the certificate. [L. '11, p. 458, § 27.]

§ 7892-28. Redemption Fund.

All moneys collected by the treasurer upon any assessments under this act shall be kept as a separate fund, to be known as "Local Improvement Fund, District No. ——" and shall be used for no other purpose than the redemption of warrants and bonds drawn or issued upon or against said fund. [L. '11, p. 459, § 28.]

§ 7892-29. Liability of Treasurer.

If the treasurer shall receive any moneys for assessments, giving a receipt therefor, for any property and afterward return the same as unpaid, or shall receive the same after making such return, and the same be sold for assessment which has been so paid and receipted for by himself, his clerk, assistant

or deputy, he and his bond shall be liable to the holder of the certificate given to the purchaser at the sale for the amount of the face of the certificate, and legal interest to be demanded within two years from the date of sale and recovered in any court having jurisdiction of the amount, and the city shall in no case be liable to the holder of such certificate. [L. '11, p. 459, § 29.]

§ 7892-30. Record of Payment.

Whenever before the sale of any property the amount of any assessment thereon, with interest, penalty, costs and charges accrued thereon, shall be paid to the treasurer, he shall thereon mark the same paid, with the date of payment thereof on the assessment-roll, and whenever after the sale of any property for any assessments the same shall be redeemed, he shall thereupon enter the same redeemed with the date of such redemption on such record. Such records shall be made on the margin of the record opposite the description of such property. [L. '11, p. 460, § 30.]

§ 7892-31. Property Held in Trust.

Whenever any property shall be bid in by any city or town or be stricken off to any city or town under and by virtue of any proceeding or proceedings provided in this act said property shall be held in trust by said city or town for the fund of the improvement district for the creation of which fund said assessment was levied and for the collection of which assessment said property was sold, to the extent of the amount of the assessment or installment for which said property was sold, with penalty, accrued interest, and interest on said installment to time of next call for bonds or warrants: Provided, however, Such city or town may at any time after the procuring of a deed pay in to such fund the amount of the delinquent assessment for which said property was sold and all accrued interest and interest to the time of the next call for bonds or warrants issued against such assessment fund at the rate provided thereon, and thereupon shall take and hold said property discharged of such trust. [L. '11, p. 460, § 31.]

§ 7892-32. Sale of Property Held in Trust.

Any city or town may at any time after the period of redemption has expired and deeds issued to said city or town under and by virtue of any proceedings mentioned in this act, sell any such property at public auction to the highest bidder for cash, but no bid shall be accepted for any amount less than the amount set forth in said deed, plus accrued interest to date of sale, computed on the assessment for which said property was sold from the date of the execution of said deed, and all delinquent assessments and taxes that may stand against said property with accrued interest thereon, penalties, costs and other charges, and the said city or town shall pay into said fund for which said property was held in trust so much thereof as shall fully cancel the assessment for which said property was sold, together with all interest thereon.

Any such sale shall be had only upon notice setting forth a description of the property to be sold, that the city treasurer will sell such property on the day specified at the front door of the building in which the city or town council holds its sessions, between the hours of 10 o'clock A. M. and 4 o'clock P. M. and continue such sale from day to day, or withdraw such property from sale after the first day if the treasurer in his discretion deems that the

interests of the city or town so require. Such notice shall be published at least five times in the official daily newspaper of such city or town, or at least two times in the official weekly newspaper of such city or town, or in the case of any city or town not having an official newspaper then at least two times in such other newspaper mentioned in section 7892-10: Provided, That at least fifteen days shall elapse between the date of last publication of such notice and the day such property is sold. [L. '11. p. 460, § 32.]

§ 7892-33. Redemption and Deed.

Any property so sold for an assessment shall be subject to redemption by the former owner, or his grantee, mortgagee, heir, or other representative at any time within two years from the date of the sale upon the payment to the treasurer for the purchaser of the amount for which the same was sold, with interest at the rate of fifteen per cent (15) per annum, together with all taxes and special assessments, interest, penalties, costs and other charges thereon paid by the purchaser of such property at or since such sale, with like interest thereon. Unless written notice of taxes and assessments subsequently paid, and the amount thereof, shall be deposited with the city or town treasurer, redemption may be made without including the same. On any such redemption being made, the treasurer shall give to the redemptioner a certificate of redemption therefor, and pay over the amount so received to the purchaser of the certificate of sale or his assigns. Should no redemption be made within said period of two years, the treasurer shall, on demand of the purchaser or his assigns, and the surrender to him of the certificate of sale, execute to such purchaser or his assigns, a deed for the property therein described: Provided, That no such deed shall be executed until the holder of such certificate of sale shall have notified the owners of such property that he holds such certificate, and that he will demand a deed therefor. Said notice shall be given by personal service upon said owners: Provided, That in case said parties are nonresidents of the state or cannot be found therein after diligent search, then such notice may be given by publication in the official paper of the city or town, or if there be no official paper, then in the manner provided in section 7892-10, once a week for three successive weeks. Such notice and return thereof, with the affidavit of the person, or in case of a city or town, of the comptroller or clerk, claiming such deed, showing that such service was made, shall be filed with the treasurer. If, notwithstanding such notice, no redemption be made within sixty days after the date of service, or the date of first publication of such notice, the holder of such certificate of sale shall be entitled to a deed thereon. Such deed shall be executed only for the property described in the certificate, and after payment of all delinquent taxes and special assessments thereon, or installments thereof, and certificates of delinquency or other certificates issued for special or local assessments, whether the same were levied, assessed or issued prior or subsequent to the issuance of said certificates of sale: Provided, That any such deed may be issued to any city or town for the face amount for which said certificate of sale was issued, plus accrued interest, costs, penalties and charges, and shall be held by such city or town subject to the liens of general taxes and special assessments.

The deed shall be executed in the name of the city or town by which the improvement was made; shall recite in substance the matters contained in the

certificate of sale, the notice to the owner, and that no redemption has been made of the property within the time allowed by law. The deed shall be signed and acknowledged by the city or town treasurer, as such, and shall be prima facie evidence that the property was assessed according to and as required by law; that the assessment was not paid; that the property was sold as required by law; that it was not redeemed; that due notice of demand for deed had been given, and that the person executing the deed was the proper officer; and the deed shall be conclusive evidence of the regularity of all other proceedings from the assessment, up to and including the execution of the deed, and shall convey the entire fee simple title to the property therein described, except as otherwise provided herein for cities and towns, stripped of all liens and claims except assessments for local improvements or installments thereof, not delinquent. [L. '11, p. 461, § 33.]

§ 7892-34. Foreclosure.

Any city or town may proceed with the collection or enforcement of any delinquent assessment, or delinquent installment, whether the same became a lien after this act shall become effective, or prior thereto, by proceedings in court therefor in an action brought in its own name in the superior court in the county in which such city or town is situate. It shall not be necessary to bring a separate suit for each such separate piece or parcel of property delinquent, but all or any part of the property delinquent under any single assessment-roll, or assessment district, may be proceeded against in the same action, and all or any of the owners or persons interested in any of the property so delinquent may be joined as parties defendant in the action to foreclose, and all or any liens for such delinquent assessments, or installments thereof, may be foreclosed in such proceeding. Such proceeding shall be tried before the court without a jury. In any such proceeding, it shall be sufficient to allege the passage of the ordinance providing such improvement, the making of such improvement, the levying of the assessment, the confirmation thereof, the date of delinquency of such assessment or installment, and that such assessment was not paid prior to such delinquency or at all. The assessment-roll and confirmatory order, or duly authenticated copies thereof shall be prima facie evidence of the regularity and legality of the proceedings connected therewith, and the burden of proof shall be on the defendants. In any such action where the owners or parties interested in any particular lot, tract or parcel of land or other property included in such suit shall suffer a default, the court may enter judgment of foreclosure and sale as to such parties and property so in default and order execution thereon, and the action may proceed as to the remaining defendants and property. The judgment of the court shall specify separately the amount of the assessment, or installment thereof, with interest, penalty and costs, chargeable to the several lots, tracts and parcels of land and other property in such proceedings. Such judgment shall have the effect of a separate judgment as to each lot, tract or parcel of land or other property, described in such judgment, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken. In entering judgment, the court shall decree that such lots, tracts, or parcels of land or other property be sold to enforce such judgment and execution shall issue for the enforce-

ment of such decree. Judgment may be entered as to any one or more separate lots, tracts or parcels of land or other property involved in such proceeding, and the court may retain jurisdiction of the case as to the balance. All proceedings supplemental to judgment, including appeal, order of sale, sale, period of redemption and the issuance of deed shall be had and conducted in accordance with the law, now or hereafter in force, relating to property sold under or upon foreclosure of real estate mortgages. [L. '11, p. 463, § 34.]

§ 7892-35. Enforcement of Subsequent Liens Authorized.

When the assessment upon property is payable in installments, the enforcement of the lien of any installment by any method herein authorized shall not prevent the enforcement of the lien of any subsequent installment by any method herein authorized when the same may become delinquent.

Any such city or town may provide by general ordinance that, upon failure to pay any installment when due, the entire assessment shall become due and payable and the collection thereof enforced in the manner prescribed. [L. '11, p. 465, § 35.]

§ 7892-36. Certificate of Delinquency.

Any city or town may, by general ordinance, provide for the issuance of certificates of delinquency for any and all delinquent assessments, or installments thereof, heretofore or hereafter levied, and any penalty and interest thereon to date of issuance. Such certificates of delinquency shall constitute a lien against the property upon which such assessments were levied, and shall bear interest from the date of issuance thereof at the rate of fifteen per cent (15%) per annum, and may be foreclosed after two years from the date of their issuance in the same manner and with the same effect as mortgages upon real estate are foreclosed. Such certificates may be issued to the city, or may be sold to any person applying therefor. They may be assigned in writing, and the city may sell and assign any and all certificates which may be issued to it upon the payment of the value thereof in principal and accrued interest, in cash. Such certificate shall be prima facie evidence that the land against which the same was issued was subject to the assessment at the time the same was assessed, that the property was assessed as required by law, and that the assessment, or installment thereof, was not paid prior to the issuance of such certificate.

No such certificate of delinquency shall be issued upon any property for any assessment or installment thereof during the pendency of any proceedings in court affecting such assessment or installment thereof. [L. '11, p. 465, § 36.]

§ 7892-37. Omitted Property.

Whenever by mistake, inadvertence or for any cause property otherwise subject to assessment, within any assessment district, heretofore or hereafter created, shall have been omitted from the assessment-roll for such improvement, the council or other legislative body of such city or town may, upon its own motion or upon the application of the owner of any property within such district charged with the lien of an assessment for such improvement, proceed to assess such omitted property for such improvement, in accordance with the special benefits accruing to such omitted property by reason

of such improvement and in proportion to the assessments levied upon other property in such district.

In any such case, the council or other legislative body shall first pass a resolution setting forth that certain property therein described was omitted from such assessment, and notifying all persons who may desire to object thereto to appear at a meeting of the council or other legislative body of such city or town at a time specified in such resolution and present their objections thereto, and directing the proper board, officer or authority to report to such council at or prior to the date fixed for such hearing the amount which should be borne by each such lot, tract or parcel of land or other property so omitted, which resolution shall be published in all respects as other resolutions provided for in section 7892-10. At the conclusion of such hearing or any adjournment thereof, the council shall consider the matter as though the property had been included upon the original roll, and may confirm the same or any portion thereof by ordinance. Thereupon such roll of omitted property shall be certified to the treasurer for collection as other assessments. [L. '11, p. 466, § 37.]

§ 7892-38. Fees for Issuance of Certificate and Deeds.

The city or town treasurer shall charge for the issuance of each certificate of sale and each certificate of delinquency the sum of fifty cents; for each deed the sum of one dollar. [L. '11, p. 466, § 38.]

§ 7892-39. Lien of Purchaser.

The purchaser at any sale authorized in this act acquires a lien on the property so bid in by him for the amount paid by him at such sale as well as for all taxes and delinquent assessments, or delinquent installments thereof, and certificates of delinquency, and all interest, penalties, costs and charges thereon whether levied previously or subsequently to such sale, and whether for state, county, city or town purposes, subsequently paid by him on such property, and shall be entitled to interest at the rate of fifteen per cent per annum on the original amount paid by him from the date of said sale and upon such subsequent payments from the date of the payment of the respective amounts. [L. '11, p. 467, § 39.]

§ 7892-40. Local Assessments Included in Certificate of Delinquency.

The holder of any certificate of delinquency for general taxes shall, before commencing any action to foreclose the lien of such certificate pay in full all local assessments or installments thereof outstanding against the whole or any portion of the property included in such certificate of delinquency, or, he may elect to proceed to acquire title to such property subject to certain or all local assessments a lien thereon, in which case the complaint, decree of foreclosure, order of sale, sale, certificate of sale and deed shall so state. If such holder shall pay such local assessments, he shall be entitled to fifteen per cent interest per annum on the amount of the delinquent assessments or delinquent installments thereof so paid, from date of payment.

In any action to foreclose any lien for general taxes upon any property a copy of the complaint shall be served on the treasurer of the city or town within which such property is situate within five days after such complaint is filed. In any case where any property shall be struck off to or bid in by

the county at any sale for general taxes, and such property shall subsequently be sold by the county, the proceeds of such sale shall first be applied to discharge in full the lien or liens for general taxes for which the same was sold, and the remainder, or such portion thereof as may be necessary, shall be paid to the city to discharge all local assessment liens upon such property, and the surplus, if any, shall be distributed among the proper county funds. [L. '11, p. 467, § 40.]

§ 7892-41. Limitation of Actions.

An action to collect any special assessment or installment thereof, for local improvements of any kind, or to enforce the lien of any such assessment or installment, whether such action be brought by a municipal corporation or by the holder of any certificate of delinquency, or by any other person having the right to bring such action, shall be commenced within ten years after such assessment shall have become delinquent, or within ten years after the last installment of any such assessment shall have become delinquent when said special assessment is payable in installments. [L. '11, p. 468, § 41.]

§ 7892-42. Reassessments Authorized.

In all cases of special assessments for local improvements, wherein said assessments have failed to be valid in whole or in part for want of form or insufficiency, informality, or irregularity or nonconformance with the provisions of law, charter or ordinance governing such assessments in any city or town, the council of any such city or town shall have power to reassess such assessments and to enforce their collection in accordance with the provisions of law and ordinance existing at the time the reassessment is made. Whenever, on account of any mistake, inadvertence or other cause, the amount assessed shall not be sufficient to pay the cost and expense of the improvement made and enjoyed by the owners of property in the assessment district where the same is made, the council of such city or town is authorized and directed to make reassessments on all the property in said assessment district to pay for such improvement; such assessment to be made in accordance with the provisions of law and ordinance existing at the time of its levy. Any city or town is hereby authorized to assess or reassess all property which the council shall find to be specially benefited to pay the whole or any portion of the cost and expense of any local improvements which such city or town has heretofore made, is now making, or may hereafter make at the expense in whole or in part of property specially benefited thereby, whether or not such property so to be assessed or reassessed abuts upon, is adjacent to, or proximate to such improvement, or was included in the original assessment district; and the right to so assess all property so found to be specially benefited shall also apply to any supplemental assessment or reassessment which such city or town may find it necessary to make for the purpose of providing for any deficiency in any local improvement district fund caused by the invalidity of any portion of the original assessment in such improvement district, or where for any cause the amount originally assessed shall not be sufficient to pay the cost of the improvement.

Whenever any assessment for any local improvement in any city or town, whether the same be an original assessment, assessment upon omitted property, supplemental assessment or reassessment, heretofore or hereafter made,

has been or may hereafter be declared void and its enforcement [refused] by any court, or for any cause whatever has been heretofore or hereafter may be set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall make a new assessment or reassessment upon the property which has been or will be benefited by such local improvement, based upon the actual cost of such improvement at the time of its completion. [L. '11, p. 468, § 42.]

§ 7892-43. Reassessment Ordinance.

The city council of any city or town shall proceed with any assessment authorized in the preceding section by passing an ordinance ordering the same, and directing the preparation of an assessment-roll therefor, which roll may include any property specially benefited by such improvement, whether or not the same was included in the original assessment district. Such additional property when so assessed shall become a part of the local improvement district theretofore created, or attempted to be created, to provide a fund to pay for said improvement, and all payments of assessments so ordered shall be paid into and become a part of the local improvement fund provided to pay for said improvement.

The fact that the contract has been let or that such improvement shall have been made and computed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of law, the charter or ordinances governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or in any way affect the making of any assessment authorized in the preceding section: Provided, That such assessment shall be for an amount which shall not exceed the actual cost and expense of the improvement, together with the accrued interest thereon, it being the true intent and meaning of this act to make the cost and expense of local improvements payable by the property specially benefited thereby, notwithstanding the proceedings of the council, board of public works or other board, officer or authority of such city or town may be found irregular or defective, whether jurisdictional or otherwise; when such assessment is completed, all sums paid on the former attempted assessment shall be credited to the property on account of which the same were paid.

In any case where any property within the original local improvement district shall not be affected by any assessment authorized in the preceding section, such property need not be entered upon such assessment-roll.

After the certification of any such roll to the treasurer of any such city or town for collection, the same length of time for payment of the assessments appearing thereon, without the imposition of any penalties or interest, and the notice that such assessments are in the hands of the treasurer thereof for collection, shall be given as in the case of an original assessment, and after delinquency such penalty and interest shall be charged as in cases of original assessment: Provided, That in all cases where the original assessment for the improvement was payable in installments, the new assessment, after delinquency, may be divided into such equal installments and made payable at such

times as the council in the ordinance ordering such new assessment, may prescribe. [L. '11, p. 469, § 43.]

§ 7892-44. Procedure in Case of Reassessment.

All the provisions of this act relating to the filing of assessment-rolls, time and place of hearing thereon, notice of such hearing, the hearing upon such roll, and the confirmation thereof, the time when such assessment shall become a lien upon the property assessed, the proceedings on appeal from any such assessment, the method of collecting such assessments and all proceedings for enforcing the lien thereof shall be had and conducted the same in the case of assessments authorized in section 7892-42 as in the case of an original assessment. [L. '11, p. 471, § 44.]

§ 7892-45. Time for Reassessments.

No city or town shall have jurisdiction to proceed with any reassessment or supplemental assessment unless the ordinance ordering the same shall be passed by the council or other legislative body of such city or town within ten years from and after the time the original assessment for any such improvement was finally held to be invalid, insufficient or for any cause set aside, in whole or in part, held void or its enforcement denied directly or indirectly by the courts; or, in the case of supplemental assessments, from and after the time that it was finally determined that the total amount of the valid assessments levied and assessed on account of any such improvement was insufficient to pay the whole or that portion of the cost and expense thereof to be paid by special assessment. [L. '11, p. 471, § 45.]

§ 7892-46. May Issue Bonds.

The city council or other legislative body or any city or town may, in their discretion, provide by ordinance for the payment of the whole or any portion of the cost and expense of any local improvement authorized by law, by bonds of the improvement district, which bonds shall be issued to the contractor, or be issued and sold as herein provided. [L. '11, p. 471, § 46.]

§ 7892-47. Method of Issuance of Bonds.

Such bonds shall be issued only in pursuance of ordinances of the city or town issuing the same, and by their terms shall be made payable on or before a date not to exceed ten years from and after the date of the issue of such bonds, which latter date may be fixed by resolution, by council or other legislative body of said city or town and shall bear such interest as may be provided in such ordinance, not exceeding eight per centum per annum, which interest shall be payable annually, or semi-annually, as may be provided by ordinance, and each bond shall have attached thereto interest coupons for each interest payment. Such bonds shall be in such denominations as shall be provided in the ordinance ordering their issue and shall be numbered from one upward, consecutively, and each bond and coupon shall be signed by the mayor and attested by the clerk or comptroller of such city: Provided, however, That said coupons may in lieu of being so signed have printed thereon a facsimile of the signatures of said officers and each bond shall have the seal of such city affixed thereto and shall refer to the improvement to pay for which the same shall be issued and to the ordinance ordering the same, each bond

shall provide that the principal sum therein named, and the interest thereon, shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement, and not otherwise. Such bonds shall not be issued in any amount in excess of the cost and expense of the improvement. [L. '11, p. 472, § 47.]

§ 7892-48. Sale of Bonds.

The bonds issued under the provisions of this act or such portion of such bonds as may remain unsold if same is ordered as hereinafter provided may be issued to the contractor constructing the improvement in payment thereof, or the ordinance directing the issue of such bonds may provide that the same may be sold by some authorized officer or officers of the city, in the manner prescribed therein, at not less than their par value and accrued interest, and that the proceeds thereof shall be applied in payment of the cost and expense of the improvement. [L. '11, p. 472, § 48.]

§ 7892-49. Assessments Payable in Installments.

In all cases where any city or town shall issue bonds as provided in this act to pay the cost and expense of any local improvement, the said cost and expense shall be assessed against the lots, tracts, and parcels of land and other property, which under the provisions of law and the charter and ordinances of such city or town shall be liable therefor, but the ordinance levying such assessment shall provide that the sum charged thereby against each such lots, tracts, and parcels of land and other property or any portion of such sum may be paid during the thirty (30) days period provided for in section 7892-50, and that thereafter the sum remaining unpaid may be paid in equal annual installments; the number of which installments shall be equal to the number of years which the bonds issued to pay for the improvement may run, with interest upon the whole unpaid sum so charged at a rate fixed by said ordinance, and each year thereafter one of such installments together with the interest due thereon and on all installments thereafter to become due shall be collected in the same manner as shall be provided by law and the charter and ordinances of such city for the collection of assessments for such improvements in cases where no bonds are issued. [L. '11, p. 473, § 49.]

§ 7892-50. Notice of Collection of Assessment.

The owner of any lot, tract or parcel of land or other property charged with any such assessments may redeem the same from all or any portion of the liability for the contract price of such improvement by paying the entire assessment or any portion thereof charged against such lot or parcel of land, without interest, within thirty days after notice to him of such assessment, which notice shall be given as follows: The city or town treasurer shall, as soon as the assessment-roll has been placed in his hands for collection, publish a notice in the official newspaper of the city for ten consecutive daily or two consecutive weekly issues, that the said roll is in his hands for collection and that any assessment thereon or any portion of any such assessment may be paid at any time within thirty days from the date of the first publication of said notice without penalty, interest or costs. The bonds herein provided for shall not be issued prior to twenty days after the expiration of the thirty days above mentioned, but may be

issued at any time thereafter. The owner of any such lot or parcel of land may redeem the same from all liability for the unpaid amount of said assessment at any time after said thirty days by paying the entire installments of said assessment remaining unpaid and charged against such lot or parcel at the time of such payment, with interest thereon to the date of the maturity of the installment next falling due. In all cases where any sum is paid as herein provided the same shall be paid to the city treasurer, or to the officer whose duty it is to collect said assessments, and all sums so paid shall be applied solely to the payment of the cost and expense of such improvements or the redemption of the bonds issued therefor. [L. '11, p. 473, § 50.]

§ 7892-51. Remedy of Bondholder.

If the city or town shall fail, neglect or refuse to pay said bonds or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessment and foreclose the lien thereof in any court of competent jurisdiction, and shall recover in addition to the amount of such bonds and interest thereon, five per centum, together with the cost of such suit. Any number of holders of such bonds for any single improvement may join as plaintiffs and any number of owners of the property on which the same are a lien may be joined as defendants in such suit. [L. '11, p. 474, § 51.]

§ 7892-52. Confined to Enforcement of Assessment.

Neither the holder nor owner of any bond issued under the authority of this act shall have any claim therefor against the city by which the same is issued, except from the special assessment made for the improvement for which such bond was issued, but his remedy in case of nonpayment, shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed or engraved on each bond so issued. [L. '11, p. 474, § 52.]

§ 7892-53. Exchange of Bonds, When Authorized.

Whenever any city has heretofore issued bonds for the purpose of paying the cost and expense of local improvements, or has sold such bonds and paid such cost and expense from the proceeds thereof, such city may, with the consent of the holders of such bonds, exchange for them bonds authorized by this act. [L. '11, p. 475, § 53.]

§ 7892-54. Interest on Bonds, Call of Bonds.

The city or town treasurer shall pay the interest on the bonds authorized to be issued by this act out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this act, over and above sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds: Provided, That such bonds shall be called in and paid in their numerical order: Provided, further, That such call shall be made by publication in the city or town official newspaper in its first publication following the delinquency of the installment of the assessment or as soon thereafter as is practicable, and shall state that bonds No. — (giving the serial number or numbers of the bonds called) will be paid on the day the next interest coupons

on said bonds shall become due, and interest on said bonds shall cease upon such date. [L. '11, p. 475, § 54.]

§ 7892-55. Items of Cost.

Whenever any local improvement herein authorized shall be ordered, there shall be included in the cost and expense thereof to be assessed against the property specially benefited by such improvement and included in the district created to pay the same, or any part thereof, the cost of that portion of said improvement included within the limits of any street intersection space or spaces, the estimated cost and expense of all engineering and surveying necessary for said improvement to be done by and under the direction of the city or town engineer, ascertaining the ownership of the lots or parcels of land included in the assessment district, advertising, mailing and publishing all notices required to be advertised, published or mailed, accounting and clerical labor, books and blanks expended or used by the city or town comptroller and the city or town treasurer in connection with said improvement. [L. '11, p. 475, § 55.]

§ 7892-56. Assess Tide Land Leases as Realty.

For the purposes of local assessment, all leases of tide lands owned in fee by the state of Washington shall be, and the same are hereby declared to be, real property. [L. '11, p. 476, § 56.]

§ 7892-57. Parkways, Park Drives and Boulevards.

Any city or town council upon request of the board of park commissioners, shall have authority to designate such streets as they may see fit as parkways, park drives, and boulevards, and to transfer all care, maintenance and improvement of the surface thereof to the board of park commissioners, or to such authority of such city or town as may have the care and management of the parks, parkways, boulevards and park drives of the city.

Any city or town may acquire, either by gift, purchase or the right of eminent domain, the right to limit the class, character and extent of traffic that may be carried on such parkways, park drives and boulevards, and to prescribe that the improvement of the surface thereof shall be made wholly in accordance with plans of such board of park commissioners, but that the setting over of all such streets for such purposes shall not in any wise limit the right and authority of the city council to construct underneath the surface thereof any and all public utilities nor to deprive the council of the right to levy assessments for special benefits. In the construction of any such utilities, any damages done to the surface of such parkways, park drives or boulevards shall not be borne by any park funds of such city or town. [L. '11, p. 476, § 57.]

§ 7892-58. Assessment for Park Drives and Boulevards.

Whenever the management and control of the park drives, parkways and boulevards of any city or town shall be vested in a board of park commissioners or other similar authority of such city or town, the council of any such city or town may, upon request of such board or other similar authority therefor specifying the particular park drives, parkways or boulevards, or portions thereof, to be improved, and the nature of such improvement, pass an or-

dinance providing for the improvement thereof, which ordinance shall be based either upon a resolution or a petition as hereinabove provided. Any such city or town shall have the same power to provide for making such local improvements and to levy and collect special assessments on property benefited thereby, and for paying the same or any portion thereof as in the case of other local improvements: Provided, That the plans and specifications for such improvements shall, before their adoption, be submitted to and approved by such board of park commissioners, or other similar authority of such city or town. [L. '11, p. 477, § 58.]

§ 7892-59. Work to be Done by City or Contract.

All local improvements, the funds for the making of which are derived in whole or in part from assessments upon property specially benefited shall be made either by the city or town itself, or by contract upon competitive bids. The board, officer or authority charged with the duty of letting contracts for local improvements shall determine whether such local improvement shall be done by contract, or by the city itself. The city or town shall have power to reject any and all bids. [L. '11, p. 477, § 59.]

§ 7892-60. General Ordinance.

The council of each city and town shall pass such general ordinance or ordinances as may be necessary to carry out the provisions of this act. Thereafter all proceedings relating to local improvements shall be had and conducted in accordance with this act, and the ordinances of such city or town relating to local improvements. [L. '11, p. 477, § 60.]

§ 7892-61. Validation of Local Improvement Assessments.

Whenever the city or town council of any city or town within this state has made, or shall hereafter make any assessment against property within any local improvement district for any purpose authorized in this act and has in making such assessment acted in good faith and without fraud or shall hereafter act in good faith and without fraud the said assessment shall be valid and enforceable as such and a lien upon the property upon which the same purports to be a lien; and it shall be no objection to the validity thereof that the contract for such improvement was not awarded in the manner or at the time required by law, nor shall it be any objection to the validity of such assessment that the same was made by an unauthorized officer or person, if the same shall have been confirmed by the city or town authorities, of such city or town, nor, shall it be any objection to the legality of such assessment that the same is based upon a front-foot basis, or upon a basis of benefits to the property within such district unless it shall be made to appear that the city or town authorities did not act in good faith and did not attempt to act fairly in regard thereto, or unless it shall be made to appear that the city or town authorities acted fraudulently or oppressively in making such assessment; and all assessments heretofore or hereafter made which are made by the city or town authorities in good faith are hereby declared to be valid and in full force and effect, and to be collectible in the manner which is now or may hereafter be provided by law for the collection of assessments for the purposes specified in this section. [L. '11, p. 478, § 61.]

§ 7892-62. Assessments Paid by Joint Owner.

Whenever any local assessment, or installment thereof, shall be paid, or any certificate of sale therefor be redeemed, or any judgment therefor be paid by any joint owner of any property assessed for any local improvement, such joint owner may, after demand and refusal, by an action brought in the superior court, recover from each of his co-owners the respective amounts of such payment which each such co-owner should bear, with interest thereon at ten per cent per annum from the date of such payments, and costs of the action, and the joint owner making such payment shall have a lien upon the undivided interests of his co-owners in and to such property from date of such payment. [L. '11, p. 478, § 62.]

§ 7892-63. City or Town may Purchase at Tax Sales.

Whenever any property situate in any city or town shall be offered for sale for general taxes, the city or town within which such property is situate shall have power to protect the lien or liens of any local assessments outstanding against the whole or any portion of such property by purchase or otherwise. [L. '11, p. 479, § 63.]

§ 7892-64. Proceedings in Case of Consolidated Cities.

The city council of any city which is composed of two or more cities or towns which have been or may hereafter be consolidated, as provided by law, shall have power to make and pass all necessary ordinances, orders and resolutions for any assessment where the improvement has been made or was being made by any such former city or town prior to the consolidation thereof, and to fully carry out and enforce the provisions of this act. [L. '11, p. 479, § 64.]

§ 7892-65. Assessments Paid in Error.

Whenever, through error or inadvertence, any person shall pay any local assessment, or installment thereof, upon the lands of another, such payor, may, after demand and refusal, by an action in the superior court, recover from the owner of such lands the amount so paid, and costs of the action. [L. '11, p. 479, § 65.]

§ 7892-66. Vote Required on Ordinances.

No ordinances mentioned in this act shall be considered passed unless they shall have received the affirmative vote of at least a majority of the members of the council or other legislative body of such city or town: Provided, That in cities of the first class the vote required for the passage of any such ordinances shall be subject to such further limitations as may be prescribed in the charter of any such city: Provided, That in any city or town, other than cities of the first class, no ordinance providing for any improvement herein authorized shall be effective over the written objection or objections of the owners of a majority of the lineal frontage and of the area within the limits of the proposed improvement district filed with the clerk of any such city or town prior to the final passage of such ordinance unless such ordinance shall receive the affirmative vote of at least two-thirds of all the members of the council or other legislative body of such city or town. [L. '11, p. 479, § 66.]

§ 7892-67. Act to Apply to All Cities and Towns.

The provisions of this act shall apply to all incorporated cities and towns in this state, including unclassified cities and towns operating under special charters. [L. '11, p. 480, § 67.]

§ 7892-68. Word "Council" Construed.

Whenever the words city council or town council are used in this act, they shall be construed to mean the council or other legislative body of such city or town. Whenever the word mayor is used in this act, it shall be construed to mean the presiding officer of said city or town. [L. '11, p. 480, § 68.]

§ 7892-69. Act to be Liberally Construed.

The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act, but the same shall be liberally construed for the purpose of carrying out the objects for which this act is intended. [L. '11, p. 480, § 69.]

§ 7892-70. Saving Clause.

Any acts or parts of acts herein repealed, which are re-enacted in form or in substance in this act shall not be construed as new enactments but as continuations and amendments of such acts or parts of acts.

All rights of action under existing laws which this act in any way supersedes or repeals, if the same at the time of taking effect of this act shall not have been commenced, shall proceed under the provisions of this act. All actions and proceedings, which may be pending in court under existing laws which this act in any way supersedes or repeals, shall proceed without being in any manner affected by the passage of this act. All proceedings commenced by any city or town before the taking effect of this act, relating to the making of any local improvement, shall proceed without being in any manner affected by the passage of this act, except as provided in section 7892-24. [L. '11, p. 480, § 70.]

§ 7892-71. Charters Suspended.

This act shall supersede the provisions of the charter of any city of the first class inconsistent herewith. [L. '11, p. 481, § 71.]

For acts repealed, see L. '11, p. 481, § 71.

§ 7892-72. Local Improvement Warrants Authorized.

Every city and town shall have the power by general ordinance to provide for the issuance of warrants in payment of the cost and expense of any local improvement, such warrants to be payable out of the special fund in such local improvement district, said warrants to bear interest from date thereof at a rate at not exceeding eight per cent (8%) per annum, and to be redeemed either in cash or in local improvement bonds authorized to be issued in the manner prescribed by general ordinance. [L. '11, p. 482, § 72.]

CHAPTER XXIV.

REASSESSMENTS.

§§ 7893—7964.

Repealed. See L. '11, p. 481, § 71.

§ 7893.

A judgment holding an assessment for a local improvement valid as to certain tracts and invalid as to other tracts does not prevent a reassessment of the whole district: *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448.

Judgments in actions declaring the validity or invalidity of local improvement assessments are not res judicata in another action upon a reassessment: *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448.

An action by a holder of a warrant against a special improvement fund to compel a reassessment cannot be maintained when the land owner could plead the statute of limitations against the reassessment: *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 28 L. R. A., N. S., 735, 104 Pac. 272.

As to statute of limitations as against a municipal corporation, see note in 101 Am. St. Rep. 157.

As to vested right of municipal corporations in defense of statute of limitations, see note in 27 L. R. A., N. S., 1188.

Where the record does not show the exact date when an assessment became delinquent, it will be presumed that an action to compel a reassessment was commenced within the period limited by the statute of limitations, when the defense of the statute was not interposed and a reassessment was ordered: *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 28 L. R. A., N. S., 735, 104 Pac. 272.

As to the effect of running of limitations since original assessment upon a reassessment order because of invalidity of original, see note in 28 L. R. A., N. S., 735.

An action begun by a holder of a warrant against a special fund to compel a reassessment, he having no other remedy, in which the city defends for the benefit of the land owners, arrests the running of the statute of limitations against the right to levy a reassessment, and is equivalent in law to a valid assessment, and is binding on the land owners: *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 28 L. R. A., N. S., 735, 104 Pac. 272.

The fact that property has been assessed for an improvement does not prevent a reassessment for an additional charge to make up a deficit arising when part of the assessments were held invalid, such reassessment being expressly authorized by this section,

the extent of the benefit which the property derived from the improvements: *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965.

Property which is exempt from assessment was included in the

original assessment, thereby creating a deficiency, does not affect the power to levy a reassessment on other property to make up the deficiency: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

A reassessment to make up a deficiency is authorized where the city council canceled the original assessment against property which had been adjudged to be damaged and therefore not assessable: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

Upon a reassessment the question of the benefits and the apportionment thereof is an original question in no way controlled by the original assessment: *Inner-Circle Property Co. v. Seattle*, 9 Wash. 508, 125 Pac. 970.

Where assessments were adjudged illegal for the reason that the property was found by the jury to be damaged and was therefore nonassessable, such property cannot be subjected to a reassessment, although it may in fact have been benefited, the former adjudication being final: *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965.

An award of damages to a leasehold interest in state lands, being an adjudication that the property was not benefited, exempts the same from a reassessment levied to make up a deficiency in the original assessment: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

§ 7894.

Under this section a reassessment is prima facie authorized where a portion of the lots, found by the jury to be damaged, were adjudged nonassessable for that reason, and the city council by resolution canceled the same and other like assessments for the same reason: *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965.

§ 7895.

Upon a reassessment for local improvements, the city may include additional costs and accrued interest: *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448.

Upon a reassessment, interest on the amount of the condemnation awards is properly added: *In re Third, Fourth, and Fifth Avenues, Seattle*, 55 Wash. 519, 104 Pac. 799.

§ 7898.

Where a city council has made a reassessment and the same has been confirmed, upon appeal to the superior court the burden is upon the appellants to show want of authority on the part of the council to make the reassessment, in view of this section, the

presumption being that the council had authority to make the reassessment by reason of a deficiency in, or the invalidity of, the original assessment: *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970.

§ 7905.

This act, entitled an act to validate mu-

nicipal assessments and to prohibit setting the same aside except for fraud, was not intended to repeal section 7552, authorizing an appeal from the confirmation of an assessment by the city council to the superior court, and does not affect such appeals or the procedure therein: *Real Estate Ins. Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057.

CHAPTER XXV.

FORECLOSURE OF SPECIAL ASSESSMENTS.

§ 7909.

This chapter is repealed. See L. '11, p. 481, § 71.

A city assessment foreclosure and sale, without notice to the owner, is void when conducted by the city attorney, who made no diligent effort to ascertain the name or address of the owner, and who has, through the instrumentality of a third person, bid in the property at a grossly inadequate price: *Roger v. Whitham*, 56 Wash. 190, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272, 105 Pac. 628.

As to nature of proceedings to collect improvement taxes, see note in 133 Am. St. Rep. 930.

§ 7922.

A city attorney is charged as a trustee, as well for the owner of property sought to be charged with the lien of a special assessment as for the city, and is bound to perform his full duty to each: *Roger v. Whitham*, 56 Wash. 190, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272, 105 Pac. 628.

CHAPTER XXVI.

DRAINAGE AND SEWERS IN CITIES OTHER THAN FIRST CLASS.

§ 7939.

This chapter is repealed. See L. '11, p. 481, § 71.

A municipal assessment for sewer purposes is to be based upon benefits received, under Laws of 1907, chapter 70, and not upon the last general assessment for city purposes, under Laws of 1903, chapter 27, which is superseded: *Stewart v. Chehalis*, 53 Wash. 213, 101 Pac. 841.

A finding that a sewer was constructed almost solely for the benefit of a hospital "and was not intended or expected to benefit, nor did it prove of any benefit to the said premises of the plaintiff up to the time of the trial," is insufficient to defeat the assessment on the ground that it was not made according to benefits to the property: *Stewart v. Chehalis*, 53 Wash. 213, 101 Pac. 841.

CHAPTER XXVII.

CONSTRUCTION OF DIKES.

§ 7955.

This chapter is repealed. See L. '11, p. 481, § 71.

An assessment levied by a city for the construction of a dike, under sections 7955-7964, upon property outside of the city is void, the city having no extraterritorial jurisdiction, in the absence of express statutory authority: *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192.

As to right of municipal corporation to exercise power of eminent domain without legislative authority, see note in Ann. Cas. 1912C, 199, also in 16 Ann. Cas. 886.

A city cannot acquire jurisdiction to levy an assessment on lands outside its limits by estoppel through the fact that the owner of the lands petitioned for the improvement, as the petition would not justify any proceeding in excess of the city's jurisdiction, especially where objection was duly made to the unwarranted action at the first opportunity: *Edmonds Land Co. v. Edmonds*, 66 Wash. 201, 119 Pac. 192.

As to location of improvement as affecting liability for expense thereof, etc., see note in 39 L. R. A., N. S., 290.

As to estoppel of land owner, see note in 28 L. R. A., N. S., 1204, and 36 L. R. A., N. S., 39.

CHAPTER XXIX.

FILLING LOW LANDS, SECOND AND THIRD CLASS CITIES.

§ 7971.

The act of 1909 empowering a city to fill low lands and assess the cost upon the lands filled in in proportion to the surface area is not a deprivation of property without due process, since it provides for notice and a hearing and authorizes the board to make alterations and modifications in the assessment as justice and equity may require: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

This section, for the filling of tide and swamp lands by cities, authorizes the assessment of property benefited thereby situated within the assessment district, although it was not part of the land filled in: *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

As to the location of improvement as affecting liability for expense thereof on division of territory of municipality, town or county, see note in 39 L. R. A., N. S., 290.

A necessity exists, authorizing the exercise of the police power by a city for the purpose of filling low lands, and the improvement is not disproportionate to the danger, where it appears that an area covering one thousand city lots, within or adjacent to the business portion of a city where permanent streets are necessary, are so low and covered with stagnant water as to be unsanitary and a serious menace to the health of the city, and that the danger can be removed by filling in the land, and by no other practical or economical method: *Bowers v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

In all matters pertaining to the public health and safety substantially the entire police power of the state is vested in municipal corporations of the first class: *Shepard v. Seattle*, 59 Wash. 363, 40 L. R. A., N. S., 647, 109 Pac. 1067.

The title of the act of 1909, empowering cities "to fill low lands . . . and for that purpose to exercise the right of eminent domain for the taking or damaging of property" is sufficiently broad to authorize the filling of low land under the police power as a sanitary measure without making compensation for damages claimed to the property filled in, since the reference to the right of eminent domain applies to property taken or destroyed and not to land filled in, and the power "to fill" includes the right to exercise the police power: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

An ordinance for a local improvement by filling tide lands is not invalid by reason of a recital that one of its purposes was for the "general improvement of the property," where it also appears that it was necessary to the public health, sanitation and general

welfare, within this section: *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

As to the benefit to public health as condition to power to exercise eminent domain for drainage of private lands, see note in 49 L. R. A. 783.

As to power of health authorities to require alterations in private property in a particular manner to abate conditions menacing public health, see note in 24 L. R. A., N. S., 241.

As to the meaning generally of "local improvement" for which special assessment may be levied, see note in 20 Ann. Cas. 339.

Whether the facts warrant the exercise of the police power for the purpose of filling low lands in a city is a judicial question to be resolved by the courts: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

The provision requiring a written permit from the city commissioners of health, in an ordinance prohibiting the maintenance of a private hospital for the treatment of the insane except under certain conditions, is not objectionable as an unreasonable exercise of the police power: *Shepard v. Seattle*, 59 Wash. 363, 40 L. R. A., N. S., 647, 109 Pac. 1067.

The act of 1909, empowering cities, in the exercise of the police power, to fill low lands, is not invalid or inconsistent in that it provides for compensation to the owners of buildings or improvements under the right of eminent domain, since the right of eminent domain and the police power rest in the control of the legislature and may be employed singly or together, and interested parties cannot object because compensated in any degree: *State ex rel. Stalling v. Aberdeen*, 58 Wash. 562, 109 Pac. 379.

As to the principles in law of eminent domain, see note in 13 L. R. A. 332.

As to expediency to exercise right of eminent domain a legislative question, see notes in 4 L. R. A. 785 and 7 L. R. A. 151.

As to drainage of land as public use for which property may be taken under right of eminent domain, see note in 20 Ann. Cas. 272.

§ 7973.

In proceedings by a city to fill low lands, the damages and expenses paid by the city in condemnation suits may be added to the costs of the improvement and assessed against the property in the district: *State ex rel. Stalling v. Aberdeen*, 58 Wash. 562, 109 Pac. 379.

As to the rule of apportionment of assessment for public improvement, see note in 8 L. R. A. 371.

§ 7975.

A city may, by virtue of the police power, in a proper case, and when necessary to the public welfare, irrespective of the right of eminent domain, fill in low lands that are unsanitary and a menace to health, without rendering compensation for damages claimed to private property filled in, and under this section may assess the property to pay the cost of the work, providing the exercise of the power is not unjust or arbitrary: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

As to the general nature of the police power of municipalities, see note in 104 Am. St. Rep. 638.

An assessment upon the property to pay for the cost of filling low lands "in proportion to the surface area," as authorized by this section, is not unreasonable or arbitrary, because not made according to benefits or in proportion to the value of the property; nor is the same void as authorizing unequal taxation, in violation of the constitution requiring property to be taxed according to its value, as that clause of the constitution does

not apply to special assessments: *Bowes v. Aberdeen*, 58 Wash. 535, 30 L. R. A., N. S., 709, 109 Pac. 369.

As to validity of special assessment levied by front-foot instead of according to benefits, see note in Ann. Cas. 1913A, 665.

§ 7976.

Under this and the next section the action of the city council is final as to all persons not objecting, in the absence of fraud or arbitrary action; hence a complaint to set aside an assessment by one who made no objections is insufficient where it alleges merely that the property was not benefited, without alleging any irregularity or any facts showing capricious or arbitrary action: *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

As to test of validity of ordinance as denying equal protection of laws, see note in 123 Am. St. Rep. 36.

As to estoppel of land owner to attack assessments for special benefits on ground that property is not benefited, see note in 36 L. R. A., N. S., 39.

§ 7987-1. Low Lands and Waterways—Assessments for Benefits.

Whenever the city council or commission of any city of the second or third class in this state shall deem it necessary or expedient on account of the public health, sanitation, the general welfare, or other cause, to fill or raise the grade or elevation of any marsh lands, swamp lands, tide lands or lands commonly known as tide flats, or any other lands situated within the limits of such city and to clear and prepare said lands for such filling, such city shall have power so to do; and for the purpose of filling and raising the grade or elevation of such lands, and to secure material therefor and to provide for the proper drainage thereof after such fill has been effected, the city council or commission of such city may, if it deems it advisable so to do, acquire rights of way (and where necessary or desirable, may vacate, use and appropriate streets and alleys for such purposes) and lay out, build, construct and maintain over and across such low lands, canals or artificial waterways of at least sufficient width, depth and length to provide and afford the quantity of earth, dirt and material required to complete such fill and with the earth, dirt and material removed in digging and constructing such canals and waterways, fill and raise the grade or elevation of such marsh lands, swamp lands, tide lands or tide flats; and such canals or waterways shall be constructed of such width and depth (provided that all the earth, dirt and other suitable material removed in constructing the same shall be used to fill the low lands as herein provided) as will make them available, convenient and suitable to provide water frontage for landings, wharves and other conveniences of navigation and commerce for the use and benefit of the city and the public; and when such canals or waterways shall have been constructed as herein provided, such city may construct and maintain the necessary bridges over and across the same; such canals or waterways shall be forever under the control of such city and shall be and become public thoroughfares and waterways for the use and benefit of commerce, shipping, the city and the public generally. The

expense of making such improvement and in doing, accomplishing and effecting all the work provided for in this act, including the cost of making compensation for property taken or damaged, and all other cost and expense incidental to such improvement, shall be assessed to the property benefited, except such amount of such expense as the city council or commission, in its discretion, may direct to be paid out of the current or general expense fund. Proceedings for the filling and for changing the grade and elevation of any such low lands may be had in the manner provided in this act. [L. '13, p. 30, § 1.]

§ 7987-2. Funds Applicable—Lands Excluded—Protests—Notice—Vote.

Whenever the city council or commission of any such city shall desire to make any improvement contemplated in the next preceding section, such city council or commission shall provide therefor by ordinance and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon the property benefited, compensation therefor shall be made from any general or special funds of such city applicable thereto. If such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessments upon property benefited, the proceedings for the making of such special assessment shall be as hereafter provided. Such ordinance shall specify the boundaries of the proposed improvement district and shall describe the lands which it is proposed to assess for said improvement, and shall provide for the filling of such low lands and shall outline the general scheme or plan of such fill. Where any parcel of land within the boundaries of such proposed improvement district shall, prior to the initiation of the improvement, be wholly filled to the proposed grade or elevation of the proposed fill, such parcel of land may be excluded from the lands to be assessed when in the opinion of the city council or commission justice and equity require its exclusion. The boundaries of any improvement district may be altered so as to exclude land therefrom at any time up to the levying of the assessment as in this act provided, but such changing of the boundaries shall be by ordinance. Upon the introduction of an ordinance providing for such fill, if the city council or commission shall desire to proceed with the filling of such low lands as in this act contemplated, said city council or commission shall fix a time, not less than ten days, in which protests against said fill may be filed in the office of the city clerk. Thereupon it shall be the duty of the clerk of said city to publish in the official newspaper of said city in at least two consecutive issues thereof before the time fixed for the filing of such protests, a notice of the time fixed for the filing of protests, together with a copy of the proposed ordinance as introduced. If protests against the proposed fill by the owners of more than half of the area of land situated within the proposed filing district exclusive of streets, alleys and public places, be filed on or before the date fixed for such filing, the council shall not proceed further with such work unless two-thirds of the members of the said council shall vote to proceed with such work, and if any such city is operating under the commission form of government composed of three commissioners, said commission shall not proceed further with such work except by a unanimous affirmative vote of all the members thereof; if such commission be composed of five members, then at least four affirmative votes thereof shall be necessary before proceed-

ing with such work. If no such protest shall be filed or if such protest be filed and two-thirds of the councilmen shall vote to proceed with such work or in cases where such cities are operating under the commission form of government, such commissioners shall vote unanimously or four out of five commissioners as above mentioned shall vote to proceed with such work, the said city council or commission shall at such meeting or in a succeeding meeting proceed to pass the proposed ordinance for the work, with such amendments and modifications as to the said city council or commission of said city may seem proper. By the provisions of such ordinance the local improvement district shall be called "Filling District No. ——" which shall include all property subject to assessment, and which it may be proposed to assess, and which may be properly included under the provisions of this act. [L. '13, p. 32, § 2.]

§ 7987-3. Eminent Domain—Fill not Damage—Benefits not Considered.

Whenever an ordinance shall be passed as in the preceding section of this act provided, and it shall appear that in making of such improvements so authorized, private property shall be taken or damaged thereby, the city shall file a petition in the superior court of the county in which such city is situated, in the name of the city, praying that just compensation to be made for the property to be taken or damaged for the improvement specified in such ordinance, be ascertained by a jury or by the court, in case a jury be waived, and all of the provisions of sections 7768 to 7822 of Remington and Ballinger's Annotated Codes and Statutes of Washington, and acts amendatory thereof shall be applicable to the proceeding had in the superior court under the provisions of this act for the ascertainment of the compensation to be made for the taking and damaging of property, except in so far as the same may be inconsistent with this act. The filling of unimproved and uncultivated low lands of the character mentioned in section 7987-1 shall not be considered as a damaging or taking of such lands. The damage, if any, done to cultivated lands or growing crops thereon, or to buildings and other improvements situated within the district proposed to be filled, shall be ascertained and determined in the manner above provided; but no damage shall be awarded to any property owner for buildings or improvements placed upon lands included within said district after the publication of the ordinance referred to in section 7987-2, defining the boundaries of the proposed improvement district: Provided, That the city shall after the passage of such ordinance, proceed with said improvement with due diligence. Where the improvement is to be made at the expense of the property benefited, no account shall be taken of benefits by the jury or court in assessing the amount of compensation to be made to the owner of any property within such district, but such compensation shall be assessed without regard to benefits to the end that said property for which damages may be so awarded, may be assessed the same as other property within the district for its just share, and proportion of the expense of making said improvement, and the fact that compensation has been awarded for the damaging or taking of any parcel of land shall not preclude the assessment of such parcel of land for its just proportion of said improvement as hereinafter provided. [L. '13, p. 34, § 3.]

§ 7987-4. Plans—Estimate.

At the time of the initiation of the proceedings for any improvement as contemplated by this act or at any time afterward, the city council or commission of such city shall cause plans and specifications for said improvement to be prepared and shall cause an estimate to be made of the cost and expense of making said improvement, including the cost of supervision and engineering, abstractor's fees, interest and discounts and all other expenses incidental to said improvement, including an estimate of the amount of damages for property taken or damaged, which plans, specifications and estimates shall be approved by the city council or commission. [L. '13, p. 35, § 4.]

§ 7987-5. Assessment-roll.

When such plans and specifications shall have been prepared and such estimate of the cost and expense of making such improvement shall be made and adopted by the city council or commission, as set out in the preceding section, and when an estimate has been made of the compensation to be paid for property damaged or taken, either before or after such compensation shall be ascertained in the said superior court as hereinbefore provided, the city council or commission through the proper office or officers, of such city, shall cause an assessment-roll to be prepared containing a list of all the property within said improvement district which it is proposed to assess for such improvements, together with the names of the owners, if known, and if unknown, the property shall be assessed to an unknown owner, and opposite each description shall be set the amount assessed to such description. When so ordered by the said city council or commission, the entire amount of compensation paid or to be paid for property damaged or taken, including all of the costs and expenses incidental to the condemnation proceedings and together with the entire cost and expense of making the improvement may be assessed against the property within the district subject to assessment, but the city council or commission may order any portion of such costs paid out of the current or general expense fund of the city, in their discretion. The several parcels of land located within said improvement district to be assessed for such improvement shall be assessed according to and in proportion to surface area, one square foot of surface to be the unit of assessment: Provided, That where any parcel of land was wholly or partially filled by the owner prior to the initiation of the improvement an equitable deduction for such filling or partial filling may be allowed. The cost and expense incidental to the filling of the streets, alleys and public places within said assessment district shall be borne by the private property within such district subject to assessment when so ordered by the city council or commission. When the assessment shall be payable in installments, the assessment-roll when equalized, as hereinafter provided, shall show the number of installments and the amounts thereof. The assessment herein provided may be made payable in any number of equal annual installments not exceeding fifteen in number. [L. '13, p. 35, § 5.]

§ 7987-6. Notice and Hearing of Protests.

When such assessment-roll shall be so prepared it shall be filed in the office of the city clerk and thereupon it shall be the duty of the city clerk to give notice by publication in at least three issues of the official paper that

such roll is on file in his office and that at a date mentioned in said notice, which shall be at least twenty days after the date of the first publication thereof, the city council or commission of such city will sit as a board of equalization to equalize said roll and to hear, consider and determine protests and objections against the same. At the time specified in said notice, the city council or commission of said city shall sit as a board of equalization to equalize the said roll and they may adjourn the sitting from time to time until the equalization of such roll is completed. The city council or commission shall have power as such board of equalization to hear, consider and determine objections and protests against any assessment levied under the provisions of this act and shall have power as such board to make such alterations and modifications in the assessment-roll as justice and equity may require. [L. '13, p. 36, § 6.]

§ 7987-7. Appeals to Superior Court—Judgment.

Any person who has made objections to the assessment as equalized, shall have the right to appeal from the equalization as made by the city council or commission to the superior court of the county in which such city may be situated. Such appeal shall be made by filing a written notice of appeal with the clerk of such city within ten days after the equalization of said assessment by the council or commission, and said notice shall describe the property and the objections of such appellant to such assessment; and the appellant shall also file with the clerk of the superior court aforesaid within ten (10) days from the time of taking such appeal a copy of said notice, appeal, assessment and proceedings thereon, certified by the clerk of such city, together with a bond to such city conditioned to pay all costs that may be awarded against appellant in such sums not less than two hundred dollars and with such security as shall be approved by the clerk of such court, and the case shall be docketed by the clerk of such court in the name of the person taking such appeal as plaintiff, and such city or town as defendant. Said cause shall then be at issue and shall be tried immediately by such court as in the case of equitable causes, except that no further pleadings shall be necessary. The judgment of the court shall be either to confirm, modify or annul the assessment in so far as the same affects the property of the appellant with respect to which the appeal was taken, from which judgment an appeal shall lie to the supreme court as in other causes. [L. '13, p. 37, § 7.]

§ 7987-8. Assessments—How Collected.

From and after the equalization of the roll, the several assessments in such roll contained shall become a lien upon the real estate described in such roll, and shall remain such lien until paid, and such lien shall take precedence of all other liens against such property, except the lien of general taxes. The assessments herein provided for shall be collected by the same officers and enforced in the same manner as now provided by law or which may be hereafter enacted for the collection and enforcement of local assessments for street improvements of the class herein described, and all of the provisions of existing laws and ordinances relative to the enforcement and collection of local assessments for street improvements including the certification of delinquent assessments to the county treasurer and the issuance and foreclosure of cer-

tificates of delinquency, shall be applicable to the assessments made pursuant to this act. [L. '13, p. 38, § 8.]

§ 7987-9. Immediate Payment Plan.

When the improvement contemplated by this act shall be ordained to be made upon the immediate payment plan, the city council or commission shall provide for the payment of the same by the issuance of local improvement fund warrants against the local improvement district, which warrants shall be paid only out of the funds derived from the local assessments in the district. When such improvements shall be ordered to be made upon the bond installment plan, the city council or commission shall provide for the issuance of bonds against the improvement district as hereinafter provided. [L. '13, p. 38, § 9.]

§ 7987-10. Bonds—Guaranty.

When it is desired to issue bonds against any such improvement district, the city council or commission shall have full authority to provide for the issuance of such bonds. Such bonds may be in such denominations as the city council or commission may provide, and shall bear such rate of interest as the city council or commission may fix, not exceeding, however, eight per centum per annum; interest shall be paid annually and said bonds shall become due and payable at such time, not exceeding fifteen years from the date thereof, as may be fixed by the said council or commission and shall be payable out of said local assessment district funds. If so ordered by the council or commission, such bonds may be issued in such a way that different numbers of said bonds may become due and payable at different intervals of time, or they may be so issued that all of the bonds against said district shall mature together. The city, however, may reserve the right to call or mature any bond on any interest-paying date when sufficient funds are on hand for its redemption; but bonds shall be called in numerical order. The city council or commission of any such city shall have authority for and on behalf of such city to guarantee the payment of the whole or any part of the bonds so issued against any such local improvement district, but such guaranties on the part of the city shall only be made by ordinance duly enacted, the passage of which ordinance shall require the vote of not less than two-thirds of the councilmen and the approval of the mayor, or three commissioners in case the governing body consists of three commissioners, or four where such city is governed by five commissioners. The city council or commission shall have power to enact all ordinances necessary for the issuance of the bonds herein provided for, and to give full force and effect to this act. [L. '13, p. 38, § 10.]

§ 7987-11. Minimum Price of Bonds.

The city council or commission of any such city shall have power to negotiate sufficient warrants or bonds against any such local improvement district at a price not less than ninety-five per cent of their par value as may be necessary to raise sufficient money to pay any and all compensation which may be awarded for property damaged or taken in the judicial proceedings hereinbefore mentioned, including the costs of such proceedings; but in lieu of so doing, the city council or commission shall have power to negotiate current or general expense fund warrants at par to raise funds for the payment of

such compensation and expenses in the first instance, but in that event the current or general expense fund shall be reimbursed out of the first moneys collected in any such local assessment district or realized from the negotiation or sale of local improvement warrants or bonds. [L. '13, p. 39, § 11.]

§ 7987-12. Interest.

The local assessments herein provided for shall bear interest at such rate as may be fixed by the council or commission, not exceeding the rate of eight per centum per annum from and after the expiration of thirty days after the equalization of the assessment-roll and shall bear such interest after delinquency as may be provided by general ordinance of the city: Provided, That such assessment shall bear interest at the rate of fifteen per cent per annum from and after the date of the certification of such assessments to the county treasurer of the county, as in cases of local street assessments. Warrants drawn against any such local improvement districts shall bear interest from the date of issuance at the rate of eight per centum per annum. [L. '13, p. 40, § 12.]

§ 7987-13. Contract—Rebates—Supplemental Assessment.

The contract for the making of any improvement as contemplated by this act may be let either before or after the making up of the equalization of the assessment-roll, and special fund warrants or bonds may be issued against said local improvement district, either before or after the equalization of the roll as in the judgment of the council or commission may best subserve the public interest. When the assessment-roll is made up and equalized, based in whole or in part upon an estimate of the cost of the improvement and it shall be later found that such estimate was too high, the excess shall be rebated pro rata to the property owners on the assessment-roll, such rebates to be deducted from the last installment, or installments, when the assessment is upon the installment plan. When it is found that the estimated cost was too low and that the actual bona fide cost of the improvement is greater than the estimate, the city council or commission after due notice and a hearing, as in case of the original equalization of the roll, may add the required additional amount to the assessment-roll to be apportioned among the several parcels of property upon the same rules and principles as if it had been originally included, except that such additional amount shall be added to the last installment of such assessment in case such assessment be upon the installment plan. The same notice shall be required for adding to the assessment-roll in this manner as is required for the original equalization of the roll, and the property owner shall have the right of appeal. [L. '13, p. 40, § 13.]

§ 7987-14. Contractor to Accept Bonds or Warrants.

The city council or commission in its discretion may provide in letting the contract for any such improvement, that the contractor shall accept special fund warrants or local improvement bonds against the local improvement district within which such improvement is to be made, in payment for the contract price of such work, and that such warrants or bonds may be issued to the contractor from time to time as the work progresses, or the city council or commission may negotiate such special fund warrants or bonds against such local improvement district at not less than ninety-five cents in money for

each dollar of warrants or bonds, and with the proceeds of such sales pay the contractor for such work and pay the other costs of such improvement. [L. '13, p. 41, § 14.]

§ 7987-15. Surplus Funds Invested.

Whenever money shall accumulate in any such improvement fund and is likely to lay idle awaiting the maturity of the bonds against the district, the city council or commission, under proper safeguards, may invest such money temporarily, or may borrow the same temporarily, at a reasonable rate of interest, but when so invested or borrowed, the city shall be responsible and liable for the restoration to such fund of the moneys so invested or borrowed from any such fund, with interest thereon, whenever required for the redemption of bonds maturing against such district. [L. '13, p. 41, § 15.]

§ 7987-16. Reassessments.

In case any assessment made under the provisions of this act should be found to be invalid for any cause or in case the same should be set aside for any reason in any judicial proceeding, then a reassessment may be made and all laws now in force or which may be hereafter enacted relative to the reassessment of local assessments, for street or other improvements, shall, as far as practical, be applicable hereto. [L. '13, p. 41, § 16.]

§ 7987-17. Waterways—Construction of—Contract.

When the filling of any marsh land, swamp land, tide land or tide flats shall result in the construction and completion of any canal or waterway as contemplated in this act, the same shall not be constructed less than three hundred feet wide at the top between the shore lines and with sufficient slope to the sides or banks thereof to as nearly as practicable render bulkheadings or other protection against caving or falling in of said sides or banks unnecessary and of sufficient depth to meet all ordinary requirements of navigation and commerce. Such canal or waterway shall be and remain under the control of the city except as herein provided, and immediately upon the completion of the same the city shall establish outer wharf and dock lines lengthwise of said canal or waterway on both sides thereof in such manner and position that not less than two hundred feet of the width thereof shall always remain open between such lines and beyond and between which lines no right shall ever be granted to build docks, wharves or other obstructions except bridges; nor shall any permanent obstruction to the free use of the channel so laid out between said wharf or dock lines, excepting bridges, their approaches, piers, abutments and spans, ever be permitted but the same shall be kept open for navigation. Such city shall have the right to lease the area so created between the said shore lines and the wharf and dock lines so established or any part, parts or parcels thereof during times when the use thereof is not required by the city, for periods not exceeding thirty years, to private individuals or concerns for dock, wharf, warehouse or manufacturing purposes at such annual rate or rental per lineal foot of frontage on the canal or waterway as it may deem reasonable. The rates of wharfage, dockage and other charges to the public which such lessee may impose shall be reasonable; and the city council or commission may regulate such rates. The lease so granted by the city shall never be transferred or assigned without the consent of the city

council or commission having been first obtained; and when at the time of granting such leases the city shall own the land abutting upon the shore line and outside of such canal or waterway at any given point then the said area lying between the shore line and the said wharf or dock line at that point shall never be leased unless an equal frontage of said abutting property immediately adjoining the same is leased at the same time for the same period to the same individual or concern: Provided, That such city shall never lease to any individual or concern more than four hundred (400) lineal feet of frontage of such area lying between the shore lines and the wharf or dock lines and no individual or concern shall ever hold or occupy by lease, sublease or otherwise more than the said four hundred (400) lineal feet of frontage of such area: Provided, however, That any individual or concern may acquire by lease or sublease whatever additional number of lineal feet of frontage of such area may in the judgment of the city council or commission be necessary for the use of such individual or concern, upon petition therefor to the city council or commission signed by not less than five hundred (500) resident freeholders of said city. [L. '13, p. 42, § 17.]

§ 7987-18. Acquisition of Abutting Lands—Lease of Dock Sites.

While acquiring the rights of way for such canals or waterways or at any time thereafter such city shall have the right to acquire for its own and for public use, by purchase, gift, condemnation or otherwise, and pay therefor out of the current expense fund of such city or by bonding the city or by pledging revenues to be derived from rents and issues of the lands so acquired or through such other means as may be provided by law, lands abutting upon the shore lines or right of way of such canals or waterways to a distance, depth or width of not more than three hundred (300) feet back from the banks or shore lines of such canals or waterways on either side or both sides thereof, or not more than three hundred (300) lineal feet back from and abutting on the outer lines of such rights of way on either side or both sides of such rights of way, and such area of such abutting lands as the council or commission may deem necessary for its use for public docks, bridges, wharves, streets and other conveniences of navigation and commerce and for its own use and benefit generally; and when the said cities are not using said lands they shall have the right to lease the said abutting lands so acquired or such parts or parcels thereof as may be deemed for the best interest and convenience of navigation, commerce and the public interest and welfare to private individuals or concerns for terms not exceeding thirty years each at such annual rate or rental as the city council or commission of such city may deem just, proper and fair, for the purpose of erecting docks and wharves for wholesale and retail warehouses and for general commercial purposes and manufacturing sites, but the said city shall never convey or part with title or control of the abutting lands above mentioned and so acquired other than in the manner herein specified: Provided, That any lease or leases granted by such city on such abutting lands shall never be transferred or assigned without the consent of the city council or commission having been first obtained. And such city shall never lease to any individual or concern more than four hundred (400) lineal feet of canal or waterway frontage of said land and no individual or concern shall ever hold or occupy by lease, sub-

lease, or otherwise more than the said four hundred (400) lineal feet of said frontage: Provided, however, That any individual or concern may acquire by lease or sublease whatever additional frontage of such abutting land may be in the judgment of the city council or commission necessary for the use of such individual or concern, upon petition presented to the city council or commission therefor signed by not less than five hundred (500) resident freeholders of such city; and at the time that the city shall lease to any individual or concern any of such abutting lands such individual or concern must likewise for the same period of time lease all of the area between the shore line and wharf and dock line of such canal or waterway lying contiguous to and immediately in front of the abutting land so leased. [L. '13, p. 43, § 18.]

§ 7987-19. Tax Levy—Special Fund.

For the purpose of raising revenues to carry on any project under this act, excepting the actual filling of such marsh lands, low lands, swamp lands, tide lands or tide flats, but including funds for the payment for lands taken, purchased, acquired or condemned and the expenses incident to the acquiring thereof, or any other cost or expenses incurred by the city under this act other than the cost of actually filling such lands, any such city is hereby empowered and authorized to levy an annual tax of not exceeding three (3) mills on each dollar of assessed valuation of all property within the city. The city council or commission of any such city may create a fund into which all moneys so derived from taxation and moneys derived from rents and issues of the lands acquired under and by virtue of this act shall be paid and against which special fund warrants may be drawn or negotiable bonds issued to meet expenditures under this act. [L. '13, p. 45, § 19.]

§ 7987-20. Work Done by Contract—Day Labor.

When such city shall undertake any improvement authorized by this act and the expenditures required for the same exceed the sum of five hundred dollars, the same shall be done by contract and shall be let to the lowest responsible bidder, after due notice, under such regulation as may be prescribed by ordinance: Provided, That the city council or commission may reject all bids presented and readvertise in their discretion, or, if in the judgment of the city council or commission such work can be performed, or supplies or materials furnished by the city independent of contract, cheaper than under the bid submitted, it may after having so advertised and examined the bids, cause such work to be performed or supplies or material to be furnished independent of contract. This section shall be construed as a concurrent and cumulative power conferred on such cities and shall not be construed as in any wise repealing or affecting any law now in force relating to the performing, execution and construction of public works. [L. '13, p. 45, § 20.]

§ 7987-21. Eminent Domain—Lands Outside City.

The right of eminent domain is hereby extended to any such city of the second or third class for the condemnation of lands and other property, either within or without the corporate limits of such city, for the purpose of filling and draining such marsh lands, swamp lands, low lands, tide lands, or tide flats and in so doing constructing said canals or waterways as contemplated in

this act; and every such city shall have the right to appropriate real estate or other property for the rights of way of such canals or waterways or whatever property is necessary to be appropriated or damaged for the construction thereof, and the filling and draining of such marsh lands, low lands, swamp lands, tidelands or tide flats and for other uses provided for in this act; and all the provisions of sections 7768 to 7822 of Remington and Ballinger's Annotated Codes and Statutes of Washington, and acts amendatory thereof shall be applicable and used in appropriating and damaging lands as contemplated by this section except in so far as the same may be inconsistent with this act; and the right of eminent domain authorized by this section shall be exercised in the same manner and under the same procedure as is authorized by said sections 7768 to 7822, and acts amendatory thereof. [L. '13, p. 45, § 21.]

§ 7987-22. Act Concurrent.

This act shall not be construed as repealing or in any wise affecting Remington and Ballinger's Code, sections 7971 to 7987, or any other existing laws relative to the making of any such improvements as are embraced within this act, but this act shall be considered as concurrent with such existing laws. [L. '13, p. 46, § 22.]

CHAPTER XXXII.

ACCIDENT CLAIMS AND FUNDS.

§ 7995.

A charter provision requiring claims to be filed with the city council for injuries to the person caused by defects, want of repair, or obstructions in streets, does not apply to a claim against a city for negligently allowing an electric light pole to fall upon a servant of the city grading a street, as the provisions must be strictly construed, and not extended beyond its terms: *Giuricevic v. Tacoma*, 57 Wash. 323, 28 L. R. A., N. S., 533, 106 Pac. 908.

As to inclusion of claim for tort in statute requiring "claim" or "demand" against municipality to be presented to council, see note in 19 Ann. Cas. 1113. See, also, notes in 38 L. R. A., N. S., 1136 and 39 L. R. A., N. S., 1045.

As to rule of notice of defects or injury and its application to case of city's employees, injured through city's alleged negligence, see note in 28 L. R. A., N. S., 533.

The charter of Spokane requiring all claims for damages for personal injuries or for injuries to property, sustained by reason of the negligence of the city, to be filed with the city clerk within one month, applies to claims for damages to lots by reason of the negligent removal of lateral support in grading a street: *Smith v. Spokane*, 54 Wash. 276, 102 Pac. 1036.

As to municipal liability for removal of lateral or subjacent support of plaintiff's land, see note in 68 L. R. A. 698.

A charter provision requiring notice of claims to be filed with the city council for injuries to the person caused by defects,

want of repair, or obstructions in streets, has no application to injuries to a servant of the city injured by reason of the city's failure to furnish a safe place to work, as the city is presumed to have notice of injury to its servants, and the purpose of the provision is to give notice of spurious claims: *Giuricevic v. Tacoma*, 57 Wash. 329, 28 L. R. A., N. S., 533, 106 Pac. 908.

As to liability of municipality for defect in street as dependent on notice or knowledge, when statute makes municipality liable for failure to repair, see note in Ann. Cas. 1913A, 691.

A claim against a city for personal injuries to a married woman need not be signed by the husband: *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

A claim for damages sufficiently locates and describes the defect, where it describes a hole in a certain street "lying in front of the new ferry slip," and that plaintiff fell into a hole as she went from the ferry slip to said street, since the hole previously described is evidently intended: *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

Where a claim against a city for personal injuries makes no mention of injury to her eyesight, although alleged in the complaint, plaintiff cannot recover therefor, when the claim was filed twenty-one days after the injury and she testifies that she knew her eyesight was injured within five days after the accident: *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091.

A claim against a city for personal injuries to plaintiff's "limbs, side, back, and

neck," admits of evidence of a goiter that developed subsequently and by reason of the accident where the ultimate result could not be known at the time of the accident, and the defendant had ample opportunity to investigate and claimed no surprise: *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914.

The requirement of a city charter that claims for personal injuries shall be filed within thirty days and shall state the nature and extent of the injuries and the amount of the claim is for the purpose of giving timely notice, and does not preclude a recovery for additional injurious results that have developed since the claim was filed and were not known or anticipated at the time: *Pierce v. Spokane*, 59 Wash. 615, 110 Pac. 537.

Under a claim against a city for personal injuries alleging that plaintiff was greatly bruised and injured and her whole right side paralyzed, and that she suffered great pain under her kidney, it is permissible to show injuries to the right shoulder and back: *Horton v. Seattle*, 61 Wash. 301, 112 Pac. 366.

A complaint in an action against a city for personal injuries fails to state that the claim required by charter provisions was filed with the city council, as against a demurrer, where it merely alleges that the plaintiff caused the city and its officers and agents to be fully informed of the time, place, cause, etc., of the injury: *Giuricevic v. Tacoma*, 57 Wash. 329, 28 L. R. A., N. S., 533, 106 Pac. 908.

It is a reasonable and valid requirement that claims against a city for personal injuries shall be in writing and verified with the city clerk within thirty days; and the same is not excused or substantially complied with by a verbal notice to other officers, or by the statement of an officer that he would report the claim to the city council, or that a letter to a councilman was not answered or objected to: *Cole v. Seattle*, 64 Wash. 1, Ann. Cas. 1913A, 344, 34 L. R. A., N. S., 1166, 116 Pac. 257.

An ordinance of a city requiring officers to investigate and report all claims or demands against the city that come to their knowledge does not excuse a claimant from filing a verified claim with the city clerk after bringing it to the notice of an officer of the city: *Cole v. Seattle*, 64 Wash. 1, Ann. Cas. 1913A, 344, 34 L. R. A., N. S., 1166, 116 Pac. 257.

The requirement that a claim against a city must be presented to the city council before action brought cannot be waived by any officers of the city other than the city council: *Cole v. Seattle*, 64 Wash. 1, Ann. Cas. 1913A, 344, 34 L. R. A., N. S., 1166, 116 Pac. 257.

This section has no application to claims as to which the city charter did not require any notice or demand: *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113.

The charter of the city of Spokane providing that all claims for damages for personal injuries alleged to have been sustained by reason of the negligence of the city or any officer, agent or servant thereof, be presented to the city council, has no application to claims arising out of the relation of master and servant and the failure of the city to furnish a servant with a safe place to work: *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113.

As to the duty of master to furnish safe appliances and places for servant, see note in 33 Am. St. Rep. 766.

As to sufficiency of notice under employer's liability act, see note in 21 L. R. A., N. S., 233.

A claim against a city "accurately describes" the injury, within the requirements of a city charter, so as to admit proof of a sprained ankle causing permanent injuries, where it alleges that claimant's leg was fractured and bruised necessitating a surgical operation and that claimant will be disabled many months: *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

A claim by a husband and wife for personal injuries to the wife, required to be sworn to by the "claimant," may be sworn to by either, the wife being a proper party under section 182, and therefore a claimant: *James v. Seattle*, 68 Wash. 359, 123 Pac. 472.

Where a city ordinance provided that claims for personal injuries by reason of the city's negligence must be presented within thirty days, and that if the injury was caused by the existence of snow or ice or by reason of such place being out of repair, unsafe, or obstructed, the first provision relates to continuous negligence which the city could have provided against, and the latter provision refers only to temporary and quickly changing conditions; and hence thirty days is allowed for notice of an injury by reason of trapdoors being left partially open in a place where pedestrians "usually and continuously passed to and fro and over and in so passing walked continuously over and across said doors": *Connolly v. Spokane*, 70 Wash. 160, 126 Pac. 407.

This section requiring claims against a city for personal injuries to be filed within thirty days, giving the residence of the claimant, specifying the items of damage, and verified, is mandatory, and an action cannot be maintained unless the claim complies with all the requirements: *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58.

In such a case, notice to the city officers by a claimant resident in the city cannot take the place of the claim required to be filed with the city clerk: *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58.

Seattle charter, article 4, section 29, providing that all claims for damages against the city must be presented to the city council and filed with the city clerk within thirty

days after the time when such claim for damages, accrues, all such claims to accurately locate and describe the defect that caused the injury, applies to actions for damages arising ex contractu as well as ex delicto, and bars an action for damages by a contractor for expense incurred and loss of profits through breach of contract, where no claim therefor was filed within the time limit: *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152.

This section, requiring a claim in tort against a city to state the claimant's residence by street and number, at the time of filing of the claim, and for six months prior to its accrual, is reasonable: *Collins v. Spokane*, 64 Wash. 153, 35 L. R. A., N. S., 840, 116 Pac. 663.

An answer admitting the filing and rejection of a claim against a city and denying all other allegations does not waive the objection that the claim filed was insufficient: *Collins v. Spokane*, 64 Wash. 153, 35 L. R. A., N. S., 840, 116 Pac. 663.

The fact that a claimant's residence was known to the city officials and the claim rejected on its merits does not excuse the statement of such residence in a claim against the city, as required by statute: *Collins v. Spokane*, 64 Wash. 153, 35 L. R. A., N. S., 840, 116 Pac. 663.

Objection to the sufficiency of a claim against a city need not be taken by plea in abatement, as the statute requiring the filing of the claim is mandatory and compliance is a condition precedent which must be alleged and proved: *Collins v. Spokane*, 64 Wash. 153, 35 L. R. A., N. S., 840, 116 Pac. 663.

§ 7999.

Sections 7999-8001, authorizing cities to create an accident fund, and directing a payment of personal injury judgments therefrom, affects only the remedy, and is applicable to existing judgments for which no warrants were drawn when the law went into effect: *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501.

CHAPTER XXXIII.

PUBLIC UTILITIES, ACQUISITION OF, AND BONDS FOR.

§ 8005. Public Utilities—Authority to Acquire and Operate.

Any incorporated city or town within the state be, and hereby is, authorized to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate waterworks, within or without its limits, for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with an ample supply of water for all uses and purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution and price thereof; to construct and maintain systems of sewerage, and systems and plants for refuse collection and disposal, with full jurisdiction and authority to manage, regulate and control the same within and without the limits of the corporation; to construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the preparation and manufacture of all such stone or asphalt products or compositions or other materials which may be used in street construction or maintenance, together with the right to use the same, and also to fix the price of and to sell the same for use in the construction of municipal improvements of such city or town; to construct, acquire and operate public markets and one or more cold storage plants for the sale and preservation of butter, eggs, meats, fish, fruits, vegetables, and other perishable provisions; and to construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes, public and private, with full authority to regulate and control the use, distribution and price thereof, together with the right to handle and sell, or lease, any meters, lamps, motors, transformers and equipment or accessories of any and every kind,

necessary and convenient for the use, distribution and sale thereof; to authorize the construction of such plant or plants by others for the same purpose, and to purchase such gas, electricity or power from others either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within such city or town, and to regulate and control the use and price thereof; to construct, condemn and purchase, purchase, acquire, add to, maintain, operate or lease cable, electric and other railways within the limits of such city or town for the transportation of freight and passengers above, upon or underneath the ground, with full authority to regulate and control the use and operation thereof, and to fix, alter, regulate and control the fares and rates to be charged thereon; and for the purposes aforesaid, it shall be lawful for any city or town in this state to take, condemn, and purchase, purchase, acquire and retain water from any public or navigable lake or watercourse percolating or subterranean, or any underflowing water within the state, and, by means of aqueducts or pipe-lines, to conduct the same to said city or town; and such city or town is hereby authorized and empowered to erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the purpose of storing and retaining water therein up to and above high-water mark; and for all the purposes of erecting such aqueducts, pipe-lines, dams, or waterworks or other necessary structures in storing and retaining water, as above provided, or for any of the purposes provided for by this act, such city or town shall have the right to occupy and use the beds and shores up to the high-water mark of any such watercourse or lakes, and to acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easements or privileges named in this act, or necessary for any of said purposes, and any such city or town shall have the right to acquire by purchase or by condemnation and purchase any lands, properties or privileges necessary to be had to protect the water supply of such city or town from pollution: Provided, That should private property be necessary for any such purposes or for storing water above high-water mark, such city or town may condemn and purchase, or purchase and acquire such private property: And provided further, That no such dam or other structure shall impede, obstruct or in any way interfere with public navigation of such lake or watercourse. [L. '13, p. 112, § 1.]

Under this section authorizing cities to condemn property for lighting, heating, and power purposes, "public and private," the word "private" will be eliminated as a nullity, as it is not so commingled with the public uses that they cannot be separated, and the remainder of the act is constitutional as a complete act capable of execution in accordance with the legislative intent: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

This section, authorizing cities to condemn for public purposes "works, plants, and facilities," either expressly or by necessary implication grants the right to acquire works and plants of private corporations already devoted to a public use: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

As to right of eminent domain as applied to property already devoted to public or quasi-public use, see note in 13 L. R. A. 432. See, also, notes in 3 L. R. A. 832; 7 L. R. A. 766; 58 L. R. A. 244; 60 L. R. A. 198; 66 L. R. A. 897.

This section, giving to cities the right to occupy and use the beds and shores of lakes up to the high-water mark, does not mean the highest water reached during annual flood periods, but means the upland boundary of tide and shore lands separating soil adapted for use from that which is submerged so long or frequently in ordinary seasons that vegetation will not grow upon it: *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59.

§ 8006.

Under Ballinger's Code, section 1077, requiring a town to sell bonds issued for the purpose of purchasing waterworks, as deemed for the best interests of the town, the town has no authority to issue bonds and deliver them to bankers who advanced

the money to purchase the waterworks at the special instance and request of the town: *Hansard v. Green*, 54 Wash. 161, 132 Am. St. Rep. 1107, 24 L. R. A., N. S., 1273, 103 Pac. 40.

As to implied authority of municipality to borrow money and issue bonds, see note in 51 Am. St. Rep. 830.

§ 8010-1. Acquisition of Water for Irrigation and Domestic Use.

That all cities and towns within the state, other than cities of the first class, situated within the limits of any irrigation project owned and operated by the United States government, any water users' association, private individuals or corporation, where the water used for irrigation and domestic purposes is appurtenant or may become appurtenant to the land embraced within the limits of any such city or town are hereby authorized to purchase, contract for and acquire water for the purpose of furnishing said city or town and the inhabitants thereof with a supply of water for irrigation and domestic purposes, and may do so either by the entire city or town or by assessment districts as the mayor and council of said city or town may determine. [L. '11, p. 510, § 1.]

§ 8010-2. Submission.

Whenever the city council of any city or town shall deem it advisable that the city or town of which they are officers, should purchase a water right for said city or town and provide a piping system for the proper distribution of said water to the inhabitants thereof, the city or town council may provide therefor by ordinances, which shall specify and adopt the system or plan proposed, the amount of water measured in second-feet that it is possible to purchase, the cost thereof, together with the estimated cost as near as can be of the construction of a piping system, and the same shall be submitted for ratification or rejection to the qualified voters of said city or town at the general or special election, and for the purpose of providing for constructing and maintaining such water system for irrigation and domestic purposes, and issuing bonds to pay therefor, such cities and towns are hereby authorized to proceed in all ways in accordance with and apply all provisions of Remington and Ballinger's Code, sections 8005-8010. [L. '11, p. 511, § 2.]

§ 8010-3. City Engineer to Prepare Plans.

If the city or town council should decide to construct said piping system for the distribution of water under the provisions of this act, by the establishment and creation of assessment districts, then before any contract shall be let for such construction the mayor and council shall by ordinance or resolution adopt the plans therefor, which shall be prepared by the city engineer, and shall fix and establish tax assessment districts and such cities and towns are hereby authorized to charge the expenses of such waterworks for irrigation and domestic purposes to all the property included within such district which is contiguous or approximate to any street in which any main or lateral pipe of such waterworks is for irrigation and domestic purposes to be placed, and to levy special taxes upon such property to pay therefor, which assessment and tax shall be levied in accordance with the last general assessment of the property within said district for city purposes. [L. '11, p. 511, § 3.]

§ 8010-4. Procedure.

That for the purpose of providing for the establishment of such water system for irrigation and domestic purposes, for the establishment and creation of assessment districts, for the issuing of bonds to pay therefor, for the collection of all assessments and the enforcement of any lien created by this act, such cities and towns are hereby authorized to proceed in all ways in accordance with and to apply all provisions of any statute now in force or that may hereafter be enacted relative to local improvements: Provided, however, Such statute appertains to such cities or towns. [L. '11, p. 512, § 4.]

§ 8010-5. Rental.

The annual rental for the use of said water for irrigation and domestic purposes shall be fixed by the city or town council and the charges so fixed shall constitute a lien against the premises so furnished as provided by law. [L. '11, p. 512, § 5.]

§ 8010-6. Surplus.

Any city or town owning or operating its own gas, water, or electric plant shall have the right to dispose of any surplus gas, water or electricity, remaining after the wants of the inhabitants thereof have been supplied. [L. '11, p. 512, § 6.]

§ 8010-7. Conduits and Transmission Lines.

For the purpose of carrying out the provisions of section 8010-6 any municipality intending to make such purchase shall have authority to build and construct and maintain all necessary conduits and transmission lines from the boundaries of such municipality to the boundary of such city or town selling such surplus products. [L. '11, p. 512, § 7.]

CHAPTER XXXV.

LOCAL IMPROVEMENT BONDS.

§§ 8018-8028.

Repealed. See L. '11, p. 481, § 71.

CHAPTER XXXVII.

INDEBTEDNESS AND FUNDING BONDS.

§ 8043-1. Special Election—Time for Voting.

At any special election held in any city for the purpose of submitting to the qualified electors any proposition or propositions to incur municipal indebtedness and to issue negotiable bonds therefor, the polls shall open and close at the same hours fixed by the laws of the state of Washington for the opening and closing of the polls at elections where national, state, county or municipal officers are elected, any provision in the charter of any such city to the contrary notwithstanding. [L. '11, p. 110, § 1.]

CHAPTER XL.

POLICE PENSION FUND.

§ 8078. Police Pension Board—Duties.

The mayor, clerk, treasurer, president of the city council of each of the incorporated cities of the first class of the state of Washington, or in case any of said cities has no city council, the commissioner who has supervision of the police department, together with three members of the police department of each of said cities, to be elected as hereafter provided, are, in addition to the duties now required of them, hereby created and constituted a board of trustees, of the relief and pension fund of the police department of each of said incorporated cities, and shall provide for the disbursement of the said relief and pension fund, and shall designate the beneficiaries thereof, as hereafter directed, which said board shall be known as the board of police pension fund commissioners. The police department of each incorporated city of the first class in the state of Washington, shall elect three regularly appointed, qualified and acting members of said department to act as members of said board; said election shall be held every two years, at the times and in the manner in this section provided. Not more than thirty nor less than fifteen days preceding the date fixed by law for the regular election of the mayor of such cities, written notice of nomination of any member of said department for membership on said board may be filed with the secretary of said board. Each notice of nomination shall be signed by not less than five members of said department, and nothing herein contained shall prevent any member of said department from signing more than one notice of nomination. Said election shall be held on a date to be fixed by the secretary of said board and shall be not less than five days and not more than ten days before the date fixed by law for the election of the mayor as aforesaid. Notice of the dates upon which said notice of nominations may be filed and of the date fixed for the election of said members of said board shall be given by the secretary of said board by posting written notices thereof in a prominent place in the police headquarters of said city. For the purpose of said election, the secretary of said board shall prepare and furnish printed or typewritten ballots in the usual form, containing the names of all the persons regularly nominated for such membership and shall furnish a ballot-box for said election. Each member of said police department shall be entitled to vote at said election for three persons as members of said board. The chief of said department shall appoint two members of said department to act as officials of said election, who shall be allowed their regular wages for said day, but shall receive no additional compensation therefor. Said election shall be held in the police headquarters of said department and the polls shall open at 7:30 A. M. and close at 8:30 P. M. The three nominees receiving the highest number of votes at said election shall be declared elected as members of said board, and their term shall commence on the same date as that of the term of office of the mayor of said city: Provided, That not more than thirty days after the taking effect of this act, a special election shall be held to elect members of said board from said department to serve until the expiration of the regular term of the present mayor of each of said cities. The secretary of said board shall fix

the time for the filing of notices of nominations, allowing not less than five days for that purpose, and shall fix the date for said special election, which date shall be not less than five days after the expiration of the time fixed for the filing of notices of nominations. Said special election shall in every other respect be governed by the rules in this section provided for the holding of the regular election of members of said board. [L. '11, p. 55, § 1.]

§ 8081. Retirement for Age—Pension.

Whenever any person at the taking effect of this act, or thereafter, shall have been duly appointed or selected and sworn, and shall have served for twenty years or more, in the aggregate, as a member, in any capacity or rank whatever, of the regularly constituted police department of any such city which may hereafter be subject to the provisions of this act, and shall have reached the age of sixty years, said board may order and direct that such person be retired from further service in such police department, and from the date of the making of such order the service of such person in such police department shall cease, except in cases of emergency as hereinafter provided, and such person so retired shall thereafter, during his lifetime, be paid from such fund a yearly pension equal to one-half of the amount of salary attached to the rank which he held in said police department for the period of one year next preceding the date of such retirement. [L. '11, p. 57, § 2.]

§ 8082. Disabled in Service—Retirement—Pension.

Whenever any person, while serving as a policeman in any such city shall become physically disabled by reason of any bodily injury received in the immediate or direct performance or discharge of his duties as such policeman, or become incapacitated for service, said incapacity not having been caused or brought on by dissipation or abuse, of which the board shall be judge, said board may, upon his written request filed with the secretary of said board, or without such written request, if it deems it to be for the benefit of the public, retire such person from said department, and order and direct that he shall be paid from said fund during his lifetime, a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held in said police department at the date of such retirement, but on the death of such pensioner his heirs or assigns, shall have no claims against or upon such police relief or pension fund: Provided, That whenever such disability shall cease, such pension shall cease, and such person shall be restored to active service at the same salary he received at the time of his retirement. [L. '11, p. 58, § 3.]

§ 8085. Death from Natural Causes—Benefit to Whom.

Whenever any member of the police department of such city shall, after five years of service in said department, die from natural causes, then his widow, or child, or children under the age of sixteen years, or if there be no widow or children, then his parents or unmarried sisters, minor brother or brothers, dependent upon him for support, shall be entitled to the sum of one thousand dollars from such fund. [L. '11, p. 58, § 4.]

§ 8088. Board—Meetings, Duties, Disbursement of Fund.

The board herein provided for shall hold monthly meetings on the first Mondays of each month and upon the call of its president. It shall issue warrants, signed by its president and secretary, to the persons entitled thereto for the amounts of money ordered paid to such persons from such fund by said board, which warrants shall state for what purpose such payments are made; it shall keep a record of its proceedings, which record shall be a public record; it shall, at each monthly meeting, send to the treasurer of such city a written or printed list of all persons entitled to payment from the fund herein provided for, stating the amount of such payments and for what granted, which list shall be certified to and signed by the president and secretary of such board, attested under oath. The treasurer of such city shall thereupon enter a copy of said list upon a book to be kept for that purpose and which shall be known as "The Police Relief and Pension Fund Book," and the said board shall direct payment of the amounts named therein to the persons entitled thereto, out of such fund. A majority of all the members of said board herein provided for shall constitute a quorum, and have power to transact business. [L. '11, p. 58, § 5.]

§ 8090. Sick Benefits.

Whenever any member of the police department of any such city shall, on account of sickness or disability, suffered or sustained while a member of said department, and not caused or brought on by dissipation or abuse, of which the board shall be judge, be confined to any hospital or to his home, and shall require nursing, care or attention, the said board shall pay the necessary hospital, care and nursing expenses of such member out of said fund, and the salary of said member shall continue while he is necessarily confined to such hospital or home and necessarily requires care and nursing on account of such sickness or disability for a period not exceeding six months, after which said period the other provisions of this act shall apply. [L. '11, p. 59, § 6.]

§ 8091. Payments Quarterly—Surplus to General Fund.

Payments provided for in this act shall be made monthly upon proper vouchers. If at any time there is more money in the fund provided for in this act than is necessary for the purposes of this act, then such surplus shall be transferred from such fund to the general fund of the city: Provided, That at all times enough money shall be kept in said fund to meet all payments provided for in this act. [L. '11, p. 59, § 7.]

TITLE LXI. NAVIGATION.

CHAPTER I. WATERWAYS ACROSS TIDE LANDS.

§ 8096.

This section has no application to street extensions across tide lands and harbor area: *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 117 Pac. 232.

In a plat of streets across tide lands and harbor area, the designation at the end of certain streets, "city slip," does not indicate

that such streets were to be reserved as open spaces for vessels, but rather, that they were dedicated to the city for a usable connection of the street with the open harbor, especially when such had been the previous use, and that intent was explained to the legislature at the time of the adoption of the plat: *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 117 Pac. 232.

CHAPTER II. EXCAVATION OF WATERWAYS, AND FILLING TIDE LANDS BY PRIVATE CONTRACT.

§ 8103.

Under this section and section 8107 the lands are liable only for the maximum of sixteen cents per cubic yard fixed by the contract, except where additional costs of bulkheads are approved by the governor, pursuant to a clause in the contract; and where the commissioner is threatening to issue certificates in excessive amounts to include distributed street and alley fill and additional bulkheads without the governor's approval, injunction will issue to restrain such action: *Bussell v. Ross*, 60 Wash. 344, 111 Pac. 165.

Where a contract for filling unplatted tide lands, under this section, limited the cost to sixteen cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands; even if it was contemplated, at the time the contract was made, that the land was to be platted, in view of section 8107, providing that the cost of filling streets and alleys shall be apportioned to the lands benefited, since the purchaser of platted tide lands, under his preference right, takes the fee of the abutting streets: *Bussell v. Ross*, 64 Wash. 418, 116 Pac. 1088.

Where a contractor filing state tide lands under a contract limiting the cost to sixteen cents per cubic yard, in good faith sublet the work to a dredging company at fifteen cents per yard and expended one cent per yard in supervision and engineering, the "actual cost" to him, within this section, giving a lien for the actual cost of the fill, is sixteen cents per cubic yard, without deducting the subcontractor's profit of three cents per cubic yard: *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198.

Under this section, the "cost of the work" includes the actual cost to the contractor and the added fifteen per cent allowed as his profit; hence in a contract limiting the "cost" of the fill to sixteen cents per cubic yard, it is proper when the work actually cost the contractor sixteen cents, to allow his lien therefor and fifteen per cent additional: *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198.

Where a contract for filling unplatted tide lands, under this section, limited the cost to sixteen cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands: *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198.

The certificate of the commissioner of public lands, given pursuant to this section, requiring him to determine the actual cost of filling state tide lands under a state contract, is presumptive evidence of the cost: *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198.

Where two contracts for filling contiguous tide lands were entered into at the same time, with a view of excavating one general system of waterways, there being two connecting waterways, the commissioner's certificates showing the amount of the liens by reason of the completion of one of the waterways under the first contract, against certain lots covered in the second contract, but which were nearer to and deriving their benefit from the completed canal under the first contract, are not prematurely issued, although the other waterway was not completed, since the two contracts were in substance one: *Rich-*

ards v. Bussell, 70 Wash. 554, 127 Pac. 198.

This section, authorizing the foreclosure of liens for the cost of filling state tide lands "in the manner provided by law for the foreclosure of liens on real estate," does not authorize the allowance of any attorney's fee other than the ten dollars statutory costs: Richards v. Bussell, 70 Wash. 554, 127 Pac. 198.

In an action to foreclose the lien for filling state tide lands under this section, interest is properly allowed on installments of interest past due and unpaid: Richards v. Bussell, 70 Wash. 554, 127 Pac. 198.

§ 8107.

See notes to § 8103.

CHAPTER III.

ERECTION OF WHARVES.

§ 8112.

This section, providing that cities may authorize the construction of a wharf at the terminus of a street, has been superseded by constitution, article 15, and the laws enacted in pursuance thereof for the sale, lease or control of tide lands and harbor areas by agents of the state, so far as the same affects tide lands not owned by the city or included in public streets extended over the tide lands: State ex rel. Port Angeles v. Morse, 56 Wash. 654, 106 Pac. 147.

§ 8114.

Under the rule that counties have only such powers as are conferred by statute, and that statutes of eminent domain, being in derogation of common right, are to be strictly construed, a county has no power

to condemn lands within a city of the first class for a public wharf or dock, not connected with a county road, since a wharf is in no sense a county road; section 8114 limiting the right of eminent domain to wharf sites at the terminus of county roads and not within the limits of first-class tide lands: State ex rel. Wauconda Investment Co. v. Superior Court, 68 Wash. 660, 124 Pac. 127.

Such power is not conferred by the act of 1911, page 3 (section 8147-1), authorizing a county to sell bonds in aid of enterprises undertaken by the state or county in aid of commerce and the "acquisition" of canals, docks, wharves, etc., the act not expressly conferring the power of eminent domain, and the power never being implied from the power to "acquire": State ex rel. Wauconda Investment Co. v. Superior Court, 68 Wash. 660, 124 Pac. 127.

CHAPTER IV.

VACATION OF WATERWAYS.

§ 8117. Procedure to Obtain.

Whenever any waterway heretofore established under the authority of the laws of this state, or any portion of such waterway, shall not have been excavated, or shall not be in use for the purposes of navigation, or shall no longer be required in the public interest to exist as a waterway, such waterway or portion thereof may be vacated by written order of the commissioner of public lands of the state of Washington whenever he shall be requested so to do by ordinance or resolution of the city council of the city in which such waterway is situate, in whole or in part, or, in case such waterway is situate, in whole or in part, in a port district organized under the laws of the state of Washington, whenever he shall be requested so to do by resolution of the port commission of such port district; and upon the making of such order the waterway or portion thereof shall thereupon be deemed to be and shall be thereby vacated: Provided, however, that if the waterway or portion thereof so vacated be navigable water of the United States or otherwise within the jurisdiction of the United States, a copy of such resolution or ordinance, together with a copy of said order of the commissioner of public lands certified to by him, shall be submitted to the secretary of war and

chief of engineers of the United States for their approval, and if they approve the same such waterway or portion thereof shall thereupon be deemed to be and shall be thereupon vacated. [L. '13, p. 590, § 1.]

§ 8119. Disposal of Vacated Portion.

Should such city fail to make such selection within such time, or having within such time made such selection, the title of the remaining portions of such waterway so vacated shall vest in the state of Washington, unless the same be situate within the territorial limits of a port district created under the laws of the state of Washington, in which event such title shall vest in said port district. If subsequent to such vacation, the vacated waterway or portion of waterway shall be embraced within the limits of a port district created under the laws of the state of Washington, the title to such portions thereof as shall then remain undisposed of by the state shall vest in such port district. Such title so vesting shall be subject to any railroad or street railway crossings existing at the time of such vacation. [L. '13, p. 591, § 2.]

§ 8119-1. Preference Rights Annulled.

All preference rights of purchase created by the act of which this act is amendatory are hereby annulled. [L. '13, p. 591, § 3.]

§ 8119-2. Application of Act.

The provisions of this act shall not apply to any waterway or portion of waterway which forms, or by improving same may be made to form, a connection between a river or another waterway and any tidal water. [L. '13, p. 591, § 4.]

CHAPTER V.

RIVER IMPROVEMENTS.

§ 8145-1. Boundary Line Rivers—Overflow—Improvement.

Wherever and whenever a river is or shall be the boundary line or part of the boundary line between two counties, or it, or its tributaries or outlet or part thereof, flows through parts of two counties, and the waters thereof have in the past been the cause of damage, by inundation or otherwise, to the roads, bridges or other public property situate in or to other public interests of both such counties, or the flow of such waters shall have alternated between the said counties so at one time or times such waters shall have caused damage to one county and at another time or times to the other county, and it shall be deemed by the boards of county commissioners of both counties to be for the public interests of their respective counties that the flow of such waters be definitely confined to a particular channel, situate in whole or in part in either county, in a manner calculated to prevent such alternation or to prevent or lessen damage in the future, it shall be lawful for the two counties, and their boards of county commissioners are hereby empowered, pursuant to resolution, to enter into a contract in writing in the names of the respective counties for the purpose of settling all disputes in relation to any such situation, and providing ways and means for the control and disposition of such waters. Any such contract may provide:

(a) That it shall be operative in perpetuity, or only for a term of years or other measure of time to be specified therein.

(b) The amount of money to be expended by each county during each year of the life of said contract, or such other method of determining the amount of expenditure or dividing the financial burden as may be agreed upon.

(c) That an annual tax shall be levied, at the same time and in the same manner as other county taxes are levied, each year during the life of the contract, by the county commissioners of each county. The annual tax herein provided for need not be levied at the same rate for each county, but shall be at such rate in each county as will produce annually the amount of money for each county as is required for the fulfillment of the contract on its part: Provided, however, That in no event shall any such tax levy by either county exceed one mill on the dollar for any one year.

(d) That the general scheme for the improvement of such river shall be as stated in such contract, but by consent of the contracting parties, pursuant to resolution of each board of county commissioners, such scheme may be modified from time to time during the life of the contract. The contract may but need not provide the details of such scheme, but must designate the general purpose to be accomplished. So far as details are not specified in the contract, same shall be for future determination by joint action of the two boards of county commissioners. Any such contract may be subsequently modified or abrogated by mutual consent evidenced by separate resolution of both boards of county commissioners. [L. '13, p. 156, § 1.]

§ 8145-2. Funds Expended—Work—How Done.

When such a contract shall have been entered into the prosecution of the work of improvement and the expenditure of funds thereof shall be determined upon, controlled and provided for by joint action of the boards of county commissioners of the two counties. So acting jointly, they shall have power to employ subordinates, purchase material or equipment in open market or by contract, let contracts for work, or cause work to be done by day labor, and to reject any and all bids received for work or material. All vouchers, pay-rolls, reports, contracts and bonds on contracts shall be in duplicate, one copy to be filed in the office of the county auditor of each county: Provided, however, That the expenditure of said funds must be made in such manner so that the fund from each county is drawn on or expended alternately and such alternate expenditure shall be in proportion to the amount contributed by each county as nearly as may be practicable. [L. '13, p. 158, § 2.]

§ 8145-3. Tax Levy in Each County—Warrants—Claims.

When such a contract shall have been entered into it shall be the duty of each of the boards of county commissioners to make for their respective counties, each year, a tax levy at a rate sufficient to meet the requirements of the contract to be performed by the county, or sufficient to provide such lesser amount as the boards of county commissioners shall agree upon for such year, to be evidenced by separate resolution of each board, and when such levy shall be made the same shall be extended upon the tax-rolls of the county levying the same as other taxes shall be extended, and shall be collected in the same manner and shall be a lien upon the property as in the

case of other taxes. The fund realized in each county by such tax levy shall go into a separate fund in the treasury of the county collecting the same, to be designated intercounty river improvement fund, and the entire fund so collected in the two counties shall be devoted to and be disbursed for the purposes specified in such contract and as in this act provided, and for no other purpose, but without regard to the particular county in which the work is performed, material required or expenditure made, it being the intent that the entire fund realized in the two counties shall be devoted to the one common purpose as if the two counties were one county and the two funds one fund. The fund in each county shall be disbursed by the county treasurer of such county upon warrants signed by the county auditor of that county. Such warrants shall be issued by order of the board of county commissioners of such county, or a majority thereof. Each county auditor shall, whenever requested by the county auditor of the other county, furnish the county auditor of the other county a statement of payments into and warrants drawn upon the fund of his county from time to time, and in addition thereto, each county auditor shall on the first Monday of January, April, July and October each year during the life of the contract furnish the other a complete statement thereof. Obligations incurred in the prosecution of such improvement and warrants issued shall be payable only out of said special funds, and no general obligation against or debt of either county shall be created thereby or by any contract entered into by virtue of this act, but it is not the intent of this act to deny to either county the right to have in the courts any proper proceeding to compel compliance with such contract on the part of the other county. [L. '13, p. 158, § 3.]

§ 8145-4. Eminent Domain—Proceedings.

When such a contract shall have been entered into the power of eminent domain is hereby vested in each of such counties, to acquire any lands necessary to straighten, widen, deepen, dike or otherwise improve any such river, its tributaries or outlet or to strengthen the banks thereof, or to acquire any land adjacent to such river or its tributaries, or the right to cut and remove timber upon the same for the purpose of preventing or lessening the falling of timber or brush into the waters of such river or tributaries, or to acquire any rock quarry, gravel deposit or timber for material for the prosecution of such improvement, together with the necessary rights of way for the same. Any such land, property or rights may be acquired by purchase instead of by condemnation proceedings. Said right of eminent domain shall extend to lands or other property owned by the state or any municipality thereof. The title to any such lands, property or rights so acquired shall vest in the county in which situate for the benefit of such enterprise and said fund, but when said contract shall have terminated by lapse of time or for any other reason, then such title shall be held by such county independent of any claims whatsoever of the other county, but any material, equipment or other chattel property on hand shall be converted into money and the money divided between the two counties in the ratio of their respective contributions to the fund. The exercise of such rights of eminent domain or purchase shall rest in the joint control of the two boards of county commissioners. Such eminent domain proceedings shall be in the name of and had in the county where the property to be acquired is situate, provided

if either county shall fail or refuse to institute and prosecute any condemnation proceedings when directed so to do by any legal meeting provided for in section 8145-5, such proceeding may be instituted and prosecuted by and in the name of the other county. The proceedings may conform to the provisions of sections 921 and 926, inclusive, of Remington and Ballinger's Annotated Codes and Statutes of Washington, or to any general law now or hereafter enacted governing eminent domain proceedings by counties. The awards in and costs of such proceedings shall be payable out of such funds. The purposes in this act specified are hereby declared to be county purposes of each and both of such counties. [L. '13, p. 159, § 4.]

§ 8145-5. Joint County Meeting—Procedure.

When such a contract shall have been entered into and occasion shall arise for the joint action of the two boards of county commissioners whether such joint action is provided for in this act or otherwise desired upon any matter having relation to such contract or the prosecution of such improvement, such joint action may be secured by a notice calling a joint meeting signed by two county commissioners, designating the time and place in either county of such meeting, served by one of the two county auditors upon the remaining county commissioners at least seven days (exclusive of the date of service or mailing) prior to the time so designated. If the notice is signed by two county commissioners of the same county the place of meeting shall be at some place in the other county designated in the notice. Such service may be personal or by mail addressed to the member in care of the county auditor of his county. The six county commissioners may constitute a legal meeting without notice by being present together for that purpose. The auditor's certificate of such personal service or mailing, attached to a copy of the notice, shall be made a part of the records of the meeting and be competent proof of the fact. Except in the case hereinafter provided for, the presence of four of the county commissioners shall be necessary to constitute a legal meeting. Each meeting shall be presided over by one of those present selected by vote. The county auditor of the county wherein the meeting is held shall be secretary of the meeting, and shall make duplicate record of its proceedings, one of which, with his certificate thereon, shall be forwarded to the county auditor of the other county, and such record shall be a part of the record of the board of county commissioners of each county. A majority vote of those present at any legal meeting shall be determinative upon any question properly considered at the meeting, and shall be binding upon each county as if enacted or adopted by its own board of county commissioners separately, but no joint meeting whatsoever shall in any manner continue, extend, change, alter, modify or abrogate the contract when made or any of the terms and conditions contained therein. Each county commissioner shall be paid out of said fund in his own county all disbursements made by him for traveling and other expenses incurred in attending any joint meeting or in any way connected with the prosecution of the improvement. Any legal meeting shall have power to adjourn to another time and place. An adjourned meeting shall have all the powers of the meeting of which it is an adjournment, but shall have no power after the end of the thirtieth day following the date of the original meeting of which it is an adjournment. If the three county commissioners of either

county shall fail to attend any two meetings consecutively called, the notice for the next succeeding meeting may be also served upon the special commissioner hereinafter provided for, and if he and three county commissioners attend pursuant to such notice the four shall constitute a legal meeting, but if he does not so attend and three county commissioners do attend, the same shall constitute a legal meeting: Provided, All notices calling a joint meeting shall specify distinctly and separately each question to be considered at said meeting; and it shall be unlawful to consider any question at such meeting or at any adjourned meeting thereof except those which have been distinctly and separately specified, except in cases where all six county commissioners are present or five county commissioners present are unanimous on the question, and in any action which may be taken on any question other than those specified in the notice shall be void and shall not be binding on either county, except in cases where all six county commissioners are present or the action was by unanimous vote of five county commissioners present at such meeting. [L. '13, p. 161, § 5.]

§ 8145-6. Special Commissioner—Duties.

When such a contract shall have been entered into there shall be designated at the first legal joint meeting, or adjournment thereof, held in each calendar year a special commissioner to serve as such until the first joint meeting held in the ensuing year. If such designation shall not be made at any such first annual meeting, the United States engineer in charge of the district in which such improvement is located shall be such special commissioner until the next succeeding first annual meeting. If a special commissioner shall for any reason fail to serve as such officer, or be removed by unanimous vote of any legal meeting, a successor to him may be chosen at any subsequent legal joint meeting during his term. Such special commissioner shall have power to attend and vote at any joint meeting in the following cases and none other, to wit: (1) In cases specially so provided in section 8145-5; (2) In any case where the vote of any such joint meeting shall stand equally divided upon any question arising under this act or such contract or in the prosecution of the work of improvement. The special commissioner shall have no voice or vote except upon questions on which the vote of the county commissioners is equally divided. The procedure in cases covered by the foregoing subdivision (2) of this section shall be substantially as follows: It shall be the duty of the secretary of the meeting at which the division shall occur, if the attendance of the special commissioner at that meeting is not secured, to forthwith transmit to the special commissioner written notice of the fact of disagreement and the question involved, and of the time and place to which the meeting shall have been adjourned or at which the question will recur. If there shall be no such adjournment of the meeting, or if the secretary shall not give such notice, any two commissioners may in the manner provided in section 8145-5 call a joint meeting for the consideration of the question in dispute, and in such event either county auditor may give such notice to the special commissioner. No informality in the mode of securing the attendance of the special commissioner shall invalidate the proceedings of or any vote taken at any meeting which he shall attend and which he is empowered to attend by the provisions of this act. The special commissioner shall receive, to be

paid equally out of the two funds, his traveling and other expenses incurred in attending meetings or otherwise in connection with the work of improvement, and such compensation for his services as shall be fixed by the joint meeting which shall have selected him, or failing to be so fixed, his compensation shall be ten dollars per day of actual service. [L. '13, p. 162, § 6.]

§ 8145-7. Act not Exclusive.

Nothing in this act contained shall be construed to prevent any county which may be a party to such contract from further caring for any such river or the banks thereof, as authorized so to do by existing laws or by such laws as may be hereafter enacted, provided the rights of neither county, as fixed by contract, shall be impaired thereby. [L. '13, p. 164, § 7.]

§ 8145-8. Act Creates No Liability.

No legal claim of any kind or character whatsoever in favor of one county and against the other shall be based upon or created by the enactment hereof, except such as may arise when the contract herein provided for shall have been entered into. After such contract shall have been entered into, should any loss or damage be sustained by either county occasioned by the overflow of any such river, if caused by any act or omission to act of the other county, its officers or agents, or any other cause whatsoever, then such county so suffering or sustaining said loss shall not be entitled to recover therefor from the other county, nor shall any cause of action, legal or equitable, be based thereon: Provided, however, That if either county shall suffer loss or damage because of the failure or refusal of the other county to perform any such contract on its part to be performed, the injured county shall have a cause of action against the defaulting county to recover the same, but the limit of recovery for any loss or damage suffered in any one year shall not exceed the sum of ten thousand dollars, and any such recovery shall be limited to such special fund, and in no event be recoverable out of the general fund of such defaulting county. If any such loss or damage shall be liquidated in an amount by agreement or by judgment, the defaulting county shall increase its tax levy for said special fund for the ensuing year sufficiently to provide for such liquidated amount: And provided further, That either county may have any proper action in the courts to compel the performance of the contract or any duty imposed thereby or by this act. [L. '13, p. 164, § 8.]

§ 8145-9. Warrants may be Issued—Limit of Tax Levy.

When such a contract shall have been entered into, it shall be lawful to issue warrants upon said fund, though there be at the time of such issuance no money in the fund, but in such cases the aggregate of such warrants so issued in any year shall not exceed one-half the amount of the next annual tax levy required by such contract. Such warrants shall be stamped by the county treasurer when presented to him for payment, to bear interest at a certain rate thereafter until paid, such rate to be the then current rate as determined by the county auditor. [L. '13, p. 165, § 9.]

CHAPTER VI.

CANAL, HARBOR AND RIVER IMPROVEMENTS.

§ 8146.

Abutting upland owners on a navigable lake, who purchased the shore lands from the state after the state had granted to the United States the right to lower the waters of the lake, take subject to such right: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

An act of the state legislature in aid of a ship canal, granting to the United States the right to lower the waters of a navigable lake, is the grant of an easement, rather than a mere revocable license: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

A license by the state to the United States to lower the waters of a lake, in aid of the construction of a canal, is one coupled with an interest, and not revocable, where the United States made and

expended appropriations for the work on the faith thereof: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

The act of 1909, creating a special fund and appropriating moneys therefrom to be expended in the construction of the Lake Washington canal, theretofore authorized by other legislation, cannot be invoked by taxpayers as in any manner affecting the authority for the construction of the canal: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

The intention of the federal government to undertake the work of constructing a ship canal within the requirements of a state act providing therefor is sufficiently shown by federal appropriations amounting to over two and a quarter millions of dollars for the purpose: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 8147-1. Joint Aid River and Harbor Improvements—Bonds—Election.

Whenever the board of county commissioners of any county of the first class of this state shall deem it for the interest of the county to engage in or to aid the United States of America, the state of Washington, or any adjoining county or any city of this state, or any of them, in construction, enlargement, improvement, modification, repair or operation of any harbor, canal, waterway, river channel, slip, dock, wharf, or other public improvement, or any of the same, for the purposes of commerce, navigation, sanitation and drainage, or any thereof, or to acquire or operate wharf sites, dock sites, or other properties, rights or interests, or any thereof, necessary or proper to be acquired or operated for public enjoyment of any such public improvement, and to incur indebtedness to meet the cost thereof and expenses connected therewith, and issue bonds of the county for the payment of such indebtedness, or any thereof, such county is hereby authorized and empowered, by and through its county commissioners, to engage in or aid in any such public work or works, operation or acquisition, as aforesaid, and to incur indebtedness for such purpose or purposes to an amount, which, together with the then existing indebtedness of such county, shall not exceed five per centum of the taxable value of the taxable property in said county, as shown by the last previous assessment-roll thereof for state and county purposes, and to issue the negotiable bonds of the county for all or any of such indebtedness and for the payment thereof, in the manner and form and as provided in sections 1846 to 1851, inclusive, of Ballinger's Annotated Codes and Statutes of Washington, and other laws of this state which shall then be in force, and to make part or all of such payment in bonds or in moneys derived from sale or sales thereof, or partly in such bonds and partly in such money: Provided, That said commissioners shall have first submitted the question of incurring such indebtedness to the voters of the county at a general or special election, and three-fifths of the voters voting upon the question shall have voted in favor of incurring the same. [L. '11, p. 3, § 1.]

The above reference is to Remington and Ballinger's Code, §§ 5026-5028 and 5085-5091.

TIME FOR APPLICATION.—A proceeding by a county under Laws of 1895, page 142, to provide for the payment of expenses incurred in constructing a drainage ditch under the unconstitutional act of 1899, must be commenced within a reasonable time, and a delay of more than eleven years is unreasonable: *Lewis County v. McCutcheon*, 53 Wash. 367, 101 Pac. 1083.

A resolution for the submission of a county bond issue is not illegal as combining several purposes in the conjunctive and disjunctive, from the fact that it recites that the money is to be expended for the specified purposes and other rights and interests necessary to the improvement or of securing the drainage or public interests to be derived therefrom, where the other matters referred to were but details in carrying out the enterprise: *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A., N. S., 577, 116 Pac. 1076.

An election to authorize a bond issue may be submitted to the voters of a county

as a single proposition, requiring one affirmative or negative vote, although it is proposed to raise four specified sums for distinct parts of the project—(1) the excavation of a canal from waters to the north of a harbor, (2) the deepening of a river to the south of the harbor, (3) the diversion of the waters of another tributary river, and (4) the erection of wharves and docks in aid or furtherance of the improvement—where it appears that all four parts are related, and in fact one general project for the creation of a great harbor and the utilization and uniting of the waters in and about it: *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A., N. S., 577, 116 Pac. 1076.

Laws of 1895, chapter 2, passed for the single purpose of permitting King County to condemn a right of way for the Lake Washington Canal, and granting the power of eminent domain, expressly limited to the purposes mentioned in the first section, cannot be extended by implication to authorize a county to exercise the right of eminent domain to acquire a public wharf or dock, under this section: *State ex rel. Wauconda Investment Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127.

§ 8147-2. County Purpose.

That any and every such purpose as is mentioned in the foregoing section is hereby declared to be a county purpose. [L. '11, p. 4, § 2.]

§ 8147-3. Voting Prior to This Act.

That, in case, at any special or general election, in any such county, the question of incurring any such indebtedness or issuing any such bonds has been submitted to the vote of the voters of such county at any time within one year next prior to the day when this act shall become a law and be in force, and the vote at such election was such as would have authorized, by sufficient majority of votes, the incurring of such indebtedness and the issuance of such bonds had this act been then in force, and such vote been taken pursuant to the provisions of this act, then, and in that case, such vote and all the proceedings in connection therewith had or taken, in manner and form aforesaid, be, and the same hereby are, validated and confirmed, and such county is authorized and empowered, by and through its county commissioners, to proceed with the matters of incurring such indebtedness and issuing such bonds, and payment of such indebtedness, by sale of such bonds, or otherwise, and with the matter of engaging or aiding in the construction or other public work or acquisition or operation, intended or contemplated in incurring such indebtedness, in substantially the same manner as in cases under section 8147-1. [L. '11, p. 5, § 3.]

A bond issue in a specified sum for deepening the channel of a river "along the lines" laid out by Commercial Waterway District No. 1, and in a specified sum for diverting the waters of a river "along lines" adopted by Commercial Waterway District No. 2, is not invalid as being in aid of such districts, and beyond the au-

thority of this section: *Blaine v. Hamilton*, 64 Wash. 353, 35 L. R. A., N. S., 577, 116 Pac. 1076.

§ 8148.

The resolutions and acts of Congress appropriating money to pay the cost of

making investigations and preliminary surveys for the construction of the "Lake Washington Canal," upon the state's securing a right of way therefor for the benefit of the United States (which was done), with the proviso that nothing therein contained shall be construed as an adoption

of the project, did not manifest any intention on the part of the United States to construct or operate the canal within a reasonable time, or at all, within the meaning of this section: *State ex rel. Burke v. Board of Commrs.*, 58 Wash. 511, 109 Pac. 350.

CHAPTER VI-A.

PORT DISTRICTS.

§ 8165-1. Port Districts Authorized.

Port districts for the acquirement, construction, maintenance, operation, development and regulation of a system of harbor improvements and rail and water transfer and terminal facilities within such districts, are hereby authorized to be established in the various counties of this state, as in this act provided. [L. '11, p. 412, § 1.]

The port district act, Laws of 1911, page 412, authorizing the creation of port districts as municipal corporations, is not unconstitutional as creating municipal corporations not recognized by the constitution, there being no express constitutional prohibition against the creation of municipal corporations other than counties, cities, towns and school districts specifically named in the constitution, and the creation of municipal corporations being an inherent legislative power without express authority therefor; especially in view of the fact that the constitutional provisions respecting counties, cities, towns and school districts only regulate and do not expressly authorize their creation, and in view of constitution, article 8, section 6, referring to "other municipal corporations" than those specially mentioned: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

The port district act is not void in its entirety from the mere fact that the port district may, in whole or in part, occupy the same territory as, and be superimposed upon another municipal corporation or corporations limited by the constitution in the amount of the expenditures that may be incurred for improvements of the same nature; and a complaint questioning the validity of a port district and its proposed indebtedness is insufficient where it does not appear that the indebtedness proposed would, with the existing indebtedness of the other municipality, exceed the constitutional limit: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

A port district election is not invalidated by the failure to show that county commissioners designated the polling places "by resolution," where it appears that the clerk of the board made arrangements for the polling places, the board allowed and paid rent therefor, and a fair expression of the wishes of the voters was not inter-

fered with; nor by the fact that no notice of the polling places was given, when the statute did not require notice, and there was no claim of fraud or unfairness: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

Irregularity in a port district election, in that in a few small towns no notice of opening the registration polls was given as required by section 4765, does not invalidate the election, where it appears that all but a few hundred voters in such town voted, and the vote carried by a majority of over nine thousand: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

A port district election is not invalidated by the failure of the ballots to conform strictly to the expressions prescribed by law, and the fact that they contained other matter, where the matter was explanatory and did not mislead, but rendered the question submitted clear and certain: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

A port district election is not invalidated by an irregularity in the canvassing of the votes, the canvass being made by the general election board instead of the county commissioners as required by the port district act, in the absence of an allegation that the canvass made was incorrect and changed the result: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

A port district covering an entire county is a municipal corporation having an independent existence with power to incur indebtedness on its own account up to the constitutional limitation, and its creation is not an abuse of the power of the legislature in that it was created to avoid the constitutional limitation of indebtedness of the municipal corporations upon whose territory it was superimposed, where they were created for entirely different purposes, and its chief object was to provide

public terminal facilities for both sea and land commerce, although the municipalities upon which it was superimposed had somewhat similar powers respecting the acquisition of such facilities: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

The port district act not providing the rate of interest that the commission may authorize on bonds sold, the commission will not be enjoined from selling at a discount

bonds drawing four and one-half per cent interest, the limit specified in the resolution calling the election, where it is not alleged that the discount allowed will make usurious interest, the general powers of the commission clearly including the power to regulate the rate of interest, and there being nothing in the resolution respecting the rate at which the bonds should be sold: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

§ 8165-2. Formation of District.

At any general election or at any special election which may be called for that purpose, the board of county commissioners of any county in this state may, or on petition of ten per cent of the qualified electors of such county based on the total vote cast in the last general county election, shall, by resolution, submit to the voters of such county the proposition of creating a port district which shall be coextensive with the limits of such county as now or hereafter established. Such petition shall be filed with the county auditor, who shall within fifteen (15) days examine the signatures thereof and certify to the sufficiency or insufficiency thereof, and for such purpose the county auditor shall have access to all registration books in the possession of the officers of any incorporated city or town in such proposed port district. If such petition be found to be insufficient, it shall be returned to the persons filing the same, who may amend or add names thereto for ten days, when the same shall be returned to the county auditor, who shall have an additional fifteen (15) days to examine the same and attach his certificate thereto. No person having signed such petition shall be allowed to withdraw his name therefrom after the filing of the same with the county auditor. Whenever such petition shall be certified to as sufficient, the county auditor shall forthwith transmit the same, together with his certificate of sufficiency attached thereto, to the board of county commissioners, who shall submit such proposition at the next general election or, if such petition so requests, the board of county commissioners shall, at their first meeting after the date of such certificate, by resolution, call a special election to be held not less than thirty (30) days nor more than sixty (60) days from the date of such certificate. The notice of election shall state the boundaries of the proposed port district and the object of such election. In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot substantially in the following terms:

“Port of —, Yes.” (giving the name of the principal seaport city within such proposed port district, or if there be more than one city of the same class within such district, such name as may be determined by the board of county commissioners).

“Port of —, No.” (giving the name of the principal seaport city within such port district, or if there be more than one city of the same class within such district, such name as may be determined by the board of county commissioners).

Any petition for the formation of a port district may describe a district of less area than the county in which such petition is filed, and in such event the county commissioners shall fix a date for hearing on such petition and publish a notice of such hearing for two weeks in a newspaper of general circulation

in such county, after which hearing the county commissioners may increase or diminish the boundaries of such proposed port district and thereafter the same procedure shall be followed as is prescribed in this act for the formation of the larger port district, except that the petition and election shall be confined solely to the lesser port district: And provided, That whenever two or more petitions for the formation of a port district shall be filed as herein provided, the petition describing the greater area shall supersede all others and an election shall first be held thereunder, and no lesser port district shall ever be created within the limits, in whole or in part, of any port district. [L. '11, p. 412, § 2; L. '13, p. 202, § 1.]

§ 8165-3. Powers of Commissioners.

Within five (5) days after such election the board of county commissioners shall canvass the returns, and if at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such district, the board of county commissioners shall so declare in its canvass of the returns of such election, and such port district shall then be and become a municipal corporation of the state of Washington and the name of such port district shall be "Port of ——" (inserting the name appearing on the ballot). The powers of the port district shall be exercised through a port commission consisting of three members, one from each of the three county commissioner districts of the county in which the port district is located, when the port district is coextensive with the limits of such county. When the port district comprises only a portion of the county, three commissioner districts, numbered consecutively, having approximately equal population and boundaries following ward and precinct lines, shall be described in the petition for the formation of the port district, and one commissioner shall be elected from each of said commissioner districts. No person shall be eligible to hold the office of port commissioner unless he is a qualified voter, a freeholder within such port district, and is and has been a resident for a period of three (3) years, except as hereinafter provided, of the commissioner district from which he is elected. Port commissioners shall hold office for a term of three (3) years and until their respective successors are elected and qualified, each term to commence on the second Monday in January following the election thereto. At the same election at which the proposition is submitted to the voters as to whether a port district shall be formed, three (3) commissioners shall be elected to hold office, respectively, for the term of one, two and three years. All candidates shall be voted upon by the entire port district, and the candidate residing in commissioner district number one receiving the highest number of votes in the port district shall hold office for the term of three (3) years; and the candidate residing in commissioner district number two receiving the highest number of votes in the port district shall hold office for the term of two (2) years, and the candidate residing in commissioner district number three receiving the highest number of votes in the port district shall hold office for the term of one (1) year, each of said terms to date from the second Monday in January following the election, but also to include the period intervening between the election and the second Monday in January following. All expenses of elections for the formation of such port districts shall be paid by the county holding such election, and such expenditure is hereby declared to

be for a county purpose, and the money paid out for such purpose shall be repaid to such county by the port district, if formed. Nominations for port commissioners at the first special election and at subsequent general elections shall be by petition of one hundred (100) qualified electors of the commissioner district in which the candidate is a resident, to be filed in the office of the county auditor at least twenty (20) days prior to such election: Provided, however, That there shall be no election held on the first Saturday in December immediately following the creation of such port district: And provided further, That in the event of a vacancy in the office of port commissioner by death, resignation or otherwise, such vacancy shall be filled at the next general election, the vacancy in the interim to be filled by appointment by a majority vote of the remaining port commissioners. In the event that such ad interim appointment shall not be made by the remaining commissioners within fifteen (15) days following the occurrence of the vacancy, the appointment shall be made by the judge of the superior court of the county, and if there is more than one such judge, by such judge who is oldest in years: Provided, That if there be more than three such judges, the appointment shall be made by the three persons holding such office who are the oldest in service therein (in determining seniority, the oldest in years being hereby designated where length of service is equal), and if any one or more of those herein designated shall be unable or shall decline to act, the three shall be made up from the one or more next in seniority of service who are able to act and do not decline. Of the three persons so designated, the appointment made in writing by any two shall be valid. If there should be at the same time such number of vacancies that there are not in office a majority of the full number of commissioners fixed by law, a special election shall be called to fill the same, by the remainder, or, that failing, by the board of county commissioners of the county, such election to be held not more than forty (40) days after the occurring of such vacancies. A vacancy in the office of port commissioner shall occur by death, resignation, removal, conviction of a felony, nonattendance at meetings of the port commission for a period of sixty (60) days unless excused by the port commission, by any statutory disqualification, or by any permanent disability preventing the proper discharge of his duty.

All the foregoing provisions of this section are subject to the following provisos: That in any port district which has a population of more than eighty thousand as shown by the last official census of the United States, the port commission shall, provided the proposition for a commission of five members is adopted at an election as hereinafter provided, consist of five members, one from each of the three commissioner districts of the port district as hereinbefore prescribed, and two commissioners at large elected from the port district without regard to residence in commissioner districts. The two commissioners at large must have been residents of the port district for three years and shall be nominated and elected at the same time and in the same manner as the other commissioners except that the petition for their nomination may be signed by qualified electors residing in any part of the port district, and on the petition for the nomination and on the ballot the names of the candidates shall be designated as commissioners at large. The question of the number of commissioners shall be submitted at the first general election after the organization of any port district having said population

of more than eighty thousand, or, in the case of any port district already established and having said population, then at the general election in December, 1913, or at any prior election called for some other purpose. There shall be printed on the ballot the words "In favor of a port commission of five members," and the words "Against a port commission of five members," so that every voter shall be enabled to vote for or against the proposition of increasing the number of commissioners to five. If at such election a majority of the voters voting on said proposition, shall vote in favor of a port commission of five members, then said proposition shall be thereby adopted and from and after five days after such election, if it be a general election, otherwise from and after five days after the next general election, the port commission shall consist of five members by the addition of two commissioners at large as hereinbefore provided, but if said proposition shall fail to receive the approval of a majority of the voters voting thereon, the port commission shall continue to consist of three members only. If the proposition shall have carried at a special election, at the next general election, or if submitted at a general election, then at the same general election the names of candidates for commissioners at large shall be printed on the ballot and shall be voted on, but in the latter case the election of commissioners at large shall be contingent upon the adoption of the proposition for a port commission of five members. If such proposition shall have been or shall be adopted, the two candidates for commissioner at large who receive the highest number of votes in the port district shall be elected, and of these two the candidate receiving the higher number of votes shall hold office for the term of three years, and the other shall hold office for the term of two years from the second Monday in January following, and in addition thereto both shall hold office for the period which begins five days after their election and extends to the commencement of the term on said second Monday in January. When the term of office of any commissioner at large shall be about to expire, his successor shall be elected at the general port district election next preceding the expiration of such term, and such successor shall hold office for the term of three years from the second Monday in January following. A majority of the persons holding the office of port commissioner at any time shall constitute a quorum of the port commission for the transaction of business, and the concurrence of a majority of the persons holding such office at the time shall be necessary and shall be sufficient for the passage of any resolution, but no business shall be transacted unless there are in office at least a majority of the full number of commissioners fixed by law. [L. '11, p. 414, § 3; L. '13, p. 204, § 2.]

§ 8165-3½. Elections.

A general election shall be held on the first Saturday in December of each year for the election of a port commissioner or commissioners and for the submission of propositions, and special elections shall be held at such times and for such purposes as the port commission may by resolution prescribe, subject to the limitations and pursuant to the requirements of this act. All elections shall be called and held as in this section provided except as in this act otherwise expressly provided. All notices of election shall be given by publishing the same for a period of ten days in a daily newspaper of general circulation published in said port district, or, if there is

no daily newspaper published therein, then in at least two issues of a weekly newspaper published in said port district, such publication to be made within a period of twenty (20) days immediately preceding such election; and by posting, for at least ten (10) days prior to the date of election, a written or printed notice of such election in each polling place within such port district. The published notice shall give the time of holding the election, the hours the polls will remain open, the officer or officers to be elected, and a statement of the propositions to be submitted, and the posted notices shall, in addition, give the location of the polling places.

There shall be not less than one polling place in each of the various wards of any incorporated city within such port district, and one polling place within each precinct of each port district not within the limits of any incorporated city. It shall be the duty of the county commissioners in the formation of a port district, and of the port commission in all subsequent elections, to, at least twenty (20) days before each election, designate the polling places and appoint three election officers for each place of voting. At all elections the vote shall be by ballot. The polls shall be open between such hours of the day as the commission shall designate, but in every case the polls shall be open between 1 o'clock P. M. and 8 o'clock P. M. All electors who are, at the time of such election, duly qualified to vote within their respective precincts under the general election laws for state and county officers shall be entitled to vote at any election held in such port district.

Officers of the city and county having charge of the registration books of any city or precinct in a port district shall deliver the same for the use of the election officers at all port elections. In the event of such registration books being required by law to be used by any school district or other public corporation at the same time as the use thereof will be necessary by the port district, such books shall be delivered to the port commission and school district or other public corporation jointly, and the same polling places and registration books may be used jointly in such cases, and the same individuals may serve as election officers for all such joint elections, and in such cases the compensation of such election officers and other expense shall be so divided that the port district shall bear only its proportionate share thereof.

The manner of conducting and voting at elections under this act, opening and closing of polls, keeping of poll lists, canvassing the votes, declaring the result, and certifying the returns, shall be the same as provided by the general election laws governing the election of state and county officers, except as otherwise provided in this act.

Immediately after the closing of the polls the election officers shall then and there, without removing the ballot-box from the place where the ballots were cast, proceed to count the votes, and as soon as such count is completed a return thereof shall be signed by such election officers and securely enveloped and sealed and delivered, together with the ballot-box containing the ballots, to the port commission, or some person delegated to receive the same on their behalf.

Within five days after the election, the port commission shall meet and proceed to canvass the returns of such election, and shall thereupon declare the result. [L. '13, p. 208, § 3.]

§ 8165-4. Powers of District.

All port districts organized under the provisions of this act shall be and are hereby authorized to acquire by purchase or condemnation, or both, all lands, property, property rights, leases, or easements necessary for the purposes of the port districts, and to exercise the right of eminent domain in the acquirement or damaging of all land, property, property rights, leases or easements, and the levying and collection of assessments upon property for the payment of all damages and compensation in carrying out the provisions for which said district shall have been created, and such right shall be exercised in the same manner and by the same procedure as is or may be provided by law for cities of the first class, except in so far as such may be inconsistent with the provisions of this act, and the duties devolving upon the city treasurer under said law be and the same are hereby imposed upon the county treasurer for the purposes of this act; and to lay out, construct, condemn, purchase, acquire, add to, maintain, conduct and operate any and all systems of seawalls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other harbor improvements, rail and water transfer and terminal facilities within such port district; to establish local improvement districts within such port districts, and to levy special assessments under the mode of annual installments extending over a period not exceeding ten (10) years on all property specially benefited by any local improvement, on the basis of special benefits, to pay, in whole or in part, the damages or costs of any improvements ordered in such local improvement district; to issue local improvement bonds in any such local improvement district to be repaid by the collection of local improvement assessments: Provided, That the levying and collection of all such assessments and issuance of bonds hereby authorized shall be in the manner now and hereafter provided by state law for the levying and collection of local improvement assessments and the issuance of local improvement bonds by cities of the first class, in so far as the same shall not be inconsistent with the provisions of this act: Provided, however, That the duties devolving upon the city treasurer under said laws be, and the same are hereby, imposed upon the county treasurer for the purposes of this act; and to own and control lands, leases and all easements in land necessary for the purposes of the port district; to improve navigable and non-navigable waters of the United States and the state of Washington within the port district; to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters and all natural or artificial waterways (waterways of commercial waterway districts excepted) within the limits of such port district so far and to the full extent that this state can grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters, watercourses, bays, lakes or streams, whether navigable or otherwise, flowing through or located within the boundaries of such port district; to fix absolutely and without right of appeal or review the rates of wharfage, dockages, warehousing and port and terminal charges upon all improvements owned and operated directly by the port district itself, and ferry charges of ferries operated by itself: Provided, however, That the port commission shall file with the public service commission of the state of Washington its schedule of rates and charges so fixed, as is required by the laws of the state of Washington of public service corporations, and may not change

any rate or charge so filed without first filing a notice of such change of rate or charge with the public service commission not less than thirty days prior to the going into effect of such change of rate or charge, and to fix, subject to state regulation rates of wharfage, dockage, warehousing and all necessary port and terminal charges upon all docks, wharves, warehouses, quays, or piers owned by said port district but operated under lease from it, to execute leases of all lands, wharves, docks and property owned and controlled by said port district upon such terms as the port commission may deem proper: Provided, That no lease shall be executed for a period longer than thirty (30) years, and every such lease shall be secured by a bond, with surety satisfactory to the port commission, in a penalty not less than the rental for one-sixth of the term, but in no case less than the rental for one year where the term is one year or more, conditioned to carry out and perform the terms and conditions of such lease: Provided, That in any lease the term of which exceeds five (5) years, and when so stipulated in the lease (the insertion of such stipulation to be discretionary with the port commission) the port commission shall accept, with surety satisfactory to the port commission, a bond conditioned to carry out and perform the terms and conditions of the lease for some part of the term, in no event less than five years (unless the remainder of the unexpired term is less than five years, in which case for the full remainder), and in every such case the port commission shall require of the lessee another or other like bond to be executed and delivered within two years, and not less than one year prior to the expiration of the period covered by the existing bond, covering an additional part of the term in accordance with the foregoing provisions in respect to the original bond, and so on until the end of the term, so that there will always be in force a bond securing the performance of the terms and conditions of the lease, and the penalty in every such bond shall be not less than the rental for one-half the period covered thereby, but no such bond shall be construed to secure the furnishing of any other bond; to sell and convey any property in any wise acquired or owned by the port district whenever the port commission of such district shall have by resolution declared such property to be no longer needed for the purpose of the port district, but no property which is a part of the comprehensive scheme or modification thereof adopted by vote of the people shall be sold or disposed of without the assent of a majority of the voters voting on the question of such proposed sale or disposition at a general or special election; to raise revenue by levy of an annual tax on all taxable property within such port district, not exceeding two mills in any one year: Provided, That such levy shall be made and taxes collected in the manner now or hereafter provided by law for the levy and collection of taxes in school districts of the first class; to borrow money and issue bonds in an amount not exceeding three (3) per cent of the taxable value of all property in such port district, upon a three-fifths majority vote of the qualified voters in such port district voting thereon. General bonds of any such district may be issued for any period not exceeding fifty (50) years. [L. '11, p. 418, § 4; L. '13, p. 210, § 4.]

An election to authorize the incurring of indebtedness by a port district is not invalidated in that the debt exceeded the statutory limit of two and one-half per

cent of the assessed valuation of property within the district, where it appears that eight distinct propositions were voted on, and the aggregate indebtedness for all

the propositions, exclusive of the last one, was within the limitation, and no other debt was contemplated or threatened; and the last proposition was separate from and additional to the others and contingent and expressly conditioned upon the event that, at some future time, the district should have the necessary legal authority and right to incur the indebtedness: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

As to right of municipality to contract for periodical payments throughout term of years, where aggregate would exceed debt limit, see note in *Ann. Cas.* 1913B, 1177.

The submission of the question of incurring indebtedness by a port district under section 4 of the act of 1911 is authorized after the adoption of the "comprehensive scheme" provided for in section 6, and prior to the adoption of the "detail plans" provided for in section 9: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

Section 4 of the act of 1911, empowering a port district to acquire or construct systems of seawalls, jetties, wharves, docks,

ferries, canals, locks, tidal basins and other rail and water transfer and terminal facilities, and to issue local improvement bonds to pay for the same, contains a seeming inconsistency in also providing that no bonds shall ever be issued for the acquiring of any "dock or wharf" until such dock or wharf has been leased upon terms which will produce a net income sufficient to pay the bonds at maturity and the interest thereon, in view of the requirement in section 6 of the preliminary adoption of a comprehensive plan or scheme of the entire system; and such limitation as to docks and wharves can have no application, where a comprehensive scheme has been adopted, as required by section 6, in which there is no possibility of separating the earnings of the dock or wharf from the earnings of the other facilities making up the entire system; and hence it must be construed to apply only where a dock or wharf is acquired separately or together without the other facilities: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

§ 8165-5. Port Commissioners—Organization—Contracts.

All port commissioners shall serve without compensation. The port commission shall organize by the election from its own members of a president and secretary, shall by resolution adopt rules governing the transaction of its business and shall adopt an official seal. All proceedings of the port commission shall be by resolution recorded in a book or books kept for such purpose, which shall be public records. All funds of the port district shall be paid to the county treasurer, and all disbursements shall be made by such officer on warrants drawn by the county auditor upon order of or vouchers approved by the port commission. The port commission shall have authority to create and fill such positions and fix salaries and bonds thereof as it may by resolution provide. All materials required by the port district may be purchased in the open market or by contract, and all work ordered may be let by contract or done by day labor as the port commission may determine. Before awarding any contract the port commission shall cause to be published in some newspaper published within the district a notice for at least ten days before the letting of such contract, inviting sealed proposals for such work, plans and specifications for which must at the time of publication of such notice be on file in the office of the port commission subject to public inspection: Provided, however, That the port commission may at the same time, and as a part of the same notice, invite tenders for said work or materials upon plans and specifications to be submitted by the bidder. Such notice shall state generally the work to be done and shall call for proposals for doing the same to be sealed and filed with the commission on or before the day and hour named. Each bid shall be accompanied by a certified check payable to the order of the port commission for a sum not less than five per cent of the amount of the bid, and no bid shall be considered unless accompanied by such check. At the time and place named such bids shall be pub-

licly opened and read and the commission shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications on file, or to the best bidder submitting his own plans and specifications. If, in the opinion of the commission, all bids are unsatisfactory, they may reject all of them and readvertise, and in such case all checks shall be returned to the bidders; but if such contract be let, then and in such case all checks shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract shall be entered into for the purchase of such materials or doing such work, and a bond given to the port district for the performance of the contract and otherwise conditioned as required by law, with sureties satisfactory to the commissioners, in an amount to be fixed by the commission, but not in any event less than twenty-five (25) per cent of the contract price. If said bidder fails to enter into said contract in accordance with said bid and furnish such bond within ten days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the port district. [L. '11, p. 420, § 5; L. '13, p. 214, § 5.]

§ 8165-6. Adoption of Harbor Improvement Plans.

It shall be the duty of the port commission of any port district, before creating any improvements hereunder, to adopt a comprehensive scheme of harbor improvement in such port district, after a public hearing thereon, of which at least ten days' notice shall be published in a daily newspaper of general circulation in such port district, and no expenditure for the carrying on of any harbor improvements shall be made by said port commission other than the necessary salaries, including engineers, clerical and office expense of such port district, and the cost of engineering, surveying, preparation and collection of data necessary for the making and adoption of a general scheme of harbor improvements in such port district, unless and until such comprehensive scheme of harbor improvement has been so officially adopted by the port commission and ratified by a majority vote of the people of such port district voting thereon in favor thereof at an election which shall be held for such purpose. [L. '11, p. 422, § 6; L. '13, p. 215, § 6.]

§ 8165-7. Improvement to Follow Plans Adopted.

When such general plans shall have been adopted or approved, as aforesaid, every improvement to be made by said commission shall be made substantially in accordance therewith unless and until such general plans shall have been changed by a majority vote of the qualified electors of the port district voting thereon at an election held for such purpose. [L. '11, p. 423, § 7; L. '13, p. 216, § 7.]

§ 8165-8. Improvements—Ownership of.

No improvements shall be acquired or constructed, by the port district, unless such improvements shall, when completed, be the property of such port district, the county in which such port district is located, any commercial waterway district created within its boundaries, any city within such port district, the state of Washington or the United States of America, and the funds of such port district may be expended in the acquirement or construction of any harbor improvement embraced in such general plan adopted as

in this act provided in conjunction with the county in which such port district is located, any commercial waterway district created within its boundaries, any city in such port district, the state of Washington or the United States of America, or all or any of them. [L. '11, p. 423, § 8; L. '13, p. 216, § 8.]

§ 8165-9.

Repealed. See L. '13, p. 217, § 9.

Section 9 of the act of 1911, requiring the port commission to adopt detailed plans and an estimate of the expense of the proposed improvement and submit the same to the voters, as a prerequisite to the incurring of indebtedness, is satisfied by the adoption of plans that fairly inform the voters of the nature and extent of the proposed improvement, and it is not essential that plans be adopted in such detail as necessary for the final construction of the

improvement: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

A resolution of a port district commission for the issuance and sale of bonds, providing that the net income shall be applied to the payment of principal and interest on the bonds from year to year, and a tax levied annually for support to pay the balance of the interest and bonds annually maturing, does not constitute the levy of a tax, but is nothing more than a pledge that the tax will be levied to make up any deficiency in the income: *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

§ 8165-10. Local Improvements upon Majority Petition.

Whenever a petition signed by one hundred (100) freeholders in the district to be therein described, shall be filed with the port commission, asking that any portion of the general plan adopted be ordered, and defining the boundaries of a local improvement district to be assessed in whole or in part to pay the cost thereof, it shall be the duty of the port commission to fix a date for hearing on such petition, after which it may alter the boundaries of such proposed district and prepare and adopt detail plans of any such local improvement, declare the estimated cost thereof, what proportion of such cost shall be borne by such proposed local improvement district, and what proportion of the cost if any, but in any event not to exceed fifty per cent, shall be borne by the entire port district. At any time within two years thereafter, upon petition of the owners of a majority of the lands in such proposed local improvement district, fixed by the port commission, as shown in the office of the auditor of such county, asking that such improvement be ordered, the port commission shall forthwith by resolution order such improvement, provide the general funds of the port district to be applied thereto, acquire all lands necessary therefor, pay all damages caused thereby, and commence in the name of the port district such eminent domain proceedings and supplemental assessment or reassessment proceedings to pay all eminent domain awards as may be necessary to entitle said port district to proceed with such work, and shall thereafter proceed with such work, and shall make and file with the county treasurer its roll levying special assessments in the amount to be paid by special assessment against the property situated within such local improvement district in proportion to the special benefits to be derived by the property in such local improvement district from such improvement. Before the approval of such roll a notice shall be published ten (10) days in one or more daily newspapers of general circulation in such local improvement district, stating that such roll is on file and open to inspection in the office of the clerk of the port commission, and fixing a time not less than fifteen (15) nor more than thirty (30) days from the date of the first publication of such notice within which protests must be filed with the clerk of said port commission against any assessments shown thereon, and fixing a

time when a hearing shall be held by said commission on said protests. After such hearing the port commission may alter any and all assessments shown on such roll and may then by resolution approve the same, but in the event of any assessment being raised a new notice similar to such first notice shall be given, after which final approval of such roll may be made by the port commission. Any person feeling aggrieved by any such assessments shall perfect an appeal to the superior court of such county within ten (10) days after such approval in the manner now provided by law for appeals from assessments levied by cities of the first class in this state. Engineering and office expenses in all cases shall be borne by the general district. [L. '11, p. 424, § 10.]

§ 8165-11. Fifty Per Cent of Cost Paid from General Fund.

Whenever any improvement shall be ordered, payment for which shall be made in part from assessments against property specially benefited, not more than fifty (50) per cent of the cost thereof shall ever be borne by the entire port district, nor shall any sum be contributed by it to any improvement acquired or constructed with or by any other body, exceed such amount, unless a majority vote of the electors of the port district shall consent to or ratify the making of such expenditure. [L. '11, p. 425, § 11.]

§ 8165-12. Funds in Anticipation of Revenues.

Any port commission is hereby authorized, prior to the receipt of taxes raised by levy, to borrow money or issue the warrants of the district in anticipation of the revenues to be derived by such district from the levy of taxes for the purpose of such district during the first year, and such warrants shall be redeemed from the first money available from such taxes when collected. [L. '11, p. 426, § 12.]

§ 8165-13. County Treasurer—Funds.

The county treasurer shall create a fund to be known as the "Port of — Fund," into which shall be paid all money received by him from the collection of taxes in behalf of such port district, and no money shall be disbursed therefrom except upon warrants of the county auditor issued as in this act provided. The county treasurer shall also maintain such other special funds as may be prescribed by the port commission, into which shall be placed such moneys as the port commission may by its resolution direct, and from which disbursements shall be made upon proper warrants of the county auditor issued against the same by authority of the port commission. [L. '11, p. 426, § 13.]

§ 8165-14. Cumulative Act.

This act shall not be construed to repeal, amend or modify any law heretofore enacted providing a method of harbor improvement, regulation or control in this state, but shall be held to be an additional and concurrent method providing for such purpose. [L. '11, p. 426, § 14.]

CHAPTER VII.
COMMERCIAL WATERWAYS.

§ 8166.

This section is void in that it directs an assessment to be made on the lands benefited, but no person or board is authorized to make the assessment, and no provision is made for an assessment-roll or equalization of the same, and the owners are given no notice or opportunity to be heard; and

the provisions therein for a jury to assess the damages for land taken cannot be construed as authorizing the jury to assess the benefits: *State ex rel. Bussell v. Abraham*, 61 Wash. 601, 112 Pac. 671.

As to the validity of eminent domain statute which fails to provide for notice to land owner of proceedings to condemn, see note in *Ann. Cas.* 1913A, 1256.

§ 8166a. Organization—Powers and Duties of Commissioners.

Any county or portion of a county requiring commercial waterways may be organized into a commercial waterway district, and when so organized such district, and the board of commissioners hereinafter provided for, shall have and possess the power herein conferred, or that may hereafter be conferred by law upon such district and board of commissioners, and said district shall be known and designated as commercial waterway district No. — of the county of —, the state of Washington, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession, and shall adopt and use a seal.

The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such commercial waterway district, have the power, and it shall be their duty to manage and conduct the business and affairs of the district; make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and perform such other acts as hereinafter provided, or that may hereafter be provided by law. [L. '11, p. 12, § 1.]

Laws of 1911, page 11, providing for the organization of commercial waterway districts, prescribing the duties and powers of the commissioners and the court procedure, being a general act, applicable alike to all citizens upon the same terms, it is not unconstitutional as a special or private law or granting special privileges to a class of citizens: *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791.

As to the validity or invalidity of special statutes according to its aim and effect, see note in 93 Am. St. Rep. 111.

The commercial waterway district law (section 8166 et seq.) having been declared unconstitutional because of its failure to provide lawful means for levying the assessments authorized, it was competent for the legislature, by retroactive acts (section 8166a et seq.), to legalize and validate attempted organizations and all district indebtedness under the old law, except assessments, and to add provisions curing defects in the old law by virtue of which lawful assessments could thereafter be made, since it does not impair the obligation of a contract: *State ex rel. Bussell v. Abraham*, 64 Wash. 621, 117 Pac. 501.

As to retrospective laws, see note in 120 Am. St. Rep. 468.

As to general rule against construing statute so as to give it a retrospective effect, see notes in 10 L. R. A. 407; 12 L. R. A. 50.

As to retroactive law legalizing municipal contracts, see note in 27 L. R. A. 696.

This act does not limit the power of the commissioners in establishing a district as to the exact work to be done, since the act authorizes the commissioners to improve any and all rivers . . . located within the district and to initiate definite improvements without limitation by the brief description in the petition: *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791.

Under this section, giving a commercial waterway district the right to sue and be sued in the name of its board of commissioners, the commissioners may institute condemnation proceedings in their own name for the construction of a waterway: *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791.

The act of 1911, page 11, providing for the organization of commercial waterway districts, prescribing the powers and duties of the commissioners, and the court pro-

cedure is not unconstitutional as embracing more than one subject, the act being sufficiently broad to embrace all matters included, which are all germane to the general subject: State ex rel. Puget Mill Co. v. Superior Court, 68 Wash. 425, 123 Pac. 791.

A provision authorizing a railroad company to condemn property is germane to the title "An act to provide for the forma-

tion of corporations," and does not violate the organic act which provides that every law shall embrace but one subject, to be expressed in the title: State ex rel. Great Northern R. Co. v. Superior Court, 68 Wash. 572, 40 L. R. A., N. S., 793, 123 Pac. 996.

As to effect where title of statute embraces more than one subject, see note in 79 Am. St. Rep. 456.

§ 8167a. Petition, Contents and Requisites of—Cost Bond.

For the purpose of the formation of such waterway district a petition shall be presented to and filed with the board of county commissioners of the county in which said proposed commercial waterway district is located, which petition shall set forth the object for the creation of said district; shall designate the boundaries thereof and set forth therein the area of land to be benefited by the proposed commercial waterway system, and shall also contain the names of all freeholders residing within said proposed district, so far as known, and shall contain a brief description of the proposed system of waterways, route over which the same is to be constructed, together with the proposed spurs or branches, if any there may be, and the termini thereof, and set forth the further fact that the establishment of said district and the proposed system of commercial waterways will be of special benefit to the property included therein, and will be conducive to the public health and sanitation and increase the public revenue. Said petition shall be signed by the owners of at least a majority of the area of land in the proposed district, or by their agents, and shall pray that the same may be organized under the provisions of this act. Said petitioners shall at the time of the filing of said petition file a bond with such county commissioners, running to the state of Washington, in the penal sum of five hundred dollars, with two or more sureties, to be approved by the board of county commissioners, conditioned that they will pay all costs in case said district, for any reason, shall not be established. [L. '11, p. 12, § 2.]

§ 8168a. Hearing, Notice of—Objections—Extension of Boundaries.

Said petition shall be heard at a regular or special meeting of the board of county commissioners of said county, and said board of county commissioners shall give notice of said hearing by publishing such notice for at least two weeks in two successive issues of some weekly newspaper printed and published in said county, and in case no such newspaper be printed or published in said county, then in some such newspaper of general circulation therein, before the time at which the same is to be heard. Said notice shall give a general description of the nature of the improvement petitioned for, the boundaries and approximate area of the proposed district, the number of freeholders residing therein, so far as known, as shown by said petition, the number of petitioners on said petition, together with the total estimated amount of acreage represented to be owned by said petitioners. Said notice shall further state that said petition is on file at the office of said county commissioners, where the same may be examined or inspected by any person interested in said proposed district. When such petition is presented for hearing, the board of county commissioners shall hear the same, or may adjourn said hearing from time to time, not exceeding one month in all; and

any person or corporation may appear before said board of county commissioners and make objections to the establishment of said district, or the proposed boundary lines thereof, and upon a final hearing said board of county commissioners shall make such changes in the proposed boundaries as they may deem to be proper, and shall establish and define such boundaries, and shall ascertain and determine the area of land that will be benefited by said proposed system of commercial waterways, and shall find whether the proposed commercial waterways will be conducive to the public health, sanitation, welfare and convenience, increase the public revenue, and be of special benefit to the majority of the land included within said boundaries of said proposed district so established by said board of county commissioners: Provided, That no changes shall be made by said board of county commissioners in said boundary lines so as to include territory outside of the boundaries described in said petition: Provided further, That any person or corporation owning lands within the proposed boundaries and who did not sign said petition, or any person, or corporation owning land not included within the proposed boundaries may file a petition with the board of county commissioners asking that the proposed boundaries be extended so as to include other lands described therein; setting forth in said petition the reason therefor, but no person, persons or corporations not owning land included within the boundaries, as originally petitioned for, shall have the right to file such petition unless they ask therein to have their own lands included within the proposed boundaries: Provided, Any corporation owning land within the boundaries described in the original petition may also petition the board of county commissioners for an extension of the proposed boundaries: Provided further, That the boundaries of any commercial waterway district heretofore or hereafter established may be extended by the board of county commissioners so as to include other lands in said county, upon petition signed by the owners of a majority of the area of said lands in the proposed extension; which said petition for extension shall set forth and contain, with reference to the extension, such matters and things and data so far as applicable, as is provided for in the petition required for presentation to the board of county commissioners for the purpose of the formation of the original waterway district: Provided further, That all necessary expenses incident to making such extension, together with the proportionate share of the first cost of any system of commercial waterways existing in the original commercial waterway district at the time of making said extension, shall be levied against and apportioned to the land included in such extension as in this act provided. In such case, the board of county commissioners shall give like notice as provided for in this section of the hearing of the original petition, and the final hearing thereof may in such case be continued from time to time for a period of not exceeding sixty days, and if on final hearing the board of county commissioners deem it advisable and for the best interest of all concerned, they may grant the prayer of said petitioners in whole or in part, and said board of county commissioners of such county shall enter an order on the records of their office setting forth all facts found by them upon the final hearing of said petition, and which may be adduced by them from the evidence heard upon the final hearing thereof. [L. '11, p. 13, § 3.]

§ 8169a. Notice of Election, Requisites of—Commissioners.

Upon the entry of the findings of the final hearing of said petition as set forth in the last preceding section, said board of county commissioners of said county, if they find said proposed system of commercial waterways will be of special benefit to the majority of the area of lands included within said boundaries and will be conducive to the public health, sanitation, welfare and convenience, and will increase public revenue, shall give notice of an election to be held in such proposed commercial waterway district for the purpose of determining whether the same shall be organized under the provisions of this act as a commercial waterway district of the state of Washington, and for the further purpose of choosing at such election three commissioners, who shall be known and designated as "Commercial Waterway Commissioners" for said district proposed to be organized, which said three commissioners shall, upon their election, be the district authorities of said commercial waterway district, and such notice shall describe the boundaries as established by the board of county commissioners on its final hearing of said petition and shall state the name of such proposed commercial waterway district, and approximately, the area of land in said district to be benefited thereby, and the same shall be published for, at least, two weeks prior to such election in a weekly newspaper printed and published within the county within which said district is located, and in case no such newspaper be printed or published in such county, then in such newspaper of general circulation therein for two successive issues thereof, and shall be posted for the same period in at least four public places within the boundaries of said proposed district, which notice shall designate the places within the proposed district where the said election shall be held and require the voters to cast ballots which shall contain the words, "Commercial Waterway District, Yes" or "Commercial Waterway District, No," and also names of the persons voted for for commissioners for said commercial waterway district. The board of county commissioners shall also appoint two judges, one inspector and two clerks for each of said election places and the compensation shall be the same as hereinafter provided for, and shall be a charge upon said district in case the same be established and shall be paid in the same manner as other expenses are paid which are incurred in the establishment and construction of said improvement. In case said district be not established, then all costs and expenses shall be collectible from the bond hereinafter provided for, and any person having a charge against said district shall have a right of action thereon. [L. '11, p. 15, § 4.]

§ 8170a. Electors—Returns—Oath and Bond of Commissioners.

Said election shall be held on the day designated in such notice and shall be conducted as hereinafter provided for, and no person shall be entitled to vote at such election unless he shall be a qualified elector of the county in which such district is located, and shall have resided within the boundaries of said proposed district for a period of not less than ninety days next preceding the date of such election, or, unless he shall be the owner of real estate situated within said proposed district. The board of county commissioners shall on the Monday next succeeding said election count and canvass the votes cast thereat, and if on said canvass and count it appears that the

majority of votes cast are for the "Commercial Waterway District, Yes," the board shall immediately enter an order upon its records declaring the proposed territory duly organized as a commercial waterway district, giving to such district a proper number, followed by the name of the county and state, and shall, also, declare the three persons who received the highest number of votes duly elected commercial waterway commissioners of such commercial waterway district for the following respective terms of office: The one receiving the highest number of votes three years; the one receiving the next highest number of votes, two years; and the third member one year. Said commissioners so elected shall hold office for said respective terms and until their successors are elected and qualified. Said board shall cause a copy of the order entered of record duly signed to be filed in the office of the secretary of state, and from and after the date of such filing said organization shall be deemed complete, and the members of said board of commissioners so chosen at such election, before entering upon the discharge of their duties shall qualify as county commissioners are required to qualify, and to enter into a bond payable to the state of Washington for the benefit of said district with two or more sureties in the penal sum of not less than one thousand (\$1,000) dollars nor more than five thousand (\$5,000) dollars, conditioned for the faithful performance of their duties as commercial waterway commissioners, to be approved by the board of county commissioners and to be filed with the county clerk of the county in which said district is situated. The members of each successive board of commercial waterway commissioners, whether elected or appointed, shall before entering upon their duties take an oath and enter into a bond, as herein provided, and after being approved by the board of county commissioners shall be filed in the office of the county clerk of the county in which said district is situated. [L. '11, p. 17, § 5; L. '13, p. 115, § 1.]

§ 8171a. General Elections, Time and Manner of Holding—Judges, etc.

A general election for the election of one member of said board of commercial waterway commissioners for such district shall be held upon the first Tuesday after the first Monday in December of each year after the year in which said district shall have been established and organized, and the term of office of the persons elected thereat shall begin the second Monday of the following January: Provided, That in case of districts heretofore organized an entire board of commissioners shall be elected at the first election to be held hereunder, whose terms of office shall be one, two and three years respectively from said second Monday in January following, in accordance with the respective number of votes received by said three persons as provided in section 8170a for original elections. Said elections shall be held in accordance with the school laws of the state of Washington. No official ballot shall be required at the first or any subsequent election, and the law known as the direct primary law of this state shall have no application to the election held under this act, and the expense thereof shall be defrayed by said district, and the judges, clerks, and inspectors of said election shall each receive as compensation for the services rendered at such election the sum of three (\$3.00) dollars per day; Provided, That at least thirty days' notice immediately preceding any such general election shall be given thereof by the board of commissioners of such commercial waterway district by posting the same in four public places within

the said district. Said notice shall designate the voting places and contain the names of two electors of said district for each of said voting places as judges of said election, and the name of one elector of said district, for each of said voting places as inspector thereof, the same to be chosen by said board of commissioners. Said board of commissioners shall act as a canvassing board to canvass the votes of each election, and they shall meet the day following such election and canvass said votes and declare the result thereof and issue certificates of election. [L. '11, p. 18, § 6; L. '13, p. 116, § 2.]

§ 8172a. Powers of Commissioners—Acquisition of Rights of Way, etc.

Any commercial waterway district organized or validated under the provisions of this act, or attempted to be organized under the provisions of any previous act and validated under the provisions of any other act, shall have the following powers and authority:

(a) The right of eminent domain, with power by and through its board of commissioners to cause to be condemned and appropriated private property for the use of said organization in the construction and maintenance of a system of commercial waterways and make just compensation therefor: Provided, That the property of private corporations may be subjected to the same rights of eminent domain as that of private individuals: Provided further, That the said board of commissioners shall have the power to acquire by purchase all the property necessary to make the improvements herein provided for.

(b) Said board of commissioners herein provided shall have the right, power and authority to straighten, widen, deepen and improve any and all rivers, watercourses, streams, whether navigable or otherwise, flowing through or located within the boundaries of said district.

(c) To construct all needed and auxiliary ditches, canals, flumes, locks, dikes, and all other artificial appliances in the construction of a commercial waterway system, and which may be necessary or advisable to protect the land in any commercial waterway district, from overflow, or to assist and become necessary in the preservation and maintenance of such commercial waterway system.

(d) In the accomplishment of the foregoing objects, the commissioners of such waterway district are hereby given the right, power and authority by purchase or the exercise of the power and authority of eminent domain, or otherwise, to acquire all necessary and needed rights of way in the straightening, deepening, or widening, or otherwise improving of such rivers, watercourses or streams, and such auxiliary ditches, canals, flumes and dikes herein above mentioned, and when so acquired shall have and are hereby given the right, power and authority by and with the consent and approval of the United States government in cases where such consent is necessary, to divert, alter and change the bed or course of or otherwise improve any such river, watercourse or stream aforesaid, or to deepen, widen and straighten the same: Provided, That such diversion, alteration or change shall not be had without payment of compensation or damages for any property rights, riparian or otherwise, that may be taken or damaged thereby.

(e) The right, power and authority to acquire the necessary and needed rights of way for any and all purposes created by this act may be acquired by

the commissioners of any waterway district over and across or upon any land or interest therein of the state of Washington, or any county of this state, and streets, alleys, and avenues, or public places of any city, town or municipal corporation of this state: Provided, however, That the construction of such commercial waterway or commercial waterways shall not have the effect of impairing any right, power or authority now existing on the part of any city or town to construct in, upon, underneath, above or across such commercial waterway or commercial waterways, sewers, water pipes, mains, the granting of any franchise thereon, or improve by the way of planking, replanking, paving, repaving or any other power, right and authority which, but for this act, such city or town would have in or to such street, avenue, alley or public place, except, however, that such right, power and authority on behalf of such city or town shall not be exercised either by such city or town or by any person or persons, firms or corporations, to whom it might grant any right or franchise which will materially impair the efficiency of said commercial waterway or commercial waterways. The provisions of this section as regards such system of commercial waterway or commercial waterways, to be constructed within the boundaries of any incorporated city or town, shall apply to the extension or enlargement of any commercial waterway or commercial waterways already existing upon, over and across any street, avenue, alley or public place of any city or town, as well as the original construction thereof. [L. '11, p. 19, § 7.]

§ 8173a. State's Interest in Shore Lands Vested in District—Disposal.

All the right, title and interest of the state of Washington in and to so much of the beds and shores of any navigable river, stream, waterway or watercourse located within the boundaries of any commercial waterway district up to and including the line of ordinary high tide in waters where the tide ebbs and flows and up to and including the line of ordinary high water within the banks of any navigable rivers and lakes, to the extent that the same, under any proceedings to be had under this act, shall cease to become part of such river, stream, waterway or watercourse by reason of the diversion of such river, stream, waterway or watercourse, under any proceedings had under this act, are hereby given and granted and vested in the respective commercial waterway districts now existing, or hereafter to be formed, and the commissioners of such respective commercial waterway districts are hereby given the right, power and authority to sell such beds and shores in such manner and upon such notice and proceedings as govern, under the existing laws of the state, the board of county commissioners in the sale and disposition of any real estate belonging to the counties of this state. The proceeds of such sales are to be used for the benefit of such commercial waterway districts, and the payment of any expenses connected with the construction of such commercial waterways or maintenance thereof: Provided, however, That the commissioners of such commercial waterway district may, in their discretion, exchange such abandoned beds and shores, for other property needed in the straightening, deepening or widening of such rivers, watercourses or streams, and which exchange may be made upon such terms and conditions and in such areas as, in the discretion of such commissioners, they may deem advisable and for the best interests of such commercial waterway district without any notice or other formality or proceedings whatever. [L. '11, p. 21, § 8.]

§ 8173-1. Lowering of Shore Lines—Water Line to be Boundary—Title.

In every case where the state of Washington has heretofore sold to any purchaser from the state any second class shore lands bordering upon navigable waters of this state by description wherein the water boundary of the land so purchased is not defined, such water boundary shall be held and is hereby declared to be the line of ordinary navigation in such water; and whenever such waters have heretofore been or shall hereafter be lowered by any action done or authorized either by the state of Washington or the United States such water boundary shall thereafter be held and is hereby declared to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and there is hereby granted and confirmed to every such purchaser, his heirs and assigns, all such lands: Provided, however, That this act shall not apply to such portions of such second class shore lands which shall as hereinafter provided be selected by the commissioner of public lands of the state of Washington for harbor areas, slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys, or other public purposes: Provided, further, That all shore lands and the bed of Lake Washington from the southerly margin of the plat of Lake Washington shore lands southerly along the westerly shore of said lake to a line three hundred feet south of and parallel with the east and west center line of section 35, township 24 north, range 4 east, W. M., are hereby reserved for public uses and are hereby granted and donated to the city of Seattle for public park, parkway and boulevard purposes, and as a part of its public park, parkway and boulevard system and any diversion or attempted diversion of such lands so donated from such purposes shall cause the title to said lands to revert to the state. [L. '13, p. 667, § 1.]

§ 8173-2. Commissioner of Public Lands to Survey and Select Dock Sites, etc.—Title of Streets.

Within twelve months after the taking effect of this act it shall be the duty of the commissioner of public lands to survey such second class shore lands and in platting such survey to designate thereon as selected for public use all of such shore lands as in the opinion of said commissioner of public lands is available, convenient or necessary to be selected for the use of the public as harbor areas and sites for slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys and other public purposes. Upon the filing of such plat in the office of the commissioner of public lands, the title to all harbor area so selected shall remain in the state, the title to all selections for streets, avenues and alleys shall vest in any city or town within the corporate limits of which they may be then situate, otherwise in the county in which situate, the title to and control of any lands so selected and designated upon such plat for parkway and boulevard purposes shall, if the same lie outside of the corporate limits of any city or town and if the same form a part of the general parkway and boulevard system of a city of the first class, be in such city, the title to all selections for commercial waterway district purposes shall vest in the commercial waterway district in which situate, or for which selected, and the title to all selections for slips, docks, wharves, warehouses and other public purposes shall vest in the port district if they be situate in a port district, otherwise in the county in which situate. [L. '13, p. 668, § 2.]

§ 8174a. State, Counties and Cities may Sign Petition—Appropriations.

(a) Whenever the county owns any lands situated within the boundaries of the proposed commercial waterway district, the county auditor, when so directed by the board of county commissioners of the county in which such lands are situated, is hereby authorized to sign the petition praying for the formation of such commercial waterway districts for and on behalf and as the act and deed of such county, and when so signed the same shall be considered in determining the question of majority signature in the area of the land to the petition for a formation of such district.

(b) Whenever any city or town owns any land situated within the boundaries of a proposed commercial waterway district, the city comptroller, when so directed by the council of said city or town in which such lands are situated, is hereby authorized to sign the petition praying for the formation of such commercial waterway districts for and on behalf and as the act and deed of such city or town, and when so signed the same shall be considered in determining the question of majority signature in the area of land to the petition for the formation of such district.

(c) Whenever the state of Washington owns any land situated within the boundaries of the proposed commercial waterway district the commissioner of public lands of the state of Washington, when so directed by the board of said land commissioners of said state, is hereby authorized to sign the petition praying for the formation of such commercial waterway district for and on behalf and as the act and deed of such state, and when so signed the same shall be considered in determining the question of majority signature in the area of the land to the petition for the formation of such district.

(d) Whenever any highway, roads or bridges are maintained by the county in which a commercial waterway district may be established, as herein provided, and it shall appear that the construction and maintenance of such commercial waterway system will be beneficial to such highways, roads, and bridges or which will be beneficial to such highways, roads and bridges as may hereafter be constructed or maintained by the county in which such system of commercial waterways is situated, then the board of county commissioners of such county may, and it shall be the duty of such board to appropriate to such commercial waterway district an amount of money sufficient to pay the proportionate share of such county in accordance with the benefits received or to be received; whenever it may appear to the board of county commissioners of any county that any improvements made or to be made in any commercial waterway district under the provisions of this act shall, on account of the health of the people of the county, be beneficial in respect thereto, the board of county commissioners may make an appropriation of money to such commercial waterway district in such an amount to such board as may seem proper.

(e) Whenever it shall appear to the city or town council of any incorporated city or town, not included or wholly or partly included within the limits of any commercial waterway district that the construction and maintenance of such commercial waterway system will be of special commercial benefit and will be beneficial to the health and sanitation of the inhabitants of such incorporated city or town and to the general welfare of the said city or town, then the said city or town council is hereby empowered and authorized to appropriate such amount of money out of the general funds of the said

city or town as may to the said city or town council seem proper and just to such commercial waterway system, or the city or town council may for such purpose levy an assessment upon all the property in said city and town subject to taxation by said city or town, which shall not exceed one-half mill for each dollar of property.

(f) Public highways, streets and alleys shall not be considered in computing the area of said district. [L. '11, p. 22, § 9.]

§ 8175a. Board of Commissioners, Powers and Duties of—Vacancies.

Said board of commercial waterway commissioners hereinbefore provided for shall have the exclusive charge of the construction and maintenance of all commercial waterways or commercial waterway systems which may be constructed within the said district, and shall be the executive officers thereof, with full power to bind said district by their acts in the performance of their duties as provided by law. In case of vacancy or vacancies occurring in said board by the death, failure to elect, failure to qualify, resignation, such vacancy or vacancies shall be filled at once from the freeholders and qualified electors of said district by the judge of the superior court of said county, and said appointee shall serve until the next annual election and until his successor is elected and qualified: Provided, That in counties where there may be more than one superior judge, the judge eldest in age shall make such appointment. [L. '11, p. 24, § 10; L. '13, p. 117, § 3.]

§ 8176a. Petition for Construction, Contents—Parties.

Whenever it is desired to prosecute the construction of a system of waterways within said district, said district, by and through its board of commissioners, shall file a petition in the superior court of the county in which said district is located, setting forth therein the route or routes over which the same is to be constructed, with a reasonably accurate description thereof, together with the estimated cost of such proposed improvement, showing therein the names of the land owners whose lands are to be benefited by such proposed improvement, the description of the land owned by each such land owner, and the maximum amount of benefits to be derived by each such lot, tract or parcel of land set forth therein from the construction of said proposed improvement, and that the same will be conducive to the public health, sanitation, convenience and welfare and increase the value of all of said property for purposes of public revenue. Said petition shall further set forth a reasonably accurate description of the tracts or parcels of land or property which will be taken or damaged by said improvement, and the names of the owners and occupants thereof, and all persons having any interest therein so far as known to the officers filing the petition or appearing from the records in the office of the county auditor, the total amount of land necessary to be taken therefor, and an estimate of the value of said land so sought to be taken. The said petition shall set forth as defendants therein all persons or corporations whose lands would be benefited by said improvement, or whose lands are sought to be appropriated for said improvement, or whose lands will be damaged thereby, or who have any interest in any of said lands or property as mortgagee, or otherwise appearing on the records of the county auditor's office. Said petition shall also set forth that said proposed system of waterways is necessary, and that all

lands sought to be appropriated for rights of way or other purposes are necessary to be used in the construction and maintenance of said improvement. [L. '11, p. 24, § 11.]

§ 8177a. Board may Employ Engineers, Surveyors, etc.

In the preparation of the facts and data to be inserted in said petition and filed therewith for the purpose of presenting the matter to the said superior court, or any other time, the said board of commissioners of said commercial waterway district may employ one or more good and competent engineers, surveyors and draftsmen to assist them in compiling data required to be presented to the court with said petition as hereinbefore provided, and such legal and other assistance as may be necessary, with full power to bind said district for the compensation of such assistance or employees employed by them, and such services shall be taxed as costs in the suit. [L. '11, p. 25, § 12.]

§ 8177-1. Summons—Service—Proof.

A summons stating briefly the objects of the petition and containing a description of the land, real estate, premises or property sought to be appropriated or damaged, and those which it is claimed to be benefited by such improvement, and stating the court wherein said petition is filed, the date of the filing thereof and when the defendants are required to appear (which shall be ten days, exclusive of the day of service, if served within the county in which the petition is pending, and if in any other county, then twenty days after such service, and if served by publication, then within thirty days from the date of the first publication), shall be served on each and every person named therein as owner, encumbrancer, tenant or otherwise interested therein. Said summons must be subscribed by the commissioners, or their attorney, running in the name of the state of Washington and directed to the defendants; and service thereof shall be made by delivering a copy of such summons to each of the persons or parties so named therein, if a resident of the state, or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode, or in case of a foreign corporation, at its principal place of business in this state, with some person more than sixteen years of age; in case of domestic corporations, said service shall be made upon the president, secretary or other director or trustee for such corporation; in case of minors, on their guardians; or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor; in case of idiots, lunatics or insane persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises or other property sought to be appropriated or damaged, or which it is claimed will be benefited by such improvement, is state, tide, school or county land, the summons shall be served on the auditor of the county in which the land, real estate, premises or other property sought to be appropriated or damaged, or which it is claimed will be benefited, is situated. In all cases where the owner or person claiming an interest in such real or other property is a nonresident of this state, or where the residence of such owner or person is unknown, an affidavit of one or more of the commissioners of said district

shall be filed that such owner or person is a nonresident of this state, or that after diligent inquiry his residence is unknown or cannot be ascertained by such deponent, service may be made by publication thereof in a newspaper published in the county where such lands are situated, once a week for three successive weeks; and in case no newspaper is published in such county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated or damaged, or which it is claimed will be benefited by said improvement. Such publication shall be deemed service upon each nonresident person or person whose residence is unknown. Such summons may be served by any competent person over twenty-one years of age. Due proof of service of such summons by affidavit of publication shall be filed with the clerk of such court before the court shall proceed to hear the matter. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with summons as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all cases not otherwise provided for service of notice, order and other papers in the proceedings authorized by this chapter may be made as the superior court, or the judge thereof, may direct: Provided, That personal service upon any party outside of the state shall be of like effect as service by publication. [L. '11, p. 25, § 13.]

§ 8177-2. Defendants may Appear for Hearing.

Any or all of said defendants may appear jointly or separately at the time and place appointed for hearing said petition, or to which the same may have been adjourned. If the court or judge thereof shall have satisfactory proof that all of the defendants in said action have been duly served with said summons, as above provided, and shall be fully satisfied by competent proof that said improvement is practicable and conducive to the public health, sanitation, welfare and convenience, and will increase the value of said lands for the purpose of public revenue, and that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the establishment of said improvement, the court or judge thereof shall cause a jury of twelve qualified persons to be impaneled to fix the compensation and to assess the damages and benefits, as herein provided, if in attendance upon his court, unless a jury is waived; and if not he may, if satisfied that the public interests require the immediate construction of said improvement, direct the sheriff of his county to summons from the citizens of the county in which the petition is filed as many qualified persons as may be necessary in order to form a jury of twelve persons, unless a jury be waived. If necessary, to complete the jury in any case, the sheriff, under the directions of the court or the judge thereof, shall summons as many qualified persons as may be required to complete the jury from the citizens of the county in which the petition is filed. In case a special jury is summoned the cost thereof shall be taxed as part of the cost in the proceedings and paid by the district seeking to appropriate said land, the same as other costs in the case; and no person shall be competent as a juror who is a resident of, or land owner in, the district seeking to appropriate said land. The

jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to the state, by reason of the appropriation and use of such land, real estate, premises or other property for said improvement and shall ascertain, determine and award the amount of damages to be paid to said owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting such land, real estate, premises or other property for the establishment of said improvement; and shall further find a maximum amount of benefits per acre or per lot or tract to be derived by each of the land owners. And upon a return of the verdict into court the same shall be reported as in other cases; whereupon, a decree shall be entered in accordance with the verdict so rendered, setting forth all the facts found by the jury, and decreeing that said property be appropriated, and directing the commissioners of the district to draw their warrant on the county treasurer for the amount awarded by the jury to each person for damages sustained by reason of the establishment of said improvement, payable out of the funds of said district. [L. '11, p. 27, § 14.]

Under this section, providing for the establishment of a commercial waterway district when the court shall have satisfactory proof that all of the defendants have been served, failure to serve all of the defendants does not vitiate the proceedings as to defendants already duly served, in view of the provision that want of service shall render the proceedings void as to the parties not served, but that all persons served shall be bound, and sec-

tions 8185a and 8186a, providing for bringing in persons not served and for subsequent trials in such cases: *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791.

As to what service upon joint debtors is sufficient to constitute due process, see note in 50 L. R. A. 595.

As to sufficiency of service upon single partner in action against partnership, see note in 20 Ann. Cas. 1238.

§ 8181a. Procedure as to Parties Claiming Interest in Property Damaged.

Such jury shall also ascertain the just compensation to be paid to any person claiming an interest in any lot, parcel of land or property which may be taken or damaged by such improvement, whether or not such person's name or such lot, parcel of land or other property is mentioned or described in such petition: Provided, Such person shall first be admitted as a party defendant to said suit by such court and shall file a statement of his interest in and description of the lot, parcel of land or other property in respect to which he claims compensation. [L. '11, p. 29, § 15.]

§ 8182a. View by Jury.

The court may, upon the motion of such district or of any defendant, direct that said jury (under the charge of any officer of the court and accompanied by such person or persons as may be appointed by the court to point out the property sought to be taken or damaged) shall view the lands and property affected by said improvement. [L. '11, p. 29, § 16.]

§ 8183a. Buildings—Assessment, and Measure, of Damages.

If there be any building standing, in whole or in part, upon any land to be taken, the jury shall add to their finding of the value of the land taken the damages to said building. If the entire building is taken, or if the building is damaged so that it cannot be readjusted to the premises, then the measure of damages shall be the fair market value of the building. If part of the building is taken or damaged and the building can be readjusted

or replaced on the part of the land remaining, then the measure of damages shall be the cost of readjusting or moving the building, or the part thereof left, together with the depreciation in the market value of said building by reason of said readjustment or moving. [L. '11, p. 29, § 17.]

§ 8184a. Separate Findings as to Several Interests—Adverse Claimants.

If the land and buildings belong to different parties, or if the title to the property be divided into different interests by lease or otherwise, the damages done to each of such interests may be separately found by the jury on the request of any party. In making such findings, the jury shall first find and set forth in their verdict the total amount of the damage to said land and buildings and all premises therein, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple; and they shall then apportion the damages so found among the several parties entitled to the same, in proportion to their several interests and claims and the damages sustained by them respectively, and set forth such apportionment in their verdict. No delay in ascertaining the amount of compensation shall be occasioned by any doubt or contest which may arise as to the ownership of the property, or any part thereof, or as to the extent of the interest of any defendant in the property to be taken or damaged, but in such case the jury shall ascertain the entire compensation or damage that should be paid for the property and the entire interests of all the parties therein, and the court may thereafter require adverse claimants to interplead, so as to fully determine their rights and interests in the compensation so ascertained. And the court may make such order as may be necessary in regard to the deposit or payment of such compensation. [L. '11, p. 30, § 18.]

§ 8184-1. Providing for Omission—Levy.

If the board of waterway commissioners shall, at any time, discover that any lands within said district will be benefited by the waterway system, and the same were by mistake, inadvertence or other cause omitted from the assessment of benefits as provided for herein, or which were omitted for the reason that they were not at the time of assessing the benefits provided for herein, for any cause, subject to a legal assessment, said commissioners shall file a petition in the superior court in the original cause setting forth the facts of such benefits, describing the lands omitted, the reason the same were omitted in said original proceedings and giving the names of the owners or reputed owners thereof and praying that said original cause, as to such lands, be opened up for further proceedings for the assessment of the alleged benefits, and upon the filing of said petition summons shall issue thereon and be served on the defendants named in said petition the same as summons is served and issued in original proceedings, and the jury, in assessing the benefits, shall take into consideration the length of time said lands are to receive the benefits from said improvement and its future maintenance, estimating said time from the date when said lands first became legally assessable, which date must be found by the jury in their verdict as to each tract or parcel found to be benefited: Provided, That a jury may be waived as in other proceedings herein: And provided, further, That in case the expense and the cost of the improvements has been paid for by assessments

levied against the land assessed in the original proceedings before the lands provided for in this section are assessed, as provided herein, then, in such case, the assessments levied from time to time on said last-mentioned land shall be paid into the maintenance fund of said district. [L. '11, p. 30, § 19.]

§ 8184-2. Appeal to Supreme Court.

Every person or corporation feeling himself or itself aggrieved by any judgment for damages or compensation or any assessment of benefits provided in this act, may appeal to the supreme court of the state within thirty days after the entry of the judgment, and such appeal shall bring before the supreme court the propriety and justness of the amount of compensation or damages or assessment of benefits in respect to the parties to the appeal. Upon such appeal no bonds shall be required and no stay shall be allowed. [L. '11, p. 31, § 20.]

§ 8185a. Procedure—Judgment—New Trial, Parties not Served.

Upon the return of the verdict the proceedings of the court regarding new trial and the entry of judgment thereon shall be the same as in other civil actions, and the judgment shall be such as the nature of the case shall require. The court shall continue or adjourn the case from time to time as to all occupants and owners named in such petition who shall not have been served with process or brought in by publication, and new summons may issue or new publication may be made at any time; and upon such occupants or owners being brought in, the court shall impanel a jury to ascertain the compensation so to be made to such defendant or defendants for property taken or damaged, and to ascertain and determine the maximum benefits received by any such property, and like proceedings shall be had for such purpose as herein provided. [L. '11, p. 31, § 21.]

§ 8186a. Change in Ownership—Procedure.

The court shall have power at any time, upon proof that any such owner or owners named in such petition who has not been served with process has ceased to be such owner or owners since the filing of such petition, to impanel a jury unless a jury be waived, and ascertain the just compensation to be made for the property, or the damages thereto or benefits received by said property which has been owned by the person or persons so ceasing to own the same, and the court may, upon any finding or findings of any jury or juries, or at any time during the course of such proceedings enter such order. [L. '11, p. 32, § 22.]

§ 8187a. Infants, Insane, etc., Guardian ad Litem for.

When it shall appear from the said petition or otherwise, at any time during the proceedings upon such petition, that any infant or insane or incompetent person is interested in any property that is to be taken or damaged, or benefited, the court shall appoint a guardian ad litem for such infant or insane or incompetent person to appear and defend him, her or them, and the court shall make such order or decree as it shall deem proper to protect and secure the interest of such infant or insane or incompetent person in such property or the compensation which shall be awarded therefor and benefits to be assessed. [L. '11, p. 32, § 23.]

§ 8188a. Finality and Conclusiveness of Judgment—Costs—Appeal.

Any final judgment or judgments rendered by said court upon any finding or findings of any jury or juries, or upon any finding or findings of the court in case a jury be waived, shall be lawful and sufficient condemnation of the land or property to be taken, or of the right to damage the same in the manner proposed, upon the payment of the amount of such findings and all costs, which shall be taxed as in other civil cases: Provided, That in any case defendant recovers no damages, no costs shall be taxed. Such judgment or judgments shall be final and conclusive as to the damages caused by such improvement, and as to the compensation to be allowed for property taken, unless appealed from, and no appeal from the same shall delay proceedings, if such district shall pay into court for the owners and parties interested, as directed by the court, the amount of the judgment and costs, and such districts, after making such payment into court, shall be liable to such owner or owners or parties interested for the payment of any further compensation or damages which may at any time be finally awarded to such parties so appealing in said proceeding, and his or her costs, and shall pay the same on the rendition of judgment therefor and abide any rule or order of the court in relation to the matter in controversy. In case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such district, as aforesaid, shall remain in the custody of said superior court until the final determination of the proceedings. If the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury or the court, he shall be deemed thereby to have waived conclusively an appeal to the supreme court and final judgment may be rendered in the superior court as in other cases. [L. '11, p. 32, § 24.]

§ 8189a. Title Vests upon Payment of Judgment into Court.

The court, upon proof that just compensation so found by the jury, or by the court in case the jury is waived, together with the costs, has been paid to the person entitled thereto, or has been paid into court as directed by the court, shall enter an order that the district shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court as aforesaid, and thereupon the title to any property so taken shall be vested in fee simple in such district. [L. '11, p. 33, § 25.]

§ 8190a. Dismissal When Damages and Costs Exceed Benefits.

In case the damages or amount of compensation for such property, together with the estimated costs of the improvement, amount to more than the maximum amount of benefits which will be derived from said improvement, or, if said improvement is not practicable, or will not be conducive to the public health, sanitation, welfare and convenience, or will not increase the public revenue, the court shall dismiss such proceedings, and in such case a judgment shall be rendered for the costs of said proceedings against said district, and no further proceedings shall be had or done therein; and upon the payment of the costs, said organization shall be dissolved by decree of said court. [L. '11, p. 34, § 26.]

§ 8191a. Conflicting Claims to Money Paid into Court—Procedure.

Any person or corporation claiming to be entitled to any money ordered paid by the court, as provided in this chapter, may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he is entitled to the same, the court shall make an order directing the payment of such claimant of the portion of such money as he or it may be found entitled to; but if, upon application, the court or judge thereof shall decide that the title to the land, real estate or premises specified in the application of such claimant is in such condition as to require that an action be commenced to determine the title of claimants thereto, it shall refuse such order until such action is commenced and the conflicting claims to such land, real estate or premises be determined according to law. [L. '11, p. 34, § 27.]

§ 8192a. Collection of Assessments—Extension on Tax-rolls.

Upon the entry of the judgment, the clerk of said court shall immediately prepare a transcript which shall contain a list of the names of all persons and corporations benefited by said improvement and the amount of benefit derived by each, respectively, and shall duly certify the same, together with a list of the lands benefited by such improvement belonging to each person and corporation, and shall file the same with the auditor of the county for convenience of reference; and from and after the entry of such judgment in the office of the clerk of the court in which the same is rendered, all the lands included in the list of lands benefited by such improvement shall stand charged with the entire cost and expense of said improvement and the other costs, expenses and charges provided for by this act, not exceeding with respect to any lot or tract of land (so far as concerns the original cost) the maximum amount stated or declared in such judgment to be the maximum amount of benefits to be derived by such lot or tract of land or the owners thereof, and all such lands shall thereafter be subject to the assessments to be levied by the board of commissioners for said purposes, which assessments shall be levied pro rata in proportion to the maximum amount of benefits as to each lot or tract of land as stated or declared in such judgment. All assessments shall be levied from time to time by the board of commissioners by written notice to be addressed to and served on the county assessor of the county, which notice shall be so served on the county assessor on or before the first day of November in each year, or as soon thereafter as practicable, and such assessments shall be levied against and apportioned to the lands in such district benefited by said improvement in proportion to the maximum benefits originally determined by the judgment of the court and such assessments shall fall due during the then ensuing calendar year at the time of the falling due of general taxes, and the amount so designated shall be added by the county assessor to the general taxes of each person or corporation, and to the general taxes against each lot or tract of land or other property, according to such notice, and the several amounts thereof shall be placed upon the general tax-rolls in the office of the county assessor and shall be deemed for all purposes a part of the general taxes, and shall constitute liens against each such lot or tract of land of equal rank with state, county and city taxes and shall have the same priority over all other liens as state, county and city taxes have, and shall be subject to the same interest and penalties in case of delinquency as in case of general taxes, and for all purposes of

delinquency, certificates of delinquency, foreclosure and other proceedings leading up to final payment, enforcement and collection, such assessments shall be deemed a part of the general taxes as aforesaid. The amount of the assessment levied by the commissioners during any one year shall not exceed twenty-five per cent of the amount estimated by the board of commissioners to be necessary to pay the costs of the proceedings and the establishment of said district and waterway system, and the cost of construction of said work: Provided, That this limitation shall not apply to assessments levied to pay the principal or interest of any bonds issued under authority of this act, or levied for maintenance charges as provided by section 8197a. And provided further, That where the amount realized from the original assessment shall not prove sufficient to complete the original plans and specifications of any waterway system, alterations, extensions or changes therein for which the said original assessment was made, the board of commissioners of said district shall make such further assessment as may be necessary to complete said system according to the original plans and specifications, which assessment shall be made and collected in the manner provided herein for the original assessment. This amendment shall not be construed to impair or prejudice any proceedings had or taken by any commercial waterway district prior to this amendment under the act hereby amended or any other act relating to commercial waterway districts, but all such proceedings may be continued and carried out under the provisions of this act as hereby amended the same as if originally commenced under the provisions of this act as hereby amended. All proceedings, acts and things which may heretofore have been had or done or attempted to be had or done under the provisions of the act hereby amended or any other act of the legislature relating to commercial waterways shall be considered and deemed a full compliance with the provisions of this amendatory act with reference thereto. And in all cases where any county assessor has prior to this amendment entered upon any county tax-rolls by direction of the board of commissioners of any such district an assessment ordered by them and made pro rata in proportion to the several amounts fixed in any such court judgment as the respective maximum amounts of benefits to be derived by each lot or tract of land, notwithstanding that the provisions of this section or of the other sections of the act of which this act is amendatory have not been strictly pursued, nevertheless the said entries upon said tax-rolls be and the same are hereby validated and confirmed and given the same effect in all respects as if the said amounts had been entered upon such tax-rolls strictly in accordance with the provisions of the law then existing, and all such assessments shall be treated as if levied under the provisions of said act as hereby amended. [L. '11, p. 34, § 28; L. '13, p. 118, § 4.]

§ 8193a. Dismissal—Levy and Collection of Taxes to Pay Costs.

In the event of the dismissal of said proceedings and the rendition of judgment against said district, as hereinbefore provided, said waterway commissioners shall levy a tax upon all the real estate within said district, taking as a basis the last equalized assessment of said real estate for state and county purposes, sufficient to pay said judgment and the cost of levying said tax, and shall cause said tax-roll to be filed in the office of the clerk of the superior court in which such judgment was rendered. If said tax is not

paid within sixty days after the filing of said tax-roll, the court shall, upon the application of any party interested, direct said real estate to be sold in payment of said tax, said sale to be made in the same manner and by the same officer as is or may be provided by law for the sale of real estate for taxes for general purposes; and the same right of redemption shall exist as in the sale of real estate for the payment of taxes for general purposes. [L. '11, p. 36, § 29.]

§ 8194a. Construction—Letting of Contract—Contractor's Bonds.

After the filing of said transcript said commissioners of such waterway district shall proceed at once in the construction of said improvement, and in carrying on said construction or any extensions thereof, they shall have full charge and management thereof, shall have the power to employ such assistance as they may deem necessary and purchase all material and employ all labor that may be necessary in the construction and carrying on of the work of said improvement; and shall have power to let the whole or any portion of said work to any responsible contractor which said contract shall be let to the lowest responsible bidder after advertising for bids for such work in two successive issues of some weekly newspaper printed and published in such county, and shall in such case enter into all necessary agreements with such contractor that may be necessary in the premises: Provided, That the commissioners of said commercial waterway district may sell or otherwise dispose of all excavating material of every kind in such manner and upon such terms and conditions as in their discretion they may deem advisable and for the best interest of such commercial waterway district without any notice or other formalities or proceedings whatever. The proceeds of any sales of such excavated material are to be used for the benefit of such commercial waterway district and the payment of any expense connected with the cost of construction or maintenance thereof: Provided further, That in case the whole or any portion of said improvement is let to any contractor said commissioners shall require said contractor to give a bond in double the amount of the contract price of the whole or of such portion of said work covered by said contract, with two or more sureties to be approved by the board of commissioners of said waterway district and running to said district as obligee therein, conditioned for the faithful and accurate performance of said contract by said contractor, his executors, administrators or assigns, according to the terms and conditions of said agreement, and shall cause said contractor to enter into a further or additional bond in the same amount, with two or more good and sufficient sureties to be approved by said board of commissioners of said waterway districts in the name of said district as obligee therein, conditioned that said contractor, his executors, administrators or assigns, or subcontractor, his executors, administrators or assigns, performing the whole or any portion of said work under contract of said original contractor, shall pay or cause to be paid all just claims for all persons performing labor or rendering services in the construction of said work, or furnishing materials, merchandise or provisions of any kind or character used by said contractor or subcontractor, or any employee thereof in the construction of said improvement: Provided further, That no sureties on said last-mentioned bond shall be liable thereon unless the persons or corporation performing said labor and furnishing said materials, goods, wares, mer-

chandise and provisions, shall, within ninety days after the completion of said improvement file their claim, duly verified, that the amount is just and due and remains unpaid, with the board of commissioners of said waterway district. [L. '11, p. 36, § 30; L. '13, p. 120, § 5.]

§ 8195a. Changes in Location, System, etc., Procedure to Obtain.

The work on said improvement shall begin and shall be completed with all expedition possible, and said board of commissioners of such waterway district, or any contractor thereunder, shall have no power whatever to change said route or system of improvement or the manner of doing the work therein so as to make any radical changes in said improvement, without the written consent of all the land owners to be benefited thereby, and the land owners which may be damaged thereby. And in case any substantial changes in said system of improvement or the manner of the construction thereof shall be deemed necessary by said board of commissioners at any time during the progress thereof, and if the written consent to such changes cannot be procured from said land owners, then said commissioners, for and on behalf of said district, shall file a petition in the superior court of the county within which said district is located, setting forth therein the changes which they deem necessary to be made in the plan or manner of the construction of said improvement, and praying therein to be permitted to make such changes, and upon the filing thereof, the commissioners shall cause a summons to be served, setting forth the prayer of said petition, which summons shall be served in the same manner as the service of summons in the case of the original petition, upon all the land owners of or others claiming any lien or record interest in the lands benefited or damaged by said improvement or by said proposed change in said improvement, and any or all of said parties so served may appear in said cause and submit their objections thereto, and after the time for the appearance of all of said parties has expired, the court shall proceed to hear said petition at once without further delay, and if it appears during the course of said proceedings that the property rights of any of said land owners will be affected by such proposed change in said improvements, then the court, after having passed upon all preliminary questions as in the original proceedings shall cause, unless a jury be waived, a jury to be impaneled as in the case of the original proceeding for the establishment of said improvements, and upon the final hearing of said cause, the jury shall return a verdict finding the amount of damages, if any, sustained by all persons and corporations, the same as upon the original petition, by reason of such proposed change, and shall readjust the amount of benefits claimed to have been increased or diminished by any of said land owners by reason of said proposed change in said improvements, and the proceedings thereafter shall be the same as to rendering judgment, appeal therefrom, payment of compensation and damages and filing of the certificate with the auditor, as hereinbefore provided for in the proceedings upon the original petition, and said commissioners shall have a right thereafter to proceed with the construction of said improvements according to the changes made therein. [L. '11, p. 37, § 31.]

§ 8196a. Payments to Contractor—Reserve.

During the construction of said improvement said commissioners shall have the right to allow payment thereof, in installments as the work pro-

gresses, in proportion to the amount of work completed: Provided, That no allowance or payment shall be made for said work to any contractor or subcontractor to exceed seventy-five per cent of the proportionate amount of the work completed by such contractor or subcontractor, and twenty-five per cent of the contract price shall be reserved at all times by said board of commissioners until said work is wholly completed, and shall not be paid upon the completion of said work until ninety days have expired for the presentation of all claims for labor performed and materials, goods, wares, merchandise and provisions furnished or used in the construction of said improvements; and upon the completion of said work and the payment of all claims hereinbefore provided for according to the terms and conditions of said contract, said commissioners shall accept said improvement and pay the contract price therefor. [L. '11, p. 39, § 32.]

§ 8197a. Annual Maintenance Tax, Levy of.

The board of commissioners of any commercial waterway district shall on or before the first day of November of each year, make an estimate of the cost of maintenance of the waterway system, constructed in such district which estimate shall include the cost of making any necessary repairs that it might become necessary to make in the maintenance of such system. Such estimates shall be made for the succeeding year and the amount so estimated shall be certified by the board of commissioners to the auditor of the county in which such district is located, on or before said date and the amount thereof shall be levied against and apportioned to the lands in such district benefited by said improvement in proportion to the maximum benefits originally assessed by the judgment of the court, and said amount shall be added to the general taxes against said lands and collected therewith. [L. '11, p. 39, § 33.]

§ 8198a. Board, Organization and Officers of—Warrants.

The board of commissioners of such district shall elect one of their number chairman and one secretary, and shall keep minutes of all their proceedings, and may issue warrants of such district in payment of all claims of indebtedness against such district; such warrants shall be in form and substance the same as county warrants, or as near the same as may be practicable, and shall draw interest at a rate to be fixed by said board, from the date of their presentation to the treasurer for payment, as hereinafter provided, and shall be signed by the chairman and attested by the secretary of said board: Provided, That no warrants shall be issued by said board of commissioners in payment of any indebtedness of such district for less than the face or par value. [L. '11, p. 40, § 34; L. '13, p. 122, § 6.]

§ 8199a. Issuance of Bonds and Payments of Warrants.

At any time after the entry of a judgment in a proceeding brought under the foregoing provisions of this act, the board of commissioners of such waterway district may issue bonds as hereinafter provided for all or any part of the total amount of the cost of construction of said improvement, together with the cost of the establishment of the district and any and all other expenses of every kind connected with the completion of such waterway system, including the damages assessed and compensation made to land

owners for right of way and the expenses and costs of the entire proceedings, and the purpose of issuing such bonds may embrace, in whole or in part, the funding of any outstanding warrants or obligations of such district. In case such bonds are issued there is hereby appropriated and pledged for the payment thereof a sufficient amount of all the maximum benefits stated or declared, or to be stated or declared, by the judgment of the court against all the lands benefited and to be benefited by the improvement within such district and there is hereby appropriated and pledged for such payment a sufficient amount of all sums charged against such lands and the assessments therefor as will be sufficient to pay all such bonds as the same or any part thereof become due; and while any such bonds shall be outstanding the board of commissioners shall at no time levy any assessments for any purpose, other than their payment, which shall so far impair the fund to be realized from the collection of all the assessments as to jeopardize the payment of such bonds or to reduce such fund below the point where there will be ample amounts still leviable to provide for the payment thereof. The bonds hereby authorized shall not be sold for less than their par value. All bonds and warrants issued under the authority of this act shall be legal securities which may be used by any bank or trust company for deposit with the state treasurer, or any county or city treasurer as security for deposits in lieu of a surety bond under any law relating to deposits of public moneys. When the county treasurer shall have on hand money of such district available for the payment of the warrants of such district, he shall call such warrants in the same manner and under the same conditions as county warrants. [L. '11, p. 40, § 35; L. '13, p. 122, § 7.]

§ 8200a. Bonds—Form, Denomination, Interest—Coupons.

Said bonds shall be numbered from one upwards, consecutively, and be in denominations of not less than one hundred (\$100) dollars, nor more than one thousand (\$1,000) dollars. They shall bear the date of issue, shall be made payable to the bearer in not more than ten (10) years nor less than five (5) years from the date of their issue, and bear interest at a rate not exceeding seven per cent per annum, payable semi-annually, with coupons attached for each interest payment. The bonds and each coupon shall be signed by the chairman of the board of waterway commissioners, and shall be attested by the secretary of the board, and the seal of such district shall be affixed to each bond, but not to the coupons: Provided, however, That said coupons in lieu of being so signed may have printed thereon a fac-simile of the signatures of such officers. [L. '11, p. 41, § 36; L. '13, p. 124, § 8.]

§ 8201a. Bonds may be Exchanged for Warrants.

Said bonds may be exchanged at not less than their par value for an equal amount of the warrants of the district issuing such bonds. [L. '11, p. 41, § 37.]

§ 8202a. Liquidation of Bonds, Levy of Assessment for—Separate Fund.

Beginning five years before said bonds shall become due, the commissioners of such commercial waterway district issuing them are hereby authorized and required to levy four annual assessments each equal to twenty-five per cent of the total amount necessary to liquidate said bonds at matur-

ity; such assessments shall be collected by the county treasurer and kept as a separate fund for the sole purpose of liquidating said bonds in accordance with the provisions of the following section. [L. '11, p. 41, § 38; L. '13, p. 124, § 9.]

§ 8203a. Bonds, Payment of and Calls for.

It shall be the duty of the treasurer in any county in which there may be a district issuing bonds under the provisions of this chapter to call in for payment on each interest day on and after five years from the date of any such bonds in numerical order beginning with bond number one, as many of such bonds as can be paid out of the funds on hand for that purpose. Said call shall be published for two consecutive weeks in the newspaper doing the county printing, the first publication to be two weeks prior to the said interest day, and shall state the numbers of bonds so called and that interest thereon will cease on said interest day. [L. '11, p. 41, § 39; L. '13, p. 124, § 10.]

§ 8204a. Payment of Coupons, Annual Levy for.

It shall be the duty of such waterway commissioners annually to levy an assessment sufficient for the payment of the coupons hereinbefore mentioned as they fall due. The proceeds of said levy shall be set apart by the county treasurer as a special fund to be known as the "Interest Fund." Said coupons shall be considered for all purposes as warrants drawn upon the funds of the district issuing bonds under the provisions of this chapter, and, when presented to the county treasurer, and no funds are in the treasury to pay said coupons, it shall be his duty to indorse said coupons as presented for payment in the same manner as other warrants upon the funds of said district are indorsed, and thereafter said coupons shall bear interest at the same rate as the bond to which they belong and be subject to call in the same manner as other warrants. [L. '11, p. 42, § 40; L. '13, p. 125, § 11.]

§ 8205a. Registration of Bonds.

Before the bonds are delivered to the purchaser they shall be presented to the county treasurer, who shall register them in a book kept for that purpose and known as the bond register, in which register he shall enter the number of each bond, the date of issue, the maturity, amount and rate of interest, to whom and when payable, and the proceeds derived from the sale of said bonds shall in all cases be paid by the purchaser thereof to the county treasurer. [L. '11, p. 42, § 41.]

§ 8206a. Warrants—Presentation and Indorsement—Calls for.

All warrants issued under the provisions of this chapter shall be presented by the holders thereof to the county treasurer, who shall indorse thereon the day of presentation for payment, with the additional indorsement thereon, in case of nonpayment, that they are not paid for want of funds; and no warrant shall draw interest under the provisions of this act until it is so presented and indorsed by the county treasurer. And it shall be the duty of such treasurer, from time to time, when he has sufficient funds in his hands for that purpose, to advertise in the newspaper doing the county printing for the presentation to him for payment of as many of the out-

standing warrants as he may be able to pay: Provided, That thirty days after the first publication of said notice of the treasurer calling in any of said outstanding warrants, said warrants shall cease to bear interest, which shall be stated in the notice. Said notice shall be published two weeks consecutively, and said warrants shall be called in and paid in the order of their indorsement. [L. '11, p. 42, § 42.]

§ 8207a. Submission of Questions to Jury.

Upon the trial of any questions of issue by a jury under the provisions of this chapter the trial court may, in its discretion, submit all questions to be found by the jury in the form of separate findings, or may submit to such jury separate forms of verdict on all such questions to be found by the jury therein. [L. '11, p. 43, § 43.]

§ 8208a. Eminent Domain Extended to Public Lands.

All state, county, school district, or other lands belonging to other public corporations shall be subject to the provisions of this chapter, and such corporations, by and through the proper authorities, shall be made parties in all proceedings herein affecting said lands, and shall have the same rights as private persons, and their lands shall be subject to the right of eminent domain the same as the lands of private persons or corporations. [L. '11, p. 43, § 44.]

§ 8209a. Assessment of Benefits Against State and Municipalities—Payment.

In case lands belonging to the state, county, school district or other public corporation are benefited by any improvement instituted under the provisions of this chapter, all benefits shall be assessed against such lands, and the same shall be paid by the proper authorities of such public corporation at the times and in the manner as assessments are called and paid in case of private persons, out of any general fund of such corporation. [L. '11, p. 43, § 45.]

§ 8210a. Fees for Service of Process.

Fees for services of all process necessary to be served under the provisions of this chapter shall be the same as for like services in other civil cases, or as is or may be provided by law. [L. '11, p. 43, § 46.]

§ 8211a. Compensation of Board, Objections to.

In performing their duties under the provisions of this chapter the board of waterway commissioners shall receive such compensation as may be just and reasonable for all necessary services actually performed, not exceeding three dollars per day, to be determined and allowed by the court upon presentation by said commissioners, or either of them, of an itemized statement duly verified by either or all of such board, that the same is just, reasonable, necessary and that such services were actually performed, and that no part of said compensation has ever been paid, and in case such services are rendered by said board in the establishment or construction of said improvement, or any extension thereof, the amount thereof so allowed by the court shall be deemed to be a part of the cost of the construction and establishment of said improvement, and in case such compensation to be

allowed by the court shall be for services rendered by said board in the repairing or maintenance of such improvement, such allowance shall be added to the annual cost of maintenance of such system: Provided, That any person interested therein may file objections to the allowance asked for either in whole or in part, and such claims so filed shall not be passed upon or allowed by the court until the expiration of thirty days from the filing thereof. Said board of commissioners, or the member thereof, presenting such claims or allowance, shall, at the time of the filing thereof in the court, post notices in at least four public places within said district, which said notices shall set forth therein the fact that an application for allowance has been filed in said court, giving the date of the filing thereof and the amount of the allowance applied for, and demand that any and all persons having any interest therein shall file objections in said court, if any they have, to the allowance of such claim or any portion thereof, within thirty days from the filing of such application for allowance, and the court shall hear said application and the objections thereto, if any be made and filed, and shall in its discretion, make such allowance in such amount as it may deem to be just in the premises, and the same shall be paid as other claims against said district are paid. [L. '11, p. 43, § 47.]

§ 8212a. Court may Compel Performance by Mandatory Injunction.

The superior court may compel the performance of the duties imposed by this chapter, and may, in its discretion, on proper application therefor, issue its mandatory injunction for such purpose. [L. '11, p. 44, § 48.]

§ 8212b. Former Districts Declared Valid.

The organization, establishment and creation of all commercial waterway districts in this state heretofore had, or made, or attempted under the provisions of Remington and Ballinger's Code, sections 8166 to 8212, under which attempted organization, establishment or creation, an organized district has been maintained since the date of such attempted organization, establishment or creation is hereby for all purposes declared legal and valid, and such commercial waterway districts are hereby declared duly organized, established and created. And all debts, contracts and obligations heretofore made or incurred by or in favor of any such commercial waterway district so attempted to be organized, established and created, and all official bonds or other obligations executed in connection with or in pursuance of such attempted organization, are hereby declared legal and valid and of full force and effect: Provided, That nothing herein shall be construed to legalize or validate any attempted assessment or condemnation which may have been had by such district prior to the passage of this act. [L. '11, p. 10, § 1; L. '11, p. 45, § 49.]

§ 8212c. Districts Formed Under Previous Acts.

Nothing herein contained shall be considered as repealing any of the provisions of any act of the legislature relating to the validation and legalization of commercial waterway districts and obligations incurred by such attempted organizations, but all provisions of this act relating to the conferring of rights, powers and authority shall be deemed applicable to all commercial waterway districts, whether organized or validated under the

provisions of this act or organized or validated or legalized under or by virtue of any other act. All proceedings, acts and things which may heretofore have been had or done or attempted to be had or done under the provisions of any other act of the legislature relating to commercial waterways shall be considered and deemed a full compliance with the provisions of this act with reference thereto. And any such district so validated or legalized shall be permitted to continue its operations in accordance with the provisions of this act with like effect as if said district had been originally organized under the provisions hereof, and as if said acts, proceedings or things had been had or done by it under the provisions of this act, it being the intention hereby to enable and permit such validated or legalized district to continue and complete its operations with like force and effect as if such district had been organized and had proceeded under the provisions of this act. [L. '11, p. 45, § 50.]

CHAPTER VII-A.

PUBLIC WATERWAYS.

§ 8212-1. Public Waterway District—Improvement by County.

Whenever in any county of this state the owners of lands bordering upon or accessible to any navigable water shall desire to improve their said lands, hereinafter designated as the "district," by the construction of a new public waterway, or the deepening or enlargement of an existing public waterway, for the floatage of vessels and the drainage of swamp and overflowed lands, and the proposed improvement will increase the public revenues and be of other public benefit, they may present the plan of such proposed waterway to the board of county commissioners of such county, hereinafter designated the "board," and have the same acted upon as provided in this act. [L. '11, p. 64, § 1.]

§ 8212-2. Accessible Lands.

Lands shall be deemed accessible to such waterway when by reason of their nearness to the same their value will be materially increased by the construction or deepening or widening of such waterway. [L. '11, p. 64, § 2.]

§ 8212-3. Petition—Signatures—Map—Evidence—Hearing.

The plan of such proposed waterway shall be presented to the board by a written petition of owners of lands which it is represented will be improved by the construction, deepening or widening of such waterway; and such petition shall be signed by the owners of thirty-five per cent or more of the area of lands in the district, and shall be verified by one or more of the petitioners to the effect that the signatures attached are the genuine signature of the persons or corporations signing the same. Each petitioner shall add a description of the lands he owns. If petitioners are unmarried persons they shall so state. If lands are owned by married persons, husband and wife shall join in the petition. If a petitioner is a corporation, the signature shall be accompanied by a certified copy of a resolution of the board of directors or trustees of the corporation authorizing the person signing the petition for the corporation to execute it. If lands included in the petition are owned by minors, insane persons, or other persons under

guardianship in this state, the petition may be signed by the guardians of such persons: Provided, That the signature be accompanied by a certified copy of an order of the superior court having the guardianship of such person in charge, authorizing the guardian to sign the petition. A petition may consist of one or more separate papers or sheets which are identified with the subject matter.

The petitioners shall file with the board, with their petition, a map of the lands in the district and a statement showing each separate ownership of lands as shown by the public records of the county, and their location in the county, with the names of the owners as shown by such records, and the location of the proposed waterway if a new waterway is to be constructed. If an existing waterway is to be deepened the map shall show its location, and if it is to be widened the map shall show its location and the extent to which it is to be widened. With the petition there shall also be presented satisfactory evidence from the real property records of the county that the petitioners are severally the owners in fee simple of their respective tracts of land, and that all taxes and assessments due thereon are paid. If it is proposed that any lands in the district shall be filled with the material dug or dredged from such waterway, the petition shall so state, and the map of the district and plan of the improvement shall show the location, depth and yardage of such fill. The petition may also fix the price per cubic yard at which such fill shall be charged to the land filled, which charge shall be added to the assessment for the improvement to be made upon such lands and be paid as a part thereof. If the price of filling is not fixed by the petition it may be fixed by the board.

At any time after the filing of such petition one or more of the petitioners may file and record in the office of the auditor of the county, notice of the pendency of the proceeding, describing the boundaries of the proposed district, and from the time of such filing all persons shall be deemed to have notice of the pendency of the proceeding and be bound thereby. Upon the hearing upon such petition, hereinafter provided, if the same be denied any person interested may file in the office of said county auditor a certified copy of the order denying the same, whereupon the auditor shall enter the discharge of the notice of the pendency of the proceeding on the margin of the record thereof. And the like discharge may be filed whenever the proceeding is terminated for any other reason. [L. '11, p. 65, § 3.]

§ 8212-4. Petitioner to File Bond—Costs.

Said petitioners shall at the time of filing their petition with the board, file a bond executed by one or more of their number as principals, and in behalf of all, and by a surety corporation authorized to become surety upon public bonds in this state, which bond shall run to the state of Washington as obligee and be in the sum of five hundred dollars, conditioned that they will pay all costs of the proceeding in case for any reason the petition shall not be granted, or in case no fund shall thereafter be created for the payment of the expense attending said proposed waterway improvement. And said petitioners shall, from time to time as the board shall estimate and order, pay the costs and expenses of such proceeding. [L. '11, p. 66, § 4.]

§ 8212-5. Hearing—Dismissal—Notice—Objections.

Said petition, after the filing thereof, shall be taken up and considered by the board at the next regular or special meeting thereof, or as soon thereafter as may be convenient, and if the petition be defective in any particular it may be amended and an adjournment of the matter may be had to permit of such amendment, for a time not exceeding thirty days. If the petition be defective and be not sufficiently amended within the adjournment taken, it shall be dismissed. But if such petition be in fact sufficient, or if by amendment it be made sufficient, it shall be the duty of the board to enter an order setting a time for a public hearing thereon within thirty days from the date of such order, and directing the clerk of the board to give notice of the time and place of such hearing in the official newspaper of the county by publication therein at least once each week for three successive weeks before the time of hearing; and in case there be no such official newspaper, then in some newspaper of general circulation in said county. Such notice shall be addressed to the owners of lands not petitioning, as shown by the petition or as may be ascertained to be the fact, and to all other persons known and unknown having or claiming an interest in the lands in the district, and shall state the pendency of the proceeding, its object, the names of the signers of the petition, the number of acres of land they claim to own, the whole number of acres proposed to be improved, the boundaries of the lands to be included in the improvement district, and the time and place of hearing. And notice shall also be given that at the time and place named, or at such time as the same may be adjourned to, the board will consider the petition under the provisions of this act, and will hear all objections offered by interested parties and grant or refuse the petition as it may be advised. The clerk of the board shall keep a record of all orders, hearings and proceedings of the board in reference to such waterway district in a separate bound book, designated as the record of proceedings as to such district. [L. '11, p. 67, § 5.]

§ 8212-6. Consent of Owner—Findings—Decree.

At the time and place prescribed in the said notice any owner of land within said proposed improvement district may file with the board his written consent to the proposed improvement, and he shall then be considered as a petitioner; and if the owners of more than one-half of the lands within the district, including the lands represented by the petition, shall assent to the prayer of said petition, the board shall then proceed to hear and consider any objections which may have been filed at that or any previous time, and may adjourn such hearing from day to day. If the board after full hearing on the merits of the proposed waterway shall be satisfied that the same will be of benefit to the public interests, and that private benefit will result to the lands within the district sufficient to equal the cost of the proposed improvement, they may make findings accordingly and declare their intention to establish the waterway district under the name of the "—— Waterway District" and make the improvement as prayed for; but if the owners of less than one-half of the lands in the district shall assent to the creation thereof and the making of the proposed improvement, the board shall deny the petition and the proceeding shall be dismissed. [L. '11, p. 68, § 6.]

§ 8212-7. Right to Sue and be Sued.

Upon the entry of an order creating such waterway district by the board, it shall have power to perform all the duties and exercise all of the authority conferred upon it by this act, and shall have the right to sue and be sued in all matters pertaining to such district as the representative thereof, in the same manner and to the same extent as in all other county affairs. But such district shall bear all the expenses of such action on the part of the board, and the county shall be at no expense or charge therefor. [L. '11, p. 68, § 7.]

§ 8212-8. Right of Eminent Domain.

Said board shall have the right of eminent domain for the acquisition of lands necessary to the construction or widening of the proposed waterway, and may cause all necessary lands to be condemned and appropriated or damaged for the use of said waterway, and make just compensation therefor. The private property of the state, the county, and other public or quasi-public corporations (except incorporated cities and towns), and of private corporations, shall be subject to the same rights of eminent domain at the suit of said board as the property of private individuals. [L. '11, p. 68, § 8.]

§ 8212-9. Bridging Part of Cost.

Whenever in aid of the construction or widening of any such waterway it shall be necessary to cross or disturb any existing public highway or railroad, the cost of bridging the waterway or otherwise substantially continuing the highway or railroad may be ascertained and paid as a part of the cost of the improvement if such cost is not otherwise provided for. [L. '11, p. 69, § 9.]

§ 8212-10. Order to Condemn.

Whenever the said board shall desire to condemn and acquire land, or damage lands or property for any purpose authorized by this act, said board shall make an order therefor wherein it shall be provided that such land or damages shall be paid for wholly by special assessment upon the property within said waterway district, and the proceeding thereafter shall be as herein specified. [L. '11, p. 69, § 10.]

§ 8212-11. Compensation Ascertained by Jury or Court.

The board shall file a petition, verified by its chairman and signed by the prosecuting attorney, in the superior court of the county, praying that the property described may be taken or damaged for the purpose specified and that compensation therefor be ascertained by a jury or by the court in case a jury be waived. Such petition shall allege the creation of the waterway district and contain a copy of the order directing the proceeding, a reasonably accurate description of the lots or parcels of land or other property which will be taken or damaged, and the names of the owners and occupants of said lands and of persons having any interest therein so far as known to the said board, or as appears from the records in the office of the county auditor. [L. '11, p. 69, § 11.]

§ 8212-12. Summons Issued and Served.

Upon the filing of the petition aforesaid a summons returnable as summons in other civil actions, shall be issued and served upon the persons made parties defendant, together with a copy of the petition, as in other civil actions; and in case any of the defendants are unknown or reside out of the state, a summons for publication shall issue and publication be made and return and proof thereof be made in the same manner as is or shall be provided by the laws of the state for service upon nonresident or unknown defendants in other civil actions. Notice so given by publication shall be sufficient to authorize the court to hear and determine the suit as though all parties had been sued by their proper names and had been personally served. [L. '11, p. 69, § 12.]

§ 8212-13. Service on Commissioner of Public Lands—Attorney General—Duties.

In case the land or other property sought to be taken or damaged is state land, the summons and copy of petition shall be served upon the commissioner of public lands; if it is county land it shall be served upon the county auditor, and if school land, upon the county auditor and the chairman of the board of directors of the school district. Service upon other parties defendant, public or private, shall be made in the same manner as is or shall be provided by law for service of summons in other civil actions. If the state is made a defendant the attorney general shall represent it. If the county is a defendant the court shall appoint an attorney to represent it at all stages of the proceedings, and may allow him compensation for his services as costs of the proceeding. [L. '11, p. 70, § 13.]

§ 8212-14. Jury to Ascertain Compensation.

Upon the return of said summons, or as soon thereafter as the business of the court will permit, the said court shall proceed to the hearing of such petition and shall adjudicate whether the proposed condemnation is for a public use, and if its judgment is that the proposed use is public, it shall impanel a jury to ascertain the just compensation to be paid for the lands or property taken or damaged, unless a jury be waived; but if any defendant or party in interest shall demand, and the court shall deem it proper, separate juries may be impaneled as to the separate compensation or damages to be paid to any one or more of such defendants or parties in interest. Should the court determine that the proposed use is not public, it shall dismiss the proceeding. [L. '11, p. 70, § 14.]

§ 8212-15. File Statement of Interest.

The jury or court shall also ascertain the just compensation to be paid to any person found to have an interest in any lot or parcel of land or property which may be taken or damaged for such improvement, whether or not such person's name or such lot or parcel of land or other property is mentioned or described in said petition: Provided, That such person shall first be admitted as a party defendant to such suit by such court and shall file a statement of his interest in, and a description of, the lot or parcel of land or other property in respect to which he claims compensation. [L. '11, p. 71, § 15.]

§ 8212-16. Jury View Property.

The court may upon motion of the petitioners, or of any defendant, direct that the jury under the charge of an officer of the court and accompanied by such person or persons as may be appointed by the court to point out the property sought to be taken or damaged, shall view the lands or property taken or damaged for the proposed improvement. [L. '11, p. 71, § 16.]

§ 8212-17. Damage to Building.

If there be any building standing in whole or in part upon any land to be taken, the jury or court shall add to the finding of the value of the land taken, the value or damage to such building as the case may require. If the entire building is taken, or if it is damaged so that it cannot be readjusted to premises of the owner, then the measure of damages shall include the fair market value of the building. If part of the building is taken, or it is damaged but can be readjusted or replaced on premises of the owner, then the measure of damages shall be the cost of readjusting or moving the building or part thereof left, together with the depreciation in the market value of said building by reason of said readjustment or moving. [L. '11, p. 71, § 17.]

§ 8212-18. Damages as Interest Appears—Interpleader.

If the land and buildings belong to different parties, or if the title to the property be divided into different interests by lease or otherwise, the damage done to each of such parties or interests may be separately found by the jury or court on the written request of any party. And in making such findings the jury or court shall first find and set forth the total amount of the damage to said lands and buildings and all premises therein, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple; and they shall then apportion the damages so found among the several parties entitled to the same in proportion to their several interests and claims. But no delay in ascertaining the amount of compensation shall be occasioned by any doubt or contest which may arise as to the ownership of the property or any part thereof, or as to the extent of the interest of any defendant in the property to be taken or damaged, but in such case the jury or court shall ascertain the entire compensation or damage that should be paid for the property and the court may thereafter require adverse claimants to interplead so as to fully determine their rights and interests in the compensation so ascertained, and may make such order as may be necessary in regard to the deposit or payment of such compensation and the division thereof. [L. '11, p. 71, § 18.]

§ 8212-19. Procedure Same as Civil Actions.

Upon the filing of the findings of the jury or court, the proceedings of the court regarding new trial and the entry of judgment thereon, shall be the same as in other civil actions, and the judgment shall be such as the nature of the case may require. The final judgment of the court shall be that the lands and property taken and damaged shall, upon payment of the sums awarded, vest in the county as and for a public waterway. The court shall continue or adjourn the case from time to time as to all defendants

named in such petition who shall not have been served with process or brought in by publication, and new summons may issue or new publication be made at any time, and upon such defendants being brought in the court may impanel a jury to ascertain the compensation so to be made to such defendants for property taken or damaged, or may proceed without a jury if none be demanded, and like proceedings shall be had for such purpose as are herein provided. [L.'11, p. 72, § 19.]

§ 8212-20. Substitute Defendant.

The court shall have power at any time, upon proof that any defendant who has not been served with process has ceased to be an owner since the filing of such petition, to substitute the new owner as a defendant, and after due service of the summons and petition upon him proceed as though he had been a party in the first instance; and the court may upon any finding of the jury, or at any time during the course of the proceedings, enter every such order, rule, judgment or decree as the nature of the case may require. [L. '11, p. 73, § 20.]

§ 8212-21. Guardian ad Litem.

When it shall appear from said petition or otherwise, at any time during the proceedings upon such petition, that any infant, insane or distracted person is interested in any property that is to be taken or damaged, the court shall appoint a guardian ad litem for such infant or insane or distracted person to appear and defend for him, her or them; and the court shall make such order or decree as it shall deem proper to protect and secure the interest of such infant or insane or distracted person in such property, or the compensation which shall be awarded therefor. [L. '11, p. 73, § 21.]

§ 8212-22. Findings to State Damage.

The compensation to be ascertained by the jury or court shall be irrespective of any benefit from the improvement proposed, and the finding shall state separately the value of land taken from any tract and the damage, if any, to remaining land by reason of the severance. [L. '11, p. 73, § 22.]

§ 8212-23. Judgment Final.

Any final judgment rendered by said court upon the findings of the court or a jury, shall be the lawful and sufficient condemnation of the land or property to be taken, or of the right to damage the same in the manner proposed, upon the payment of the amount of such findings and all costs which shall be taxed as in other civil cases: Provided, That in case any defendant recovers no award, no costs shall be taxed. Such judgment shall be final and conclusive as to the damages caused by such improvement, unless appealed from, and no appeal from the same shall delay proceedings under the order of said board if it shall pay into court for the owners and parties interested, as directed by the court, the amount of the judgment and costs; but such board after making such payment into court shall be liable to such owner or owners, or parties interested, for the payment of any further compensation which may at any time be finally awarded to such parties so appealing in said proceeding, and his or her costs, and shall pay the same on the rendition of judgment therefor and abide any rule or order of the court in

relation to the matter in controversy. In case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by the board, as aforesaid, shall remain in the custody of said superior court until the final determination of the proceedings. If the owner of the land, real estate, premises, or other property, accepts the sum awarded by the jury or the court, he shall be deemed thereby to have waived conclusively an appeal to the supreme court and final judgment may be rendered in the superior court as in other cases. [L. '11, p. 73, § 23.]

§ 8212-24. Order to Take Possession of Property.

The court upon proof that the judgment, together with costs, has been paid to the person entitled thereto, or has been paid into court, shall enter an order that the board shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so made or paid into court as aforesaid, and thereupon the title to any property so taken shall be vested in fee simple in the public as a water highway. [L. '11, p. 74, § 24.]

§ 8212-25. Assessment for Damages—Interest—Expenses.

Said board shall, upon the entry of the condemnation judgment, file in the same proceeding a supplementary petition, praying the court that an assessment be made upon the lands in the district for the purpose of raising an amount necessary to pay the compensation and damages awarded for the property taken or damaged, with costs of the proceedings, and for the estimated cost of the proposed improvement; and the court shall thereupon appoint three competent disinterested persons as commissioners to make such assessment. Said commissioners shall include in such assessment the compensation and damages awarded for the property taken or damaged, with legal interest from the date of entry of the judgment, and with all costs and expenses of the proceedings incurred to the time of their appointment, or to the time when said proceedings was referred to them, together with the probable further costs and expenses of the proceeding, including therein the estimated cost of making and collecting such assessment. The petitioners for the improvement shall be entitled to have included in the costs of the proceeding, and repaid to them, such reasonable sums as they may have expended in preparing the maps and plans of the improvement and procuring the names of land owners for filing with the petition. Such expenditures to be approved and allowed by the court. [L. 11, p. 74, § 25.]

§ 8212-26. Commissioners' Compensation.

Said commissioners, before entering upon their duties, shall take and subscribe an oath that they will faithfully perform the duties of the office to which they are appointed, and will to the best of their abilities make true and impartial assessments according to the law. Every commissioner shall receive compensation at the rate of five dollars per day for each day actually spent in making the assessment herein provided for, upon his filing in the proceeding a verified statement showing the number of days he has actually spent therein; and upon the approval of said statement by the judge of the court in which the proceeding is pending, the board shall issue a warrant in the amount so approved, upon the special fund created to pay the awards

and costs of said proceeding; and the fees of such commissioners so paid, and all expenses returned by them and allowed by the court shall be included in the cost and expense of such proceeding. [L. '11, p. 75, § 26.]

§ 8212-27. Assessment—Apportionment.

It shall be the duty of such commissioners to examine the lands in the district and to apportion and assess the amount of the judgment, interest and costs as hereinbefore defined, of the condemnation proceeding, and of the estimated cost of the proposed improvement, and of the price of any fill made with material dug or dredged from such waterway, upon the several lots, blocks, tracts and parcels of land in said district, in the proportion in which they will be severally benefited; which assessment shall be a proportionate charge upon each square foot of land contained in each separate lot, block, tract or parcel of land. [L. '11, p. 75, § 27.]

§ 8212-28. Roll of Owners.

The commissioners shall make or cause to be made an assessment-roll in which shall appear the names of the owners, so far as known, a description of each lot, block, tract or parcel of land or other property, and the amounts assessed thereon as special benefits thereto, specifying separately the benefits from the opening of the waterway, for construction, and for fill if any, and certify such assessment-roll to the court before which said proceeding is pending, within sixty days after the date of the order referring said proceeding to them, or within such extension of said period as shall be allowed by the court. In determining the benefit to be assessed upon any lot or parcel of land for the opening of the waterway, the commissioners shall ascertain from the finding of the court or jury whether or not it is remaining land after the severance of land taken from an original lot or parcel for right of way of such proposed waterway, and the damage awarded to such remaining land, if any, allowed by reason of the severance; and for such opening shall assess as benefits to such remaining land only the excess of the benefit accruing thereto over the damage awarded by the finding. [L. '11, p. 76, § 28.]

§ 8212-29. Court to Order Hearing—Notice.

Upon its completion the commissioners shall return their assessment-roll into court, and thereupon the court shall make an order setting a time for the hearing thereon before the court, which day shall be at least thirty days after the entry of such order. The commissioners shall give notice of such assessment and of the day fixed by the court for the hearing thereon in the following manner:

(1) They shall at least twenty days prior to the date fixed for the hearing on said roll, mail to each owner of the property assessed, whose name and address is known to them, a notice substantially in the following form:

“(Title of cause.) To —: Pursuant to an order of the superior court of the state of Washington, in and for the county of —, there will be a hearing in the above-entitled cause on — at —, upon the assessment-roll prepared by the commissioners heretofore appointed by said court to assess the property specially benefited by the (here describe nature of improvement); and you are hereby required if you desire to make any objection to said assessment-roll, to file your objections to the same before the date herein fixed for

the hearing upon said roll, a description of your property and the amount assessed against it for the aforesaid improvement is as follows: (Description of property and amount assessed against it.)

_____,
_____,
_____,
Commissioners."

(2) They shall cause at least twenty days' notice to be given of the hearing, when a daily newspaper is published in such county, by publishing the same in at least five successive issues of said paper; or if no daily newspaper is published in said county and a weekly newspaper is published therein, then in each issue of such weekly newspaper for two successive weeks. Such notice so required to be published may be substantially as follows:

"(Title of cause.) Special Assessment Notice. Notice is hereby given to all persons interested, that an assessment-roll has been filed in the above-entitled cause providing for the assessment upon the property benefited of the cost of (here insert brief description of improvement) and that said roll has been set down for hearing on the ____ day of ____ at _____. The boundaries of said assessment district are substantially as follows: (here insert an approximate description of the assessment district.) All persons desiring to object to said assessment-roll are required to file their objections before said date fixed for the hearing upon said roll, and appear on the day fixed for hearing before said court.

_____,
_____,
_____,
Commissioners."

[L. '11, p. 76, § 29.]

§ 8212-30. Affidavits Filed.

On or before the day fixed for the hearing, the affidavit of one or more of the commissioners shall be filed in said court showing the mailing of the notices above prescribed, and an affidavit of the publisher of the newspaper showing the publication of notice, with a copy of the published notice attached, which affidavit shall be received as prima facie proof of the giving of notice as herein required. [L. '11, p. 78, § 30.]

§ 8212-31. Court Order New Notice.

If twenty days shall not have elapsed between the first publication of such notice and the day set for hearing, the hearing shall be continued until such time as the court shall order. The court shall retain full jurisdiction of the matter until final judgment on the assessments, and if the notice given shall prove invalid or insufficient the court shall order new notice to be given. [L. '11, p. 78, § 31.]

§ 8212-32. Hearing Objections—Findings.

Any person interested in any property assessed and desiring to object to the assessment thereon, shall file his objections to such report at any time before the day set for hearing said roll, and serve a copy thereof upon the prosecuting attorney. As to all property to the assessment upon which no

objections are filed and served, as herein provided, default may be entered and the assessment confirmed by the court. On the hearing of objections the report of the commissioners shall be competent evidence to support the assessment, but either party may introduce such other evidence as may tend to establish the right of the matter. The hearing shall be conducted as in other cases at law tried by the court without a jury; and if it shall appear that the property of the objector is assessed more or less than it will be benefited, or more or less than its proportionate share of the cost of the condemnation and improvement, the court shall so find, and it shall also find the amount in which said property ought to be assessed and correct the assessment accordingly. Judgment shall be entered confirming the assessment-roll as originally filed or as corrected, as the case may require. [L. '11, p. 78, § 32.]

§ 8212-33. Roll may be Recast.

The court before which any such proceeding may be pending shall have authority at any time before final judgment to modify, alter, change, annul or confirm any assessment-roll returned as aforesaid, or cause any such assessment-roll to be recast by the same commissioners whenever it shall be necessary for the obtainment of justice; or it may appoint other commissioners in the place of all or any of the commissioners first appointed for the purpose of making such assessment or modifying, altering, changing or recasting the same, and may take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such condemnation and improvement according to the principles of this act, and may from time to time, as may be necessary, continue the proceeding for that purpose as to the whole or any part of the premises. [L. '11, p. 79, § 33.]

§ 8212-34. Appeal shall not Invalidate.

The judgment of the court confirming the assessment-roll shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken. Such judgment shall be a proportionate lien upon each square foot of the property assessed from the date of entry until payment shall be made. [L. '11, p. 79, § 34.]

§ 8212-35. Interest on Assessments.

The clerk of the court in which such judgment is rendered shall certify a copy of the assessment-roll as confirmed, and of the judgment confirming the same, to the treasurer of the county, or if there has been an appeal taken from any part of such judgment, then he shall certify such part of the roll and judgment as is not included in such appeal, and the remainder when final judgment is entered: Provided, That if upon such appeal the judgment of the superior court shall be affirmed, the assessments on such property as to which appeal has been taken shall bear interest at the same rate and from the same date which other assessments not paid within the time hereafter provided shall bear. Such copy of the assessment-roll shall be sufficient warrant to the county treasurer to collect the assessments therein specified in the manner hereinafter provided. [L. '11, p. 79, § 35.]

§ 8212-36. Treasurer to Publish Notice.

The treasurer receiving such certified copy of the assessment-roll and judgment shall immediately give notice thereof by publishing such notice at least once in the official newspaper or newspapers of such county, if such newspaper or newspapers there be; and if there be no such official newspaper, then by publishing such notice in some newspaper of general circulation in the county. Such notice may be in substantially the following form:

“SPECIAL ASSESSMENT NOTICE.

Public notice is hereby given that the superior court of — county, state of Washington, has rendered judgment for a special assessment upon property benefited by the following improvement (here insert the character and location of the improvement in general terms) as will more fully appear from the certified copy of the assessment-roll on file in my office, and that the undersigned is authorized to collect such assessments. All persons interested are hereby notified that they can pay the amounts assessed, or any part thereof, without interest, at my office (here insert location of office) within sixty days from the date hereof.

Dated this — day of —, A. D. 191—.

_____,
Treasurer of — county, Washington.”

[L. '11, p. 80, § 36.]

§ 8212-37. Payment.

The owner of any land charged with an assessment under this act, may discharge the same from all liability for the cost of such condemnation and improvement by paying the entire assessment charged against his land, without interest, within the time fixed by the notice of the county treasurer for the payment thereof; or within said time he may pay a part of such assessment and allow the remainder to continue as an assessment upon his land to be collected and paid as hereinafter provided; or within said time he may pay the entire assessment per square foot upon any part of his land, providing that he shall when paying such partial assessment give to the treasurer a description of the tract paid for. [L. '11, p. 80, § 37.]

§ 8212-38. Treasurer to Note Payment.

When any assessment shall be paid either in full or in part only, within the time for payment without interest fixed by his notice, the treasurer shall note the fact of such payment opposite the assessment. [L. '11, p. 81, § 38.]

§ 8212-39. Installments—Collection.

Immediately after the expiration of the time fixed by his notice for payment of assessments without interest, the treasurer shall divide the several assessments which remain unpaid in whole or in part into ten equal amounts or installments, as near as may be, without fractional cents, and enter said installments upon the roll opposite the several assessments, numbering the same from one (1) to ten (10) successively. And thereafter said treasurer shall annually for ten years, before the time fixed by law for the collection of state and county taxes, add one of the said assessment installments with interest for one year from the expiration of the time for pay-

ment without interest, or of the anniversary thereof, at the rate of seven per cent per annum on the entire unpaid assessment, to the tax levied upon the property assessed, where said tax appears upon the county tax-roll, and collect said installment and interest, without reduction of percentage for prepayment, at the same time and in the same manner as state and county taxes are collected. And after delinquency said installments and interest shall be subject to the same charges for increased interest and penalties as are other delinquent taxes. But no tax sale of lands assessed under this act shall discharge the same from the lien of any unpaid installments of the assessment against it until all installments and interest are fully paid. [L. '11, p. 81, § 39.]

§ 8212-40. Assessment Payments Noted.

As each assessment installment is paid the treasurer shall note the payment thereof in the proper place upon the assessment-roll. [L. '11, p. 82, § 40.]

§ 8212-41. May Discharge Payments.

The owner of any lands assessed under this act may at any time after the time fixed by the treasurer's notice for payment without interest, discharge his lands from the unpaid assessment by paying the principal of all installments unpaid with interest thereon at the rate of seven per cent per annum to the next anniversary of the time fixed as aforesaid; or he may pay one or more installments, with like interest, beginning with installment No. 10 and continuing in the inverse numerical order of installments. The successor in title to any part of his lands may have the proportionate assessment segregated on the roll and charged to such part upon his producing to the treasurer his recorded deed to such part. [L. '11, p. 82, § 41.]

§ 8212-42. Seven Per Cent Interest.

The last installment of any assessment paid shall include interest thereon at the rate of seven per cent per annum to the actual date of payment. [L. '11, p. 82, § 42.]

§ 8212-43. Provision for Public Use.

Should any of the lands assessed under this act be taken for or dedicated to public use, for highway or any other public purpose, before the taking or dedication shall be complete or take effect there shall be paid to the county treasurer a sum equal to the principal of the unpaid assessment upon said land at its proportionate rate per square foot, with interest thereon for one year at seven per cent; and the treasurer shall credit the principal sum paid to the unpaid installments upon the tract as originally assessed. [L. '11, p. 82, § 43.]

§ 8212-44. Treasurer Make Report.

Immediately after expiration of the time fixed by the treasurer for the payment of assessments levied under this act, he shall report to the board in writing the sum collected by him and in his hands to the credit of the assessment-roll; and thereafter and on or before the first day of January and July in each year he shall make written reports to said board of the sums collected by him upon said roll, stating in detail the amount of prin-

cipal, interest and penalty so collected, the amount of principal remaining uncollected, and also, in detail, the principal and interest paid out by him under authority of the board, and the balance in his hands to the credit of the roll. [L. '11, p. 82, § 44.]

§ 8212-45. Bonds may be Issued.

Should the owners of any lands assessed to pay for an improvement contemplated by this act, fail to pay the assessments thereon in full on or before the day fixed by the treasurer's notice as the time for payment without interest, the board shall provide and issue bonds of the district to the total amount of the unpaid assessments, which bonds may either be issued to persons contracting to perform the work of making the improvement, or exchange with them for warrants; or be issued in exchange for work or materials; or they may be sold outright as hereinafter provided. [L. '11, p. 83, § 45.]

§ 8212-46. Interest on Bonds.

Such bonds shall be issued pursuant to an order made by the board and by their terms shall be made payable on or before a date not to exceed ten years from and after the date of their issue, which latter date shall also be fixed by such order. They shall bear interest at the rate of seven per cent per annum, which interest shall be payable semi-annually at periods named; shall have attached thereto interest coupons for each interest payment; shall be of such denomination as shall be provided in the order directing the issue, but not less than one hundred dollars nor more than one thousand dollars; shall be numbered from one upward consecutively and each bond shall be signed by the president of the board and attested by its clerk: Provided, however, That said coupons may, in lieu of being so signed, have printed thereon fac-simile signatures of said officers. Each bond shall in the body thereof refer to the improvement to pay for which the same is issued; shall provide that the principal sum therein named and the interest thereon shall be payable out of the fund created for the payment of the cost and expense of said improvement, and not otherwise; and shall not be issued in an amount which, together with the assessments already paid, will exceed the cost and expense of the said condemnation and improvement. [L. '11, p. 83, § 46.]

§ 8212-47. Par Value Maintained.

Said bonds, whether sold or exchanged, shall be disposed of for not less than their par value and accrued interest. [L. '11, p. 84, § 47.]

§ 8212-48. Advertise for Bids.

Before making any sale of such bonds the board shall advertise the sale and invite sealed bids therefor, by publication in the county official newspaper at least once, and in such other manner as it sees fit, for a period of thirty days. At the time and place fixed for receiving bids the board shall open all bids presented and may either award the bonds to the highest bidder or reject all bids. Delivery of the bonds and payment therefor may be as required by the board. The purchaser of any such bonds shall pay the money due therefor to the county treasurer, who shall place it in the district fund. [L. '11, p. 84, § 48.]

§ 8212-49. Treasurer to Call Bonds for Payment.

The treasurer shall pay the interest on the bonds authorized to be issued by this act, on presentation of matured coupons therefor, out of the funds of the district in his hands. Whenever there shall be sufficient money in any such fund (not less than one thousand dollars) over and above sufficient for the payment of matured interest on all outstanding bonds, to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds in their numerical order: Provided, That the said call for bonds shall be made by publication in the official newspaper of the county if there be one, or otherwise in some newspaper of general circulation in the county, within five days after the semi-annual interest period, and shall state that bonds numbered — (giving the serial numbers of the bonds called) will be paid on presentation; and that after a date named, not more than fifteen days thereafter, interest on the bonds called shall cease. [L. '11, p. 84, § 49.]

§ 8212-50. Claim Limited.

Neither the holder nor owner of any bond issued under authority of this act shall have any claim therefor against any person, body or corporation, except from the special assessment made for the improvement for which such bond was issued; but his remedy in case of nonpayment shall be confined to the enforcement of such assessment. A copy of this section shall be plainly written, printed or engraved on each bond so issued. [L. '11, p. 84, § 50.]

§ 8212-51. May be Reassessed.

In all cases of assessments for improvements under this act, wherein such assessment shall have failed to be valid in whole or in part for want of form or insufficiency, informality or irregularity, or nonconformance with the provisions of this act, the board is hereby authorized to cause such assessments to be reassessed and to enforce their collection in accordance herewith. [L. '11, p. 85, § 51.]

§ 8212-52. Construction—Bonds—Claims—Deposit.

After the confirmation of the assessment-roll of any improvement district provided for herein, the board shall proceed at once with the construction of the improvement, and in carrying on said construction it shall have full charge and management thereof and the power to employ such assistants as it may deem necessary, and purchase all material required in such construction; and it shall have power to let the whole or any part of the work of said improvement to the lowest and best bidder therefor, after public advertisement and call for bids; and in case of such letting of a contract it shall have the power also to enter into all necessary agreements with the contractor in the premises: Provided, That in the case of the letting of a contract the board shall require the contractor to give a bond in the amount of the contract price, with sureties to be approved by the board and running to the board as obligee therein, conditioned for the faithful and accurate performance of his contract by said contractor, and that he will pay, or cause to be paid, all just claims of all persons performing labor upon or rendering services in doing said work, or furnishing materials, merchandise or provisions used by said contractor in the construction of said improvement.

Said bond shall be filed and recorded in the office of the auditor of the county and every subcontractor on any such work shall file and record a like bond in the full amount of his subcontract. Unless otherwise paid their claims for labor or services, materials, merchandise or provisions, the claimants may have recourse by suit upon such bond in their own names: Provided, That no such claim or suit shall be maintained unless the persons making said claim shall within thirty days after the completion of said improvement, file their claims, duly verified, to the effect that the amounts thereof are just and due and are unpaid, with the clerk of the board. Each bidder for a contract to be let under this section shall deliver with his bid a check for five per cent of the amount of the bid, drawn upon a bank in this state and certified by the bank, as surety to the board that the bidder will enter into the contract with the board. The checks of unsuccessful bidders will be returned to them when an award of the contract has been made by the board. [L. '11, p. 85, § 52.]

§ 8212-53. Payment in Installments.

During the construction of the improvement said board shall have the right to allow payment therefor to contractors in installments as the work progresses, in proportion to the amount of work completed: Provided, That no such allowance or payment shall be made for exceeding seventy-five per cent of the proportionate amount of the work completed; and twenty-five per cent of the contract price shall be reserved at all times by said board until such work is fully completed, and shall not be paid until thirty days have expired after such completion. Upon completion of the work and the production of satisfactory evidence to the board that all just claims for labor, materials, goods, wares, merchandise and provisions furnished to the contractor have been paid, the board shall accept the improvement and pay the contract price therefor. [L. '11, p. 86, § 53.]

§ 8212-54. Form of Warrants.

The indebtedness of any such district on contracts, or upon employment or for supplies, shall be paid by warrants on the district fund only, to be issued by the board upon allowed written claims. Such warrants shall be in form the same as county warrants, or as nearly the same as may be practicable; shall draw the legal rate of interest from the date of their presentation to the county treasurer for payment, and shall be signed by the chairman and attested by the clerk: Provided, That no warrants shall be issued in payment of any indebtedness of such district for less than the face or par value. [L. '11, p. 86, § 54.]

§ 8212-55. Warrants Presented.

All warrants issued under the previous section of this act may be presented by the holders thereof to the county treasurer, who shall pay them or indorse thereon the date of presentation for payment and if the same are not paid, and the reason for their nonpayment; and no warrant shall draw interest until it is so presented and indorsed by the county treasurer. It shall be the duty of the treasurer from time to time, when he has sufficient funds in his hands for the purpose, to give notice to warrant holders to present their warrants for payment; such notice to be given by advertisement in the county newspaper. And thirty days after the first publication of said

notice the warrants called shall cease to bear interest. Said notice shall be published once each week for two weeks consecutively, and such warrants shall be called and paid in the order of their indorsement. [L. '11, p. 87, § 55.]

§ 8212-56. Rights of Municipal Corporations.

State, school, county, school district, and other lands belonging to other public corporations which will be benefited by the construction, deepening or widening of any such waterway, and which are not devoted to public use, shall be subject to the provisions of this act, and the owners thereof by and through the proper authorities, shall be made parties in all proceedings affecting said lands, and shall have the same rights and be liable to the same right of eminent domain as the lands of private persons or corporations. [L. '11, p. 87, § 56.]

§ 8212-57. Assessment of Lands.

Lands belonging to the state, and school, county, school district and other lands belonging to public corporations and which are not devoted to public use, which are benefited by any improvement instituted under the provisions of this act, shall be assessed in the same manner as lands of private persons and corporations, and the assessment shall be paid by the proper authorities. [L. '11, p. 87, § 57.]

§ 8212-58. Right of Appeal.

Every defendant feeling aggrieved by any condemnation judgment for compensation or damages, or by any judgment confirming an assessment upon land for benefits under this act, may appeal to the supreme court of the state from such judgments within thirty days after the entry thereof. An appeal from a condemnation judgment may bring before the supreme court either the legality of the proceeding as a taking for a public use, or the justness of the amount of compensation or damages awarded to the appellant; but an appeal from a judgment confirming an assessment of benefits shall bring before the supreme court only the justness of the assessment against the property of the appellant. Two or more defendants may join in an appeal. The bill of exceptions or statement of facts upon such appeals shall contain only such portions of the evidence in the case as relates to the property of the appellants. Otherwise than as provided in this section such appeals shall be taken as provided by law in appeals to the supreme court from final judgments in actions at law. [L. '11, p. 87, § 58.]

§ 8212-59. Provision for Payment.

Any defendant in a condemnation proceeding under this act, whose remaining land, or whose other lands in the district, shall be assessed for benefits arising from the improvement, may pay his assessments in full, if they be less than his condemnation judgment, at or before the time fixed by the treasurer for the payment of assessments without interest, by satisfying his judgment upon the judgment docket and producing to the treasurer the certificate of the county clerk that the judgment has been satisfied. And if his assessments be greater than his condemnation judgments he may, within the same time, pay his assessment to the extent of his judgment by the like satisfaction and the like production of the clerk's certificate to the treasurer. In each case

the treasurer shall note the payment and the manner thereof on the assessment-roll and report the same to the board. [L. '11, p. 88, § 59.]

§ 8212-60. Providing for Filling Property.

At any time before the completion of excavations required for the construction, deepening or widening of a waterway under this act, when there will be surplus material dug or dredged from such waterway, any owner of land within the district, for the filling of whose land no provision has theretofore been made, may have such surplus material delivered upon his land for filling purposes upon paying the cost of such delivery in a sum to be fixed by the board. The sum so fixed shall be paid to the treasurer at such time and in such manner as the board may prescribe, and shall be credited to the district fund. [L. '11, p. 88, § 60.]

§ 8212-61. Road Fund.

Should there be any money remaining in the district fund after the payment in full of all of the obligations of the district, it shall be transferred to and become a part of the road fund of the county. [L. '11, p. 89, § 61.]

§ 8212-62. Uncalled Sums to Road Fund.

Should any sum of money paid into court as compensation or damages for land or property taken or damaged in any condemnation proceeding under this act be uncalled for for the period of two years, the county clerk shall satisfy the judgment therefor and pay the money in his hands to the treasurer for the road fund of the county. But upon application to the board of county commissioners within four years after such payment, the party entitled thereto shall be paid such money by the county without interest: Provided, That if any such party, being a natural person, was under legal disabilities when such money was paid to the treasurer, the time within which he or his legal representatives shall make application for the payment thereof shall not expire until one year after his death or the removal of his disabilities. [L. '11, p. 89, § 62.]

§ 8212-63. Corporate Authority Control.

Every waterway constructed, deepened or widened under this act shall, from and after the completion thereof, be a public highway for vessels and an outlet for swamp or overflow water which may be drained into it from any lands in the district or tributary thereto, and shall be under the care and control of the board of county commissioners of the county as are other highways: Provided, That whenever any such waterway shall thereafter be included within the limits of any city or town, the care and control thereof shall pass to the corporate authorities of such city or town. [L. '11, p. 89, § 63.]

§ 8212-64. Concurrent Act.

This act shall not be held to be an exclusive method of constructing, deepening or widening such waterways, nor in conflict with any other method which may be provided by law. [L. '11, p. 89, § 64.]

§ 8212-65. Fees.

The fees for the service of all process necessary to be served under the provisions of this act shall be the same as those for like services in other civil cases. [L. '11, p. 90, § 65.]

§ 8212-66. Injunction.

The superior court may compel the performance of duties imposed by this act, and may on proper application therefor issue its mandatory injunction for such purpose. [L. '11, p. 90, § 66.]

TITLE LXII.
NOTARIES PUBLIC.

CHAPTER I.
NOTARIES PUBLIC.

§ 8298.

Under this section, a notary cannot, unless it is required by law, administer an oath with such binding force as is necessary to support a charge of perjury, in case of a false sworn statement: *State v. Dal-*

lagiovanna, 69 Wash. 84, 40 L. R. A., N. S., 249, 124 Pac. 209.

As to indictment for perjury and therein of description of authority of court or officer, see note in 124 Am. St. Rep. 660.

§ 8298-1. Powers of Notaries in Banks and Corporations.

It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to protest for nonacceptance or nonpayment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation: Provided, It shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, where such notary is a party to such instrument individually or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument. [L. '13, p. 89, § 1.]

TITLE LXIV.

OFFICERS.

CHAPTER I.

OFFICIAL BONDS.

§ 8325.

The failure of an officer to give a bond, which was a ministerial act for the security of the government and not a condition precedent to his authority to act, does not render him merely a de facto officer, but he is a de jure officer under a defeasible title, and subject to the disqualification of holding other offices attached to the office: *State ex rel. Chealander v. Carroll*, 57 Wash. 202, 106 Pac. 748.

As to who are de facto, as distinguished from de jure, officers, and herein of failure to qualify, see note in 140 Am. St. Rep. 176.

tion, although there was no law authorizing him to receive the same, is a breach of his official bond for which his surety is liable; but the recovery must be limited to the fees received during the term of office covered by the bond: *Skagit County v. American Bonding Co.*, 59 Wash. 8, 109 Pac. 199.

As to when sureties are relieved for acts of officer because not done virtute officii, see note in 78 Am. St. Rep. 420. See, also, *Ann. Cas.* 1912C, 581, and 21 L. R. A. 735.

As to extension of surety's liability when officer is holding over after term, see note in 35 L. R. A. 88.

§ 8335.

The embezzlement by the county auditor of fees for recording marriage licenses, paid to him by reason of his official posi-

§ 8344.

See notes to § 3937.

CHAPTER V.

INSPECTION AND SUPERVISION OF PUBLIC OFFICERS.

§ 8351. Officers to Keep Accounts—Penalty—Deposit of Collections.

It shall be the duty of every public officer and employee to keep all accounts of his office in the form prescribed and to make all reports required by the state auditor. Refusal or neglect to perform these duties shall be deemed an offense against the efficiency of public administration and the welfare of the people, and shall be punished by removal from office, after trial and conviction by a court of competent jurisdiction. Every public officer and employee whose duty it is to collect or receive payments due or for the use of the public shall deposit such moneys collected or received by him with the treasurer of the taxing district once every twenty-four consecutive hours. In case a public officer or employee collects or receives funds for the account of a taxing district of which he is an officer or employee, he shall, during the Saturday of each week, pay to the proper officer of the taxing district for account of which the collection was made or payment received, the full amount collected or received during the current week for the account of such taxing district. [L. '11, p. 108, § 1.]

§ 8352. State Examiners—Appointment—Compensation.

After the Bureau of Inspection and Supervision shall have formulated and installed the system of uniform accounting in any or all classes of public offices, the state auditor is hereby empowered to appoint additional assistants as required to administer the provisions of this chapter; said additional assistants shall be known as state examiners, who shall each be paid eight

dollars per day for the time necessary to the performance of his duties, and in addition thereto his railroad fare once to and from the place of examination. [L. '11, p. 108, § 1.]

§ 8354.

Under this section, a claim verified by a notary public using his seal cannot be objected to as not in the form prescribed by the bureau, where it is not made to

appear that the bureau had prescribed any form when the affidavit was made: *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459.

§ 8355. Expenses of Bureau Levied Among Counties.

The expense of maintaining and operating the bureau herein provided for shall be paid out of the state general fund in the same manner as other state employees. [L. '11, p. 108, § 1.]

§ 8356. Expenses for Local Examinations in Tax Districts.

The expense of auditing public accounts shall be borne by each taxing district for the auditing of all accounts under its jurisdiction and the state auditor is hereby authorized and empowered to certify the expense of such audit to the auditor of the county in which said taxing district is situated, who shall promptly issue his warrant on the county treasurer payable out of the current expense fund of the county, said fund, except as to auditing the financial affairs and making inspection and examination of the county, to be reimbursed by the county auditor out of the money due said taxing district at the next monthly settlement of the collection of taxes and to be transferred monthly by the county treasurer to the current expense fund: Provided, That when such examiners are used in auditing the accounts of state offices and institutions, they shall be paid by the state. [L. '11, p. 108, § 1.]

Rem. & Bal. Code, section 8356 et seq., as amended by Laws of 1911, page 108, does not violate constitution, article 11, section 12, providing that the legislature shall not impose taxes upon counties, cities or other municipal corporations, or their inhabitants, but may by general laws vest such power in the corporate authorities,

since the purpose of the law to secure a uniform system of bookkeeping and accounting, and supervision thereof, is a matter of public concern incidental to the municipality as an agency of the state, and not merely a matter of local self-government: *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639.

TITLE LXV.

PARTNERSHIPS AND BUSINESS NAMES.

§ 8366.

See notes to § 228.

CHAPTER II.

ASSUMED BUSINESS NAMES.

§ 8369.

See notes to § 228.

Partners may maintain an action upon a contract entered into by them as individuals without having complied with this section, where before suit brought they filed the required certificate showing that they were then doing business under the assumed name by which they sued, and that they were the only members of the firm: *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 137 Am. St. Rep. 1059, 108 Pac. 596; 109 Pac. 113.

As to necessity of consistency in complaint with respect to representation or individual capacity of party, see note in 1 L. R. A. 161.

Failure to plead or show a compliance with this section, directed against concealed partnerships, goes only to the capacity to sue, and is waived unless raised by demurrer: *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

This section is directed against concealed partnerships, and it is not necessary to plead and show a compliance therewith in order to maintain an action, where the firm name discloses the surnames of the partners: *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

The provisions of sections 8369, 8373, relate only to the capacity to sue, and are waived unless objection is raised by demurrer: *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509.

A contract of partnership between plaintiff and a third person is inadmissible to show a defect of parties plaintiff, or a necessity for filing the names of the partners under this section, where the contract was dated after the plaintiff's cause of action arose against the defendants: *Ryder-*

Gougar Co. v. Garretson, 53 Wash. 71, 132 Am. St. Rep. 1053, 101 Pac. 498.

The objection that a partnership, doing business under an assumed name, cannot maintain an action because it had failed to file with the county clerk the designation of the firm with the names of all the partners, as required by this section, goes only to the capacity to sue, and is waived if not raised by demurrer or answer: *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837.

A person conducting a business in which he alone is interested, in the name of a company containing his full name, is exempt from filing with the county clerk the designation of the firm with the true and real names of all persons conducting the business or having an interest therein, pursuant to this section, by section 8372, providing that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the true and real name or names of all the parties conducting such business or having an interest therein: *Merrill v. Caro Investment Co.*, 70 Wash. 482, 127 Pac. 122.

§ 8372.

Under this section, exempting partnerships in which the firm name contains all the names of the partners from the necessity of filing with the county clerk the designation of the firm with the true names of all the partners, plaintiffs, doing business under the name of "Hale-Tindall Co.," which contains the names of all the partners, are exempt from the requirements of the statute: *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837.

§ 8373.

See notes to § 8369.

TITLE LXVI.

PAUPERS.

CHAPTER II.

MOTHERS' PENSIONS.

§ 8385-1. Counties to Help Destitute Mothers.

In every county it shall be the duty of the county commissioners to provide out of the moneys of the county treasurer an amount sufficient to meet the purposes of this law, for the support of women, whose husbands are dead, or are inmates of a penal institution or an insane asylum or who are abandoned by their husbands and such abandonment has continued for more than one year or because of total disability of their husbands, and who are unable to support their children, when such women are destitute and are mothers of children under the age of fifteen years and such mothers and children reside in such counties. [L. '13, p. 644, § 1.]

§ 8385-2. Allowance.

The allowance to each of such women shall not exceed fifteen (\$15) dollars per month when she has but one child under the age of fifteen years, and if she has more than one child under the age of fifteen years, it shall not exceed the sum of fifteen dollars a month for the first child, and five dollars a month for each of the other children under the age of fifteen years. [L. '13, p. 644, § 2.]

§ 8385-3. Juvenile Court to Make Allowance.

Such allowance shall be made by the juvenile court in the counties where such court is held and elsewhere by the superior court, and only upon the following conditions: (1) The child or children for whose benefit the allowance is made must be living with the mother of such child or children; (2) When by means of such allowance the mother will be able to maintain a home for her child or children; (3) The mother must in the judgment of the court, be a proper person, morally, physically and mentally, for the bringing up of her children; (4) No person shall receive the benefit of this act who shall not have been a resident of a county in which such application is made for at least one year next before the making of such application for such allowance. [L. '13, p. 645, § 3.]

§ 8385-4. Benefits Cease When.

Whenever any child shall reach the age of fifteen years any allowance made to the mother of such child for the benefit of such child shall cease. The court may in its discretion at any time before such child reaches the age of fifteen years, discontinue or modify the allowance to any mother and for any child. [L. '13, p. 645, § 4.]

§ 8385-5. Penalties.

Any person procuring fraudulently any allowance for a person, not entitled thereto, shall be deemed guilty of a gross misdemeanor. [L. '13, p. 645, § 5.]

§ 8385-6. Prosecuting Attorney to Bring Proceedings.

In each case where an allowance is made to any woman under the provisions of this act, an order to that effect shall be entered upon the records of the court, making such allowance. Proceedings to obtain the benefit of this act shall be instituted and maintained in the same manner as proceedings are instituted and maintained in the juvenile court and the prosecuting attorney shall render all necessary assistance to applicants under this act and shall appear in every such proceeding and through the probation officer, the charity commissioner or any person having knowledge of the facts, shall carefully investigate the merits of every application to the end that this act may be fairly administered and no person granted relief hereunder except those justly entitled thereto, and no officer of the court or county officer shall receive any fees for any service rendered in carrying out the provisions of this act. A certified copy of said order shall be filed with the county auditor of the county in which such child's mother is resident, and thereupon and thereafter and so long as such order remains in force and unmodified it shall be the duty of the county auditor each month to draw his warrant on the current expense fund of the county in favor of the mother for the amount specified in such order, which warrant shall be by the auditor delivered to the mother upon her executing duplicate receipts therefor, one to be retained by the auditor and the other to be filed by the clerk with the other records in the proceedings relating to such child or children. It shall be the duty of the county treasurer to pay such warrant out of funds in the current expense fund of the county. [L. '13, p. 645, § 6.]

TITLE LXVII.

PHYSICIANS.

CHAPTER I.

PHYSICIANS AND OSTEOPATHS.

§ 8386.

An act prohibiting the practice of medicine without first obtaining a license is not objectionable as embracing more than one subject from the fact that it contains provisions affecting a variety of practitioners having different systems and methods of treatment: *State v. Greiner*, 53 Wash. 46, 114 Pac. 897.

As to construction of constitutional provisions relative to titles of statutes, see note in 1 Ann. Cas. 584.

As to validity of statute having title more comprehensive than body of act, see note in Ann. Cas. 1912A, 102.

As to application of statutes regulating practice of medicine to persons giving special kinds of treatment, see notes in 3 L. R. A., N. S., 762; 24 L. R. A., N. S., 103; 25 L. R. A., N. S., 129.

An act prohibiting the practice of medicine without first obtaining a license is within the acknowledged powers of the state: *State v. Greiner*, 63 Wash. 46, 114 Pac. 897.

As to physician as person subject to license, see note in 129 Am. St. Rep. 293.

As to power to tax operations as affected by constitutional requirement that taxes be uniform, see notes in 2 Ann. Cas. 325; 15 Ann. Cas. 986.

§ 8389.

Under this section and section 8406, providing that licensees shall use only such titles as are designated in their diplomas, "or those having no diplomas" only such as are designated in their licenses, an applicant is entitled to a license upon a showing that he has been in continuous practice in one locality for the two years previous to the passage of the act, without any diploma, and although not "legally" engaged in practice as required by the then existing statute making practice without a license a misdemeanor: *In re Christensen*, 59 Wash. 314, 109 Pac. 1040.

This section requires that an applicant for a license to practice medicine, based

upon a diploma and prior practice in this state, as distinguished from one who had been "practicing" in one locality for two years, must have been "legally" engaged in such practice, and does not authorize a license to one who was practicing in this state without any license in violation of the then existing law: *In re Harold*, 59 Wash. 322, 109 Pac. 1043.

As to constitutionality of regulations as to practicing medicine, and herein of licenses, see note in 14 L. R. A. 581.

As to effect of failure to procure license, see note in 16 L. R. A. 425.

The loss or destruction of the statement of the medical board showing the grounds for its refusal of license to practice, required by this section, to be filed and kept of record, does not entitle an applicant to a rehearing, other records of the board showing the rejection and reasons therefor: *State ex rel. Stanley v. Witter*, 68 Wash. 356, 123 Pac. 471.

Neither does failure to notify an applicant that a license has been refused entitle him to a rehearing: *State ex rel. Stanley v. Witter*, 68 Wash. 356, 123 Pac. 471.

Under this section, the court on appeal has a right to administer the provisions of the medical act relating to examinations: *In re Littlefield*, 61 Wash. 150, 112 Pac. 234.

An appeal from the decisions of the medical board refusing a physician a license to practice, under this section, brings up for review all questions of fact, notwithstanding expert evidence may be required to determine the qualifications of the applicant, in view of the provisions requiring a trial de novo, and that the examination papers be a part of the record, and that the case stand for trial as an ordinary civil action: *In re Littlefield*, 61 Wash. 150, 112 Pac. 234.

Appeal lies from the order of the board of medical examiners refusing a license to practice, under this section: *State ex rel. Brunn v. State Board of Medical Examiners*, 61 Wash. 623, 112 Pac. 746.

§ 8393. Examination Fee.

Each applicant, on making application, shall pay the secretary of the board a fee of twenty-five (\$25) dollars, which shall be turned over to the treasurer of the board, who shall retain fifteen (\$15) dollars for the fee in his possession until the board shall have passed upon the credentials of the

applicant, and in case they are insufficient the sum of fifteen (\$15) dollars shall be returned upon application.

All money received or collected by said board or any member or officer thereof, during any month, shall be turned over, before the tenth day of the succeeding month to the state treasurer together with a verified statement showing the sources from which such money was derived. The treasurer of said board shall give security bond to be approved by and deposited with the auditor of the state, in the sum of one thousand dollars (\$1,000). The cost of said bond shall be paid by the state.

Each member of the board of medical examiners shall receive a compensation of five dollars per day for each day in which he is actually and necessarily engaged in attendance upon meetings of the board, in going to and returning from the place of meeting, and all necessary expenses incurred in attending such meetings. All such compensation and expenses, and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers to be approved by a majority of said board, as in the case of state officers. The secretary and treasurer of said board shall receive a compensation to be determined by said board not to exceed fifty dollars per annum. [L. '13, p. 256, § 1.]

§ 8399.

This section requires that an appeal to the supreme court from an order of the superior court on appeal from the medical board must be taken within sixty days, and an appeal not so taken will be dismissed: *Stewart v. State Board of Medical Examiners*, 62 Wash. 59, 112 Pac. 1106.

As to review of an action of medical board, see note in 20 L. R. A. 355.

§ 8400.

A law making it a criminal offense to practice medicine without a license is valid: *State v. Dodson*, 54 Wash. 31, 102 Pac. 872.

§ 8406.

See notes to § 8389.

CHAPTER III.

DENTISTRY.

§ 8421.

An information charging the practicing of medicine without a license in the language of the statute is sufficient without setting forth the requirements for obtaining the license which are not made a part of the substantive crime, and without pleading matters made by the statute prima facie evidence of the fact that the accused had no license: *State v. Dechmann*, 57 Wash. 690, 107 Pac. 858.

This section, prohibiting the practice of dentistry without a license is not unconstitutional by reason of conflict with the constitution or by reason of its maladministration by state authority: *Brown v. State*, 59 Wash. 195, 109 Pac. 802.

As to validity of statute requiring license for practice of dentistry, see note in 5 Ann. Cas. 1005.

Upon a prosecution for practicing medicine without a license, the statutory prima facie case is made against the defendant by proof that no license is on file with the

county clerk, without proving that the defendant was not a practicing physician before the law went into effect: *State v. Dodson*, 54 Wash. 31, 102 Pac. 872.

A conviction for practicing medicine without a license cannot be objected to in that there were two forms of offense proven, where there was no attempt to charge more than one crime, and the testimony as to the several indicia of practicing was merely evidentiary, especially where the only objection to such evidence was that it was immaterial and the accused admitted that he had no license: *State v. Hanover*, 55 Wash. 403, 104 Pac. 624.

In a prosecution for practicing medicine without a state license filed of record in the county of defendant's residence, there is a failure of proof where the state fails to show the residence of the defendant, although it was shown that he practiced medicine in the county charged without any license filed in such county: *State v. Dechmann*, 57 Wash. 690, 107 Pac. 858.

§ 8423. Fees—Compensation of Board.

Each member of the board of dental examiners shall receive a compensation of five dollars a day for each day in which he is actually and necessarily engaged in attendance upon the meetings of the board, and in going to and returning from the place of meeting, and all necessary expenses incurred in attending such meetings; all such compensation and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers to be approved by a majority of said board as in the case of state officers. The secretary of said board shall receive a compensation to be determined by said board not to exceed one hundred dollars per annum. He shall give surety bond to be approved by and deposited with the auditor of the state in the sum of one thousand dollars. The costs of said bond shall be paid by the state. All money received or collected by said board or any member or officer thereof during any month shall be turned over to the state treasurer before the tenth day of the succeeding month together with a verified statement showing the sources from which such money was derived. The board shall make an annual report of its proceedings to the governor on or before the first day of January of each year together with an account of money received and disbursed by them pursuant to this act. [L. '13, p. 254, § 1.]

CHAPTER IV.

VETERINARY.

§ 8437. Registry of Practitioners—Disposition of Fees and Funds.

The board shall keep a register of all registered practitioners in the state setting forth such facts as the board may see fit. All money received or collected by said board or any member or officer thereof during any month shall be turned over before the tenth day of the succeeding month to the state treasurer together with a verified statement showing the sources from which such money was derived. The treasurer of said board shall give surety bond to be approved and deposited with the auditor of the state in the sum of one thousand dollars. The cost of said bond shall be paid by the state. [L. '13, p. 253, § 1.]

§ 8438. Compensation of Board.

Each member of the board of veterinary medical examiners shall receive a compensation of five dollars per day for each day in which he is actually and necessarily engaged in attendance upon the meetings of the board and in going to and returning from the place of meeting and all necessary expenses incurred in attending such meetings. All such compensation and expenses and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers to be approved by a majority of said board as in the case of state officers. The secretary and treasurer of the board shall each receive a compensation to be determined by said board and not to exceed fifty dollars per annum. [L. '13, p. 253, § 2.]

§ 8443. Board to Render Account to Governor.

The board shall render on or before January 1st of each year to the governor a concise statement or report of all matters pertaining to the duties imposed upon the board in this act and making such suggestions as they shall deem expedient and proper. [L. '13, p. 254, § 3.]

CHAPTER V.

PHARMACY.

§ 8456. Compensation of Board—Bond by Secretary.

Each member of the state board of pharmacy shall receive a compensation of five dollars a day for each day in which he is actually and necessarily engaged in attendance upon meetings of the board and in going to and returning from the place of meeting, and all necessary expenses incurred in attending such meeting; all such compensation and expenses and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor, upon the presentation of proper vouchers to be approved by a majority of said board, as in the case of state officers.

The secretary of said board shall receive a compensation to be determined by said board not to exceed one hundred dollars per annum.

All money received or collected by said board or any member or officer thereof during any month shall be turned over before the tenth day of the succeeding month, to the state treasurer together with a verified statement showing the sources from which such money was derived. The secretary of said board shall give a surety bond to be approved by and deposited with the auditor of the state, in the sum of one thousand (\$1,000) dollars. The cost of said bond shall be paid by the state. [L. '13, p. 257, § 1.]

§ 8459.

This section does not impliedly repeal section 6275, relating to the sale and disposal of intoxicating liquors and requiring sales by druggists for medical purposes to be upon the written prescription of a reputable physician, since repeals by implication are not favored, and this rule has special application where the laws relate to different subjects: State v. Krook, 58 Wash. 23, 107 Pac. 1032.

This section amending the pharmacy law

so as to provide that "no other license shall be necessary under any ordinance of any city" to make sales of intoxicating liquors under the pharmacy act, merely means that the state law shall govern and was not intended to authorize sales without a state license and physician's prescription: State v. Krook, 58 Wash. 23, 107 Pac. 1032.

As to licenses to druggists, see note in 129 Am. St. Rep. 294.

As to legality of sale of liquor by druggists, as affected by element of intent, see note in Ann. Cas. 1912D, 1345.

CHAPTER VI.

OPTOMETRY.

§ 8473. Disposition of Fees—Salary of Board.

Each member of the board of examiners in optometry shall receive a compensation of five dollars a day for each day in which he is actually and necessarily engaged in attendance upon meetings of the board, and in going to and returning from the place of meeting, and necessary expenses incurred in attending such meetings; all such compensation and expenses and all other expenses incident to the execution of the provisions of this act shall be paid

by the state treasurer upon warrants drawn by the state auditor upon the presentation of proper vouchers, to be approved by a majority of said board as in the case of state officers. The secretary-treasurer of said board shall receive a compensation to be determined by said board not to exceed one hundred dollars per annum. All money received or collected by said board or any member or officer thereof during any month shall be turned over before the 10th day of the succeeding month to the state treasurer together with a verified statement showing the sources from which such money was derived. [L. '13, p. 250, § 1.]

§ 8478-1. Annual License Fee.

Every registered optometrist and every optometrist practicing under an exemption certificate shall in every year after 1914 pay to said board of examiners the sum of one dollar as a license fee for such year, such payment shall be made prior to the tenth day of January in each and every year, and in case of default of payment of such fee by any person, and after twenty days' notice of such default, his certificate may be revoked by the board of examiners until such fee is paid. [L. '13, p. 251, § 14.]

CHAPTER VII.

NURSES.

§ 8485. Expenses and Compensation of Board.

Each member of the nurses' examining board shall receive a compensation of five dollars per day for each day in which she is actually and necessarily in attendance upon the meetings of the board and in going to and returning from the place of meeting, and all necessary expenses incurred in attending such meetings. All such compensation and expenses and all other expenses incident to the execution of the provisions of this act shall be paid by the state treasurer upon warrants drawn by the state auditor upon presentation of proper vouchers to be approved by a majority of said board, as in the case of state officers. The secretary and treasurer of said board shall receive a compensation to be determined by said board and not to exceed one hundred dollars per annum. All money received or collected by said board or any officer or any member thereof during any month shall be turned over to the state treasurer before the tenth day of the succeeding month together with a verified statement showing the sources from which such money was derived. [L. '13, p. 255, § 1.]

TITLE LXVIII.

PRISONS AND REFORMATORIES.

CHAPTER IV.

PENITENTIARY PRODUCTS AND EMPLOYMENT OF CONVICTS.

§§ 8559—8567.

Repealed. See L. '11, p. 648, § 10.

§ 8559-1. Purchase Jute and Other Fabrics.

The state board of control is authorized and empowered to purchase jute and other products and fabrics for use in the state penitentiary; and the jute and other fabrics and products manufactured at the state penitentiary shall be sold for such prices as shall in the judgment of the board be for the best interests of the state. [L. '11, p. 645, § 1.]

§ 8559-2. Sold Directly to Citizens of State—Exception.

The jute grain sacks and other fabrics and products manufactured at the state penitentiary shall be sold directly to the farmers, oyster growers or wool growers of the state of Washington, who are actually engaged in farming, oyster culture and wool growing, and no sacks shall be sold within the state of Washington to any person not engaged in farming or oyster culture and wool growing: Provided, however, That the state board of control may, between April 1st and January 1st of each year, dispose of any of the penitentiary products, including grain sacks, in the open market of the world at such prices as they shall deem to be for the best interests of the state. The products sold to residents of the state of Washington shall be sold under such rules, regulations and terms as may be provided by said board, for cash: Provided, That the said board of control may in its discretion accept in lieu of cash a certificate of deposit upon any state or national bank doing business in the state of Washington, payable not later than the fifteenth day of December of the current year, said certificate of deposit to bear interest at the rate of three per cent per annum. The products of the penitentiary shall be sold as near as may be in the order of the making of written application therefor, on blanks to be provided by the board. All payments for jute products and other fabrics and products shall be made to the superintendent of the state penitentiary, who is alone authorized to receipt therefor, and he shall keep a correct account of all sales, showing to whom sold, when sold, the quantity of each article sold, and the amount paid; and the warden of the penitentiary shall submit a transcript of said account of sales to the legislature through the board at each session thereof, and shall report the amount of such sales monthly to the state auditor. [L. '11, p. 645, § 2.]

§ 8559-3. Authority of Board.

The state board of control is authorized to purchase jute and other raw material for use in the penitentiary in the open market of the world, upon such terms as shall be for the best interests of the state; and the said board is authorized to make such freight arrangements for the transportation of such

raw material and jute as may be for the best interests of the state; and the board of control in conjunction with the superintendent of the penitentiary may appoint a purchasing agent or agents for the purchase of such raw material or jute, and an agent or agents for the sale and disposition of the manufactured product, which agents shall be under the direction and exclusive jurisdiction of the state board of control, and the compensation and necessary expenses of such agents shall be paid out of the proper fund provided by law for the penitentiary. [L. '11, p. 646, § 3.]

§ 8559-4. Prices—Profit Allowed—Distribution.

The price at which all grain sacks manufactured at the penitentiary shall be offered for sale shall be fixed by the state board of control at such time in each year as the board shall consider proper, which price shall not exceed the estimated cost of manufacturing thereof plus a profit of twelve and one-half per cent on said estimated cost; and the board shall apportion all sacks manufactured among the grain growing counties of the state of Washington, pro rata, according to the quantity of grain produced in each of said counties, during the current year as determined by the state grain inspector, and it shall be the duty of the state grain inspector to ascertain and determine approximately the yield of grain in each of said counties for said purpose. Such estimate shall be furnished to the board on or before December 31st, of each year, and it shall be the duty of the board immediately following such apportionment to cause notice to be published in an official newspaper in each of the said counties, in which notice of the quantities of grain sacks apportioned to such county and the price fixed for the sale of the same shall be stated, and the manner and time of application shall be set forth: Provided, however, That such apportionment shall not be necessary from June 1st to January 1st of each year, at which time the grain sacks manufactured at the penitentiary may be sold in the open market of the world. [L. '11, p. 646, § 4; L. '13, p. 98, § 1.]

§ 8559-5. Application for Sacks.

Any resident of the state of Washington actually engaged in growing grain within the state may apply for as many of said sacks as he shall require for his individual use, which application shall be made upon blanks prescribed and furnished by the board. In making the application he shall state, under oath, the acreage of grain sown by him for that season, the probable aggregate yield therefrom, that the sacks applied for are for his individual use, and such other facts as the board of control may require. All such applications for grain sacks must be made and filed with the superintendent of the state penitentiary prior to the first day of April of each year. In the event that all of the sacks assigned to any one county shall not be applied for and sold, the state board of control shall apportion the amount not applied for in such county pro rata to such counties as may have therein an excess of applications in proportion to the excess, and if there shall be no excess the sacks not applied for shall not be sold until the first day of June, during which time any resident of the state of Washington, actually engaged in growing grain within said state may apply for such sacks in accordance with the terms of this act and upon the conditions herein stated, and after June first any sacks not sold may be sold anywhere in the open market of the world on such

terms and prices as the board of control shall deem to be for the best interests of the state. [L. '11, p. 642, § 5; L. '13, p. 99, § 2.]

§ 8559-6. Payment.

Upon receiving notice of the acceptance of his application, wholly or in part, the applicant shall forthwith transmit to the superintendent of the state penitentiary one-tenth of the purchase price of said sacks, and the balance before delivery and not later than September first. If payment in full is not made before September first, in cash or by certificate of deposit, as provided for in this act, the one-tenth paid as above shall be forfeited to the state of Washington. [L. '11, p. 647, § 6.]

§ 8559-7. Board Make Rules.

The state board of control shall make all rules and regulations consistent with this act, and necessary to carry into effect the purposes thereof, and shall provide a uniform and complete form of application for sacks and furnish the same free of cost to all applicants therefor. [L. '11, p. 648, § 7.]

§ 8559-8. Construction.

This act shall be construed liberally with reference to the powers and duties of the warden of the state penitentiary and the state board of control, so that the best interests of the state will be subserved thereby. [L. '11, p. 648, § 8.]

§ 8575-1. Employment of Convicts on Roads.

Whenever there are persons confined in the state penitentiary who are physically able to perform manual labor upon the public highways, and who shall not be engaged in other work required by the state board of control, the same may be employed upon the construction and improvement of the public highways within the state. [L. '13, p. 347, § 1.]

§ 8575-2. Monthly List of Eligibles.

The board of control shall monthly certify to the state highway commissioner the number of persons in the institution named who may be used for the work authorized under this act, and the state highway commissioner shall, whenever possible, use such persons in the building or repair of public roads. [L. '13, p. 347, § 2.]

§ 8575-3. Supervision of Work and Men.

The work done, as in this act provided, shall be under the direction and supervision of the state highway commissioner, but the control and management of all the persons taken from the said penitentiary shall be under the supervision of the state board of control. The expense of the care, maintenance and transportation of all persons so taken from said institution to work upon the roads shall be paid out of the fund or funds authorized to be used upon the particular road upon which such work is being done: Provided, That a part of such expense equalizing twenty-five cents per day per person so employed shall be paid out of the appropriation for the maintenance of the particular institution from which such persons are taken. [L. '13, p. 347, § 3.]

TITLE LXX. RAILROADS AND PUBLIC UTILITIES.

CHAPTER I.

PUBLIC SERVICE COMMISSION.

§ 8626-1. Short Title.

This act shall be known as the "Public Service Commission Law," and shall apply to the public services herein described and the commission hereby created. [L. '11, p. 538, § 1.]

It is within the police powers of the state to regulate telegraph and telephone rates by surrendering the control to a properly constituted commission, subject to judicial review, under article 12 of the constitution, providing for the organization of corporations, and declaring telegraph and telephone companies to be common carriers subject to legislative control: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

The power to fix rates being reserved by the constitution, the same is not an incident to the right of a city to frame a special charter; and there being no express grant or waiver of the constitutional reservation, a city franchise to a telephone company granted under authority of a special charter is a mere license or permission, subject to control by the police power of the state, and the obligations thereof are not binding upon the state as a contract within the meaning of the federal constitution: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

Where a city, in granting a franchise to a telephone company fixing maximum rates, reserved the right to alter, amend or annul the conditions of the franchise, it cannot raise the objection that the state, in raising the rates in the exercise of its police power, will impair the obligations of the contract: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

Such act does not violate the constitutional prohibition against class legislation or deprivation of equal protection of the laws by reason of the exceptions enumerated in the proviso, the classification be-

ing within the discretion of the legislature and founded on a reasonable basis: *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

As to legislative regulation of rates of telegraph companies, see note in 33 L. R. A. 181.

As to validity of statute or ordinance regulating rates of telephone company, see note in 10 Am. St. Rep. 134; also note in Ann. Cas. 1912D, 308.

Under the public utilities act of 1911, page 538, authorizing the public service commission to fix reasonable rates and charges for public service corporations which are required to furnish adequate and sufficient services and facilities, the commission has power to require a telephone company to raise its rates above the maximum permitted by its city franchise, where such increased rate has become necessary to provide sufficient revenue to give an adequate service: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

The public utilities act of 1911, page 538, providing for a public service commission with power to establish reasonable rates and charges for public service corporations, is a "general law," within constitution, article 11, section 10, authorizing the adoption of special charters by cities subject to general laws, constitution, article 12, section 18, having required the legislature to establish reasonable maximum rates for railroads and other common carriers, and providing that a railroad commission may be established and its powers defined: *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

§ 8626-2. Public Service Commission—Appointment—Term—Removal.

There shall be and there is hereby created, a public service commission consisting of three persons, one of whom shall be elected as chairman, to be appointed by the governor, by and with the advice and consent of the senate. The terms of the commissioners first appointed under the provisions of this act shall be, one for the term of six years, one for the term of four years, and one for the term of two years; and thereafter the term of each commissioner shall be six years from and after the expiration of the term

of his predecessor. Each commissioner shall hold office until his successor shall have been appointed and qualified.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings, and there shall be no right to review of the same in any court whatsoever.

The governor shall fill all vacancies in the office of commissioner by appointment, and the person so appointed shall fill out the unexpired term of his predecessor. [L. '11, p. 538, § 2.]

§ 8626-3. Qualifications, Oath, Bond, and Compensation.

No commissioner shall hold any other office under the government of the United States or of this state, or of any county or municipal corporation within this state, nor shall he engage in any occupation or business inconsistent with his duties as such commissioner, nor shall he hold any official relation or be interested in the bonds, stocks, mortgages, securities, contracts or earnings of any public service company embraced within the provisions of this act.

Before entering upon the duties of his office he shall take and subscribe an oath of office, to the effect that he will support the constitution of the United States and the constitution and laws of the state of Washington, and faithfully and impartially discharge the duties of his office as required by law, and that he is not interested, directly or indirectly, in any public service company embraced within the provisions of this act, or any of its bonds, stocks, mortgages, securities, contracts or earnings.

Before entering upon the duties of his office, each commissioner shall give a surety company bond (the cost of said bond to be paid by the state) in the sum of twenty thousand dollars, conditioned for the faithful performance of his duties.

Each commissioner shall receive an annual salary of five thousand dollars payable in the same manner as the salaries of other state officers. [L. '11, p. 539, § 3.]

§ 8626-4. Secretary.

The commission shall have a secretary to be appointed by it and hold office at its pleasure. The secretary shall keep full and accurate minutes of all transactions and proceedings of the commission, and perform such duties as may be required by the commission. He shall receive an annual salary of two thousand dollars. [L. '11, p. 539, § 4.]

§ 8626-5. Duties of Attorney General.

It shall be the duty of the attorney general to represent and appear for the people of the state of Washington and the commission in all actions and proceedings involving any question under this act, or under or in reference to any act or order of the commission; and it shall be the duty of the attorney general generally to see that all laws affecting any of the persons

or corporations herein enumerated are complied with, and that all laws, the enforcement of which devolves upon the commission, are enforced, and to that end he is authorized to institute, prosecute and defend all necessary actions and proceedings. [L. '11, p. 540, § 5.]

§ 8626-6. Organization, Meetings, Official Seal, Employees, Expenses and Reports.

The office of the commission shall be at the state capital, where the commission shall reside. The commission shall at all times be open and in session for the transaction of business. They shall be known collectively as "The Public Service Commission of Washington" and shall adopt and use an official seal.

The commission may appoint an expert rate clerk and statistician at a salary of not to exceed three thousand dollars (\$3,000) per annum, an engineer at a salary of not to exceed three thousand dollars (\$3,000) per annum, an inspector of safety appliances at a salary of not to exceed three thousand dollars (\$3,000) per annum, an expert accountant at a salary not to exceed eighteen hundred dollars (\$1,800) per annum, a stenographer competent to report hearings at a salary of not to exceed eighteen hundred dollars (\$1,800) per annum, and such engineers, inspectors, accountants, experts, clerks, and other assistants as it may deem necessary, at such rates of compensation as it may determine upon.

All employees of the commission shall take an oath before entering upon the discharge of their duties, to faithfully and impartially discharge the duties of their several offices.

The commissioners, secretary, and other employees of the commission shall be entitled to receive from the state their actual necessary expenses when traveling on the business of the commission.

The commission is authorized to procure all necessary books, maps, charts, stationery, instruments, office furniture and other appliances deemed by the commission necessary.

All proceedings of the commission, and all documents and records in its possession, shall be public records. The commission shall make and submit to the governor an annual report containing full and complete accounts of the transactions and proceedings of its office, together with the information gathered by the commission as herein required, and such other facts, suggestions and recommendations as may be by it deemed necessary, which report shall be published as the reports of the heads of departments. [L. '11, p. 540, § 6.]

§ 8626-7. Quorum—Powers of a Commissioner.

A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission, and may hold hearings at any time or place within or without the state. Any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner. All investigations, inquiries and hearings of a commissioner shall be and be deemed to be the investigations, inquiries and hearings of the commission, and all findings, orders or decisions, made by a commissioner, when approved and confirmed

by the commission and filed in its office, shall be and be deemed to be the findings, orders or decisions of the commission. [L. '11, p. 541, § 7.]

§ 8626-8. Definitions.

The term "commission," when used in this act, means the public service commission hereby created.

The term "commissioner," when used in this act, means one of the members of such commission.

The term "corporation," when used in this act, includes a corporation, company, association or joint stock association.

The word "person," when used in this act, includes an individual, a firm or copartnership.

The term "street railroad," when used in this act, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for hire, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place within any one city or town, and includes all equipment, switches, spurs, tracks, bridges, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such street railroad, within this state.

The term "railroad," when used in this act, includes every railroad, other than a street railroad, by whatsoever power operated for public use in the conveyance of persons or property for hire, with all bridges, ferries, tunnels, equipment, switches, spurs, tracks, stations and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad.

The term "street railroad company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith within this state.

The term "railroad company," when used in this act, includes every corporation, company, association, joint stock association, partnership or person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any railroad or any cars or other equipment used thereon or in connection therewith within this state.

The term "express company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, who shall engage in or transact the business of carrying any freight, merchandise or property for hire on the line of any common carrier operated in this state.

The term "common carrier," when used in this act, includes all railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping-car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or

town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state.

The term "gas plant," when used in this act, includes all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power.

The term "gas company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state.

The term "electric plant," when used in this act, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat, or power for hire; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

The term "electrical company," when used in this act, includes any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town owning, operating or managing any electric plant for hire within this state.

The term "transportation of property," when used in this act, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported, and the transmission of credit.

The term "transportation of persons," when used in this act, includes any service in connection with the receiving, carriage and delivery of the person transported and his baggage and all facilities used, or necessary to be used in connection with the safety, comfort and convenience of the person transported.

The term "service," is used in this act in its broadest and most inclusive sense.

The term "telephone company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire within this state.

The term "telephone line," when used in this act, includes conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated, owned or controlled by any telephone company to facilitate the business of affording telephonic communication.

The term "telegraph company," when used in this act, includes every corporation, company, association, joint stock association, partnership and

person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph within this state.

The term "telegraph line," when used in this act, includes conduits, poles, wire, cables, cross-arms, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated or owned by any telegraph company to facilitate the business of affording communication by telegraph.

The term "water system," when used in this act, includes all real estate, easements, fixtures, personal property, dams, dikes, headgates, weirs, canals, reservoirs, flumes or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement of water for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses for hire.

The term "water company" when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating or managing any water system for hire within this state.

The term "vessel," when used in this act, includes every species of water craft, by whatsoever power operated, for the public use in the conveyance of persons or property for hire over and upon the waters within this state (excepting rowboats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five gross tons propelled by gas, fluid, naphtha or electric motors).

The term "steamboat company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state.

The term "dock" or "wharf" when used in this act, includes any and all structures at which any steamboat, vessel or other water craft lands for the purpose of receiving or discharging freight from or for the public, together with any building or warehouse used for storing such freight for the public for hire.

The term "warehouse," when used in this act, includes any building or structure in which freight is received for storage from the public for hire, intended for shipment or discharged by any water craft.

The term "wharfinger" or "warehouseman," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, operating or managing any dock, wharf or structure where steamboats, vessels or other water craft land for the purpose of discharging freight for the public, and where such freight is received on such dock, wharf or structure for the public for hire within this state.

The term "public service company," when used in this act, includes every common carrier, gas company, electrical company, water company, tele-

phone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section. [L. '11, p. 541, § 8.]

§ 8626-9. Charges—Duties of Common Carriers.

All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient.

Every common carrier shall construct, furnish, maintain and provide safe, adequate and sufficient service facilities, trackage, sidings, railroad connections, industrial and commercial spurs and equipment to enable it to promptly, expeditiously, safely and properly receive, transport and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort and convenience of its patrons, employees and the public.

All rules and regulations issued by any common carrier affecting or pertaining to the transportation of persons or property shall be just and reasonable. [L. '11, p. 546, § 9.]

§ 8626-10. Duty of Carriers and Persons to Expedite Traffic.

Every common carrier shall under reasonable rules and regulations promptly and expeditiously receive, transport and deliver all persons or property offered to or received by it for transportation. All persons receiving cars for loading shall promptly and expeditiously load the same, and all persons receiving property shall promptly and expeditiously receive and remove the same from the cars and freight-rooms. [L. '11, p. 547, § 10.]

§ 8626-11. Distribution of Cars.

Every railroad company shall upon reasonable notice, furnish to all persons and corporations who may apply therefor and offer property for transportation sufficient and suitable cars for the transportation of such property in carload lots. In case at any particular time a railroad company has not sufficient cars to meet all the requirements for transportation of property in carload lots, all cars available for such purpose shall be distributed among the several applicants therefor, without unjust discrimination between shippers, localities or competitive or noncompetitive points. [L. '11, p. 547, § 11.]

§ 8626-12. Railroads shall Keep a Distributing Book.

Every railroad company shall keep, subject to the inspection of any bona fide shipper, a book or books known as "car distributing book," which shall be kept by such officer or officers, employees of such railroad, and in such manner and form as the commission shall direct, showing among other things all orders for cars received by such railroad company, the name of the person ordering the same, the time when and place where such cars are required, the time when and place where such cars were supplied, and such other matters and information as the commission may prescribe. [L. '11, p. 547, § 12.]

§ 8626-13. Switch and Sidetrack Connections.

A railroad company upon the application of any shipper shall construct, maintain and operate upon reasonable terms a switch connection or connec-

tions with a lateral line of railway or private sidetrack owned, operated or controlled by such shipper, and shall upon the application of any shipper, provide upon its own property a sidetrack and switch connection with its line of railway, whenever such a sidetrack and switch connection is reasonably practicable, and can be put in with safety and the business therefor is sufficient to justify the same. [L. '11, p. 548, § 13.]

§ 8626-14. Tariff Schedules—Publication.

Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in any wise change, affect, or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of Congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto.

The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes. [L. '11, p. 548, § 14.]

§ 8626-15. Changes in Schedule—Notice Required.

Unless the commission otherwise orders no change shall be made in any classification, rate, fare, charge, rule or regulation which shall have been filed and published by a common carrier in compliance with the preceding section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, classification, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may by order allow changes in rates without requiring the thirty days' notice and the publication herein provided for. When any change is made in any rate, fare, charge, classification, rule or regulation, the effect of which is to increase any rate, fare or charge then existing, attention shall be directed to such increase by some character on the copy filed with the commission immediately preceding or following the item in such schedule, such character to be designated by the commission. [L. '11, p. 550, § 15.]

§ 8626-16. Concurrence in Joint Tariffs—Contracts, Agreements or Arrangements Between Carriers.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same also to file copies of the tariffs in which they are named as parties.

Every common carrier shall file with the commission copies of every contract, agreement or arrangement with any other common carrier or common carriers relating in any way to the transportation of persons or property. [L. '11, p. 550, § 16.]

§ 8626-17. Common Carriers to File Interstate Tariffs.

Every common carrier shall print and file or cause to be filed with the commission schedules showing the rates, fare, charges and classifications for the transportation of persons and property between all points within the state and all points without the state upon its route, and between each point within the state and all points without the state upon every route leased, operated or controlled by it, and between each point upon its route within the

state and all points without the state upon the route of any common carrier, whenever a through route and joint rate shall have been established between any two such points. If no joint rate over a through route has been established, the carrier operating within this state shall print and file with the commission the separately established rates, fares, charges and classifications applied to the through transportation. The schedules printed aforesaid shall plainly state the places between which property and persons will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges or other charges which the commission may require to be stated, all privileges granted or allowed, and any rules or regulations which may in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges or the value of the service rendered to the passenger, shipper or consignee. [L. '11, p. 551, § 17.]

§ 8626-18. Published Rates to be Charged—Free or Reduced Transportation.

No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified excepting upon order of the commission as hereinafter provided, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances. No common carrier shall, directly or indirectly, issue or give any free ticket, free pass or free or reduced transportation for passengers between points within this state, except its employees and their families, its officers, agents, surgeons, physicians and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk and fruit; to employees of sleeping-car companies, express companies, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains; baggage agents, witnesses attending any legal investigation in which the common carrier is interested; to persons injured in accidents or wrecks and physicians and nurses attending such persons; to the National Guard of Washington when on official duty, and students going to and returning from state institutions of learning: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, attorneys, agents and employees and their families, of railroad companies, steamboat companies, express companies and sleeping-car companies with

other railroad companies, steamboat companies, express companies and sleeping-car companies, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided, further, That this provision shall not be construed to prohibit the exchange of passes or franks for the officers, attorneys, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, attorneys, agents, employees, and their families of other telegraph, telephone or cable lines, or with railroad companies, express companies or sleeping-car companies: Provided, further, That the term "employee" as used in this section shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed or dying in the employment of a carrier, those entering or leaving its service and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this section shall include the families of those persons named in this proviso, also the families of persons killed and the widows during widowhood and minor children during minority of persons who died while in the service of any such common carrier: And provided, further, That nothing herein contained shall prevent the issuance of mileage, commutation tickets or excursion passenger tickets: And provided, further, That nothing in this section shall be construed to prevent the issuance of free or reduced transportation by any street railroad company for mail carriers or policemen or members of fire departments, city officers, and employees when engaged in the performance of their duties as such city employees.

Common carriers subject to the provisions of this act may carry, store or handle, free or at reduced rates, property for the United States, state, county or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, and may carry, store or handle, free or at reduced rates, the household goods and personal effects of its employees and those entering or leaving its service and those killed or dying while in its service.

Nothing in this act shall be construed to prohibit the making of a special contract providing for the mutual exchange of service between any railroad company and any telegraph or telephone company, where the line of such telegraph or telephone company is situated upon or along the railroad right of way and used by both of such companies. [L. '11, p. 551, § 18.]

§ 8626-19. Railroads shall have Scales.

It shall be the duty of all railroads operating in this state, to provide suitable facilities for the testing of all track scales used by such railroads. The commission is hereby authorized, after a hearing, upon its own motion and after notice to the railroads operating in this state, to order a suitable car or other device or facility to be provided by the railroad companies operating in this state, to be used in testing the track scales used by such railroads, the expenses of providing such car, device or facility to be equitably and reasonably apportioned among the different railroad companies by the commission. Such car, device or facility shall be used by the commission to test the accuracy of all track scales, and the different railroad companies shall transport and move such car, device or facility without charge

therefor, to the different places designated by the commission under such reasonable rules and regulations as the commission may prescribe. Such car, device or facility may be used in adjoining states to test the scales of railroad companies and for that purpose may be taken beyond the limits of the state under such reasonable rules and regulations for the due care and return thereof as the commission may prescribe. The commission is hereby authorized to prescribe and collect a reasonable fee sufficient to cover the cost and expenses connected therewith for the inspection and testing of all scales. [L. '11, p. 554, § 19.]

§ 8626-20. Unjust Discrimination.

No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property except as authorized in this act, than it charges, demands, collects or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions. [L. '11, p. 555, § 20.]

§ 8626-21. Unreasonable Preference.

No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [L. '11, p. 555, § 21.]

§ 8626-22. Long and Short Haul.

No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates, subject to the provisions of this act; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance or haul. Upon application of a common carrier the commission may by order authorize it to charge less for a longer than for a shorter distance for the transportation of persons or property in special cases after investigation by the commission, but the order must specify and prescribe the extent to which the common carrier making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any common carrier be relieved from the operation and requirements of this section. [L. '11, p. 555, § 22.]

§ 8626-23. False Billing, etc., by Carrier or Shipper.

No common carrier, or any officer or agent thereof, or any person acting for or employed by it, shall assist, suffer or permit any person or corporation to obtain transportation for any person or property between points within this state at less than the rates then established and in force in accordance

with the schedules filed and published in accordance with the provisions of this act, by means of false billing, false classification, false weight or weighing, or false report of weight, or by any other device or means. No person, corporation, or any officer, agent or employee of a corporation, who shall deliver property for transportation within the state to a common carrier, shall seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor, as aforesaid, by false billing, false or incorrect classification, false weight or weighing, false representation of the contents or substance of a package, or false report or statement of weight, or by any device or means, whether with or without the consent or connivance of a common carrier or any of its officers, agents or employees.

No person, corporation, or any officer, agent, or employee, of a corporation, shall knowingly or willfully, directly or indirectly, by false statement or representation as to the cost, value, nature or extent of injury, or by the use of any false billing, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to be false, fictitious or fraudulent, or to upon any false, fictitious or fraudulent statement or entry, obtain or attempt to obtain any allowance, rebate or payment for damage, or otherwise, in connection with or growing out of the transportation of persons or property, or agreement to transport such persons or property, whether with or without the consent or connivance of such common carrier or any of its officers, agents or employees, whereby the compensation of such carrier for such transportation shall be in fact made less than the rates then established and in force therefor.

No person, corporation, or any officer, agent or employee of a corporation, who shall deliver property for transportation within the state to a common carrier, shall seek to obtain or obtain such transportation by any false representation, false statement or false paper or token as to the contents or substance thereof, where the transportation of such property is prohibited by law. [L. '11, p. 556, § 23.]

§ 8626-24. Discrimination Prohibited—Connecting Lines.

Every railroad company shall, under such regulations as may be prescribed by the commission, afford all reasonable, proper and equal facilities for the interchange of passengers, tonnage and cars, loaded or empty, between the lines, owned, operated, controlled or leased by it and the lines of every other railroad company; and shall, under such regulations as the commission may prescribe, receive and transport, without delay or discrimination, the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad: Provided, That perishable freight of all kinds and livestock shall have precedence of shipment. Every railroad company as such is required to receive from every other railroad company at a connecting point the tonnage carried by such other railroad company in the cars in which the same may be loaded, and haul the same through to the point of destination if the destination be upon a line owned, operated or controlled by such railroad company, or, if the destination be upon the line of some other railroad company, to haul such tonnage in such cars through to the connecting point upon the line operated, owned, controlled or leased by it by way of route over which such car is billed, and there deliver the same to the next connecting

carrier, under such regulations as the commission may prescribe. [L. '11, p. 557, § 24.]

§ 8626-25. Fares and Transfers on Street Railroads.

No street railroad company shall charge, demand or collect more than five cents for one continuous ride within the corporate limits of any city, or town. Every street railroad company shall upon such terms as shall be just and reasonable, furnish to its passengers transfers entitling such passengers to one continuous trip over and upon portions of its lines within the same city or town not reached by the originating car. [L. '11, p. 558, § 25.]

§ 8626-26. Duties of Gas, Electrical and Water Companies.

All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

Every gas company, electrical company and water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

All rules and regulations issued by any gas company, electrical company or water company, affecting or pertaining to the sale or distribution of its product, shall be just and reasonable.

Every gas company, electrical company and water company shall construct and maintain such facilities in connection with the manufacture and distribution of its product as will be efficient and safe to its employees and the public. [L. '11, p. 558, § 26.]

§ 8626-27. Gas, Electrical and Water Companies shall File Schedules.

Every gas company, electrical company and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electrical company or water company. [L. '11, p. 558, § 27.]

§ 8626-28. Change in Schedule—Notice Required.

Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes without requiring the thirty days' notice by

duly filing, in such manner as it may direct, an order specifying the changes so to be made and the time when it shall take effect. All such changes shall be immediately indicated upon its schedules by the company affected. When any change is made in any rate or charge, form of contract or agreement, or any rule or regulation relating to any rate or charge or service, or in any general privilege or facility, the effect of which is to increase any rate or charge, then in existence, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or following the item in such schedule, such character to be in form as designated by the commission. [L. '11, p. 559, § 28.]

§ 8626-29. Published Rates to be Charged—Exceptions.

No gas company, electrical company or water company shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time, nor shall any such company directly or indirectly refund or remit in any manner or by any device any portion of the rates or charges so specified, or furnish its product at free or reduced rates except to its employees and their families, and its officers, attorneys, and agents; to hospitals, charitable and eleemosynary institutions and persons engaged in charitable and eleemosynary work; to indigent and destitute persons; to national homes or state homes for disabled volunteer soldiers and soldiers' and sailors' homes: Provided, That the term "employees" as used in this paragraph shall include furloughed, pensioned and superannuated employees, persons who have become disabled or infirm in the service of any such company; and the term "families," as used in this paragraph, shall include the families of those persons named in this proviso, the families of persons killed or dying in the service, also the families of persons killed, and the widows during widowhood, and the minor children during minority of persons who died while in the service of any of the companies named in this paragraph: And provided, further, That water companies may furnish free or at reduced rates water for the use of the state, or for any project in which the state is interested.

No gas company, electrical company or water company shall extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances. [L. '11, p. 560, § 29.]

§ 8626-30. Unreasonable Preference.

No gas company, electrical company or water company shall make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [L. '11, p. 560, § 30.]

§ 8626-31. Unjust Discrimination.

No gas company, electrical company or water company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method,

charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity or water, or for any service rendered or to be rendered, or in connection therewith, except as authorized in this act, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions. [L. '11, p. 561, § 31.]

§ 8626-32. Sliding Scale of Charges.

Nothing in this act shall be taken to prohibit a gas company, electrical company or water company from establishing a sliding scale of charges, whereby a greater charge is made per unit for a lesser than a greater quantity for gas, electricity or water, or any service rendered or to be rendered. [L. '11, p. 561, § 32.]

§ 8626-33. Distribution Without Discrimination.

Every gas company, electrical company or water company, engaged in the sale and distribution of gas, electricity or water, shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available gas, electricity and water as demanded. [L. '11, p. 561, § 33.]

§ 8626-34. Existing Contracts—Effect.

Nothing in this act shall be construed to prevent any gas company, electrical company or water company from continuing to furnish its product or the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order: Provided further, That the commission shall have no power to order the termination of any contract relating to the furnishing of water for irrigation or irrigation and domestic use, where such contract is based upon a consideration passing at the time of the execution of such contract. [L. 11, p. 561, § 34.]

§ 8626-35. Charges and Service of Telephone and Telegraph Companies.

All rates, tolls, contracts and charges, rules and regulations of telephone and telegraph companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any telephone or telegraph company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

Every telephone and telegraph company operating in this state shall provide and maintain suitable and adequate buildings and facilities therein, or connected therewith, for the accommodation, comfort and convenience of its patrons and employees.

Every telephone company shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded. [L. '11, p. 562, § 35.]

§ 8626-36. Tariff Schedule—Publication.

Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all other points thereon, and between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately established rates, tolls, rentals, contracts and charges applicable for such through service. The schedules printed as aforesaid shall plainly state the places between which telephone or telegraph service, or both, will be rendered, and shall also state separately all charges and all privileges or facilities granted or allowed, and any rules or regulations or forms of contract which may in any wise change, affect or determine any of the aggregate of the rates, tolls, rentals or charges for the service rendered. A schedule shall be plainly printed in large type, and a copy thereof shall be kept by every telephone company and telegraph company readily accessible to and for convenient inspection by the public at such places as may be designated by the commission, which schedule shall state the rates charged from such station to every other station on such company's line, or on any line controlled and used by it within the state. All or any of such schedules kept as aforesaid shall be immediately produced by such telephone company or telegraph company upon the demand of any person. A notice printed in bold type, and stating that such schedules are on file and open to inspection by any person, the places where the same are kept, and that the agent will assist such person to determine from such schedules any rate, toll, rental, rule or regulation which is in force shall be kept posted by every telephone company and telegraph company in a conspicuous place in every station or office of such company. [L. '11, p. 563, § 36.]

§ 8626-37. Changes in Schedules.

Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract or charge, which shall have been filed and pub-

lished by any telephone or telegraph company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days as required in the case of original schedules in the preceding section, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, toll, contract or charge will go into effect, and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission for good cause shown may allow changes in rates, charges, tolls, rentals or contracts without requiring the thirty days' notice and publication herein provided for, by an order specifying the change so to be made and the time when it shall take effect, and the manner in which the same shall be filed and published. When any change is made in any rate, toll, contract, rental or charge, the effect of which is to increase any rate, toll, rental or charge then existing, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or following the item in such schedule, which character shall be in such form as the commission may designate. [L. '11, p. 564, § 37.]

§ 8626-38. Concurrence in Joint Tariffs, Contracts, Agreements or Arrangements Between Telephone and Telegraph Companies.

The names of the several companies which are parties to any joint rates, tolls, contracts or charges of telephone companies and telegraph companies for messages, conversations and service to be rendered shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the companies filing the same to also file copies of the tariff in which they are named as parties. [L. '11, p. 565, § 38.]

§ 8626-39. Telephone and Telegraph Companies shall Furnish Copies of Contracts.

Every telephone and telegraph company shall file with the commission, as and when required by it, a copy of any contract, agreement or arrangement in writing with any other telephone company or telegraph company, or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telephone line or telegraph line or service by, or rates and charges over and upon, any such telephone line or telegraph line. [L. '11, p. 565, § 39.]

§ 8626-40. Schedule Rate to be Charged—Exceptions.

No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such

as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service.

No telephone company or telegraph company subject to the provisions of this act shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys at law, and their families, and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other telephone companies, telegraph companies, railroad companies and street railroad companies. [L. '11, p. 565, § 40.]

§ 8626-41. Unjust Discrimination.

No telegraph or telephone company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telegraph or telephone or in connection therewith, except as authorized in this act than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telegraph or telephone under the same or substantially the same circumstances and conditions. [L. '11, p. 566, § 41.]

§ 8626-42. Unreasonable Preference.

No telegraph company or telephone company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [L. '11, p. 566, § 42.]

§ 8626-43. Existing Contracts—Effect.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. [L. '11, p. 567, § 43.]

§ 8626-44. Unjust Discrimination.

No telephone or telegraph company subject to the provisions of this act shall charge or receive any greater compensation in the aggregate for the transmission of any long distance conversation or message of like kind for

a shorter than for a longer distance over the same line, in the same direction, within this state, the shorter being included within the longer distance, or charge any greater compensation for a through service than the aggregate of the intermediate rates subject to the provision of this act, but this shall not be construed as authorizing any such telephone company or telegraph company to charge and receive as great a compensation for a shorter as for a longer distance. Upon application of any telephone company or telegraph company the commission may, by order, authorize it to charge less for longer than for a shorter distance service for the transmission of conversation or messages in special cases after investigation, but the order must specify and prescribe the extent to which the telephone company or telegraph company making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any telephone company or telegraph company be relieved from the requirements of this section. [L. '11, p. 567, § 44.]

§ 8626-45. Transmission of Messages of Other Lines.

Every telephone company or telegraph company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telephone or telegraph company. [L. '11, p. 568, § 45.]

§ 8626-46. Charges, Duties of Wharfingers.

All charges made for any service rendered or to be rendered in the receipt, storage or handling of property or in connection therewith by any wharfinger or warehouseman shall be just, fair, reasonable and sufficient. Every wharfinger or warehouseman shall furnish and supply such wharves, docks, buildings, service, instrumentalities and facilities as shall be safe, adequate and efficient and in all respects just and reasonable. All rules and regulations issued by any wharfinger or warehouseman affecting or pertaining to the dockage, storage, handling and care of property shall be just and reasonable. Every wharfinger and warehouseman shall construct and maintain such facilities in connection with his warehouse, wharf, dock and structure as will be efficient and safe to its employees and the public. [L. '11, p. 568, § 46.]

§ 8626-47. Tariff Schedule—Publication.

Every warehouseman or wharfinger shall file with the commission and shall print and keep open to the public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, used or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such warehouseman or wharfinger. [L. '11, p. 568, § 47.]

§ 8626-48. Change in Schedule, Notice Required.

Unless the commission otherwise orders, no change will be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by the wharfinger or

warehouseman in compliance with the requirements of the preceding section, except by thirty days' notice to the commission and publication for thirty days, which schedule shall plainly state the changes to be made in the schedule then in force and the time when the change will go into effect, and all proposed changes shall be shown by printing, filing, and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to the public inspection. The commission for good cause shown may allow changes without requiring the thirty days' notice by duly filing in such manner as it may direct an order specifying the changes so to be made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedule by the warehouseman or wharfinger. [L. '11, p. 568, § 48.]

§ 8626-49. Published Rates to be Charged—Exceptions.

No wharfinger or warehouseman shall charge, demand, collect, or receive a greater, less or different compensation for any service rendered or to be rendered, than the rates charged applicable to such service as specified in its schedule filed and in effect at the time. Nor shall any such wharfinger or warehouseman directly or indirectly refund or remit in any manner or by any device, any portion of the rate or charge so specified, or furnish dockage, wharfage or storage or free or reduced rates except to its employees and their families and its officers, attorneys and agents; to hospitals, charitable and eleemosynary institutions and persons engaged in charitable and eleemosynary work; to indigent and destitute persons; to national homes or state homes for disabled volunteer soldiers and soldiers' and sailors' homes: Provided, That the term "employees," as used in this section shall include furloughed, pensioned and superannuated employees, persons who have become disabled or infirm in the service of such wharfinger or warehouseman, and the term "families," as used in this section, shall include the families of those persons named in this proviso, also the families of persons killed or dying in the service, also the families of persons killed, and the widows, during widowhood, and the minor children during minority of persons who died while in the service of any such wharfinger or warehouseman.

No wharfinger or warehouseman shall extend to any person or corporation any form of contract or agreement, or any rule or regulation or any privilege or facility except as are regularly and uniformly extended to all persons and corporations under like circumstances. [L. '11, p. 569, § 49.]

§ 8626-50. Unreasonable Preference.

No wharfinger or warehouseman shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service or traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever. [L. '11, p. 570, § 50.]

§ 8626-51. Unjust Discrimination.

No wharfinger or warehouseman shall, directly or indirectly or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compen-

sation for the wharfage, dockage or storage of property, or for any service rendered or to be rendered or in connection therewith, except as authorized by this act, than it charges, demands, collects or receives from any person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances and conditions. [L. '11, p. 570, § 51.]

§ 8626-52. Service Without Discrimination.

Every wharfinger or warehouseman shall upon demand furnish to all persons or corporations who may apply therefor and be reasonably entitled thereto suitable facilities for storing and transferring property from such warehouse, wharf, dock or structure, to any vessel and from any vessel to any such warehouse, wharf, dock or structure. [L. '11, p. 570, § 52.]

§ 8626-53. Charges and Services to be Fixed by Commission.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided. [L. '11, p. 571, § 53.]

§ 8626-54. Charges and Service of Gas Companies, Electrical and Water Companies to be Fixed by Commission.

Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint as herein provided, that the rates or charges demanded, exacted, charged or collected by any gas company, electrical company or water company, for gas, electricity or water, or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing, that the illuminating or heating power, purity or pressure of gas, the efficiency of electric

lamp supply, the voltage of the current supplied for light, heat or power, or the purity, volume and pressure of water, supplied by any gas company, electrical company or water company, as the case may be, is insufficient, impure, inadequate or insufficient, it shall order such improvement in the manufacture, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the storage, distribution or supply of water, or in the methods employed by such gas company, electrical company or water company, as will in its judgment be efficient, adequate, just and reasonable.

Whenever the commission shall find, after hearing, that any rules, regulations, measurements, or the standard thereof, practices, acts or services of any such gas company, electrical company or water company are unjust, unreasonable, improper, insufficient, inefficient or inadequate, or that any service which may be reasonably demanded is not furnished, the commission shall fix the reasonable rules, regulations, measurements or the standard thereof, practices, acts or service to be thereafter furnished, imposed, observed and followed, and shall fix the same by order, or rule, as hereinafter provided. [L. '11, p. 571, § 54.]

§ 8626-55. Commission to Fix Charges and Service of Telephone and Telegraph Companies.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the rental or use of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telephone extension or extension system, or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telegraph company or telephone company are unjust or unreasonable, or that the equipment, facilities or service of any telegraph company or telephone company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as hereinafter provided. [L. '11, p. 573, § 55.]

§ 8626-56. Charges and Service of Wharfingers and Warehouseman to be Fixed by Commission.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates or charges

demand, exacted, charged or collected by any wharfinger or warehouseman for the receipt, storage or handling of freight, or in connection therewith, or that the rules, regulations or practices affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of law, or that such rates and charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, charges, rules, regulations, or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing, that the rules, regulations or practices of any wharfinger or warehouseman are unjust or unreasonable, or that the equipment, facilities or service of any wharfinger or warehouseman are inadequate, inefficient, improper, insufficient or unsafe, the commission shall determine the just, reasonable, proper, adequate, efficient and safe rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order of the commission as hereinafter provided. [L. '11, p. 573, § 56.]

§ 8626-57. Joint Rates and Through Routes on Railroads.

Whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that the rates and charges in force over two or more railroads, between any two points in the state, are unjust, unreasonable or excessive, or that no satisfactory through route or joint rate exists between such points, and that the public necessities and convenience demand the establishment of a through route and a joint rate between such points, the commission may order such railroads to establish such through route, and may establish and fix a joint rate which will be fair, just, reasonable and sufficient, to be followed, charged, enforced, demanded and collected in the future, and the commission may order that carload freight moving between such points shall be carried by the different companies, parties to such through route and joint rate, without being transferred from the originating cars. In case no agreement exists between such railroads for the interchange of cars, then the commission, before making such order, shall be empowered to, and it shall be its duty, to make rules for the expeditious and safe return and proper compensation for the cars so loaded by the company or companies receiving the same. [L. '11, p. 574, § 57.]

§ 8626-58. Interstate Fares—Rates, Charges, etc.

The commission shall have power, and it is hereby made its duty, to investigate all interstate, rates, fares, charges, classifications or rules or practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state, and when the same are, in the opinion of the commission, excessive or discriminatory, or are levied or laid in violation of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplementary thereof, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall apply, by petition, to the interstate commerce commission for relief, and may present to

the interstate commerce commission all facts coming to its knowledge as to violations of the rulings, orders or regulations of that commission, or as to violations of the said act to regulate commerce or acts amendatory thereof or supplementary thereto. [L. '11, p. 575, § 58.]

§ 8626-59. Powers of Commission to Provide Rules for Expediting Traffic.

The commission shall have, and it is hereby given, power to provide by proper rules and regulations the time within which all railroads shall furnish, after demand therefor, all cars, equipment and facilities for the handling of freight in carload and less than carload lots, and receiving, gathering and transporting, after demand, of all express packages and the delivery thereof at destination, the extent of free gathering and distributing limits for express packages in cities and towns, the distance that freight shall be transported each day after receipt, the time within which consignors or persons ordering cars shall load the same, and the time within which consignees and persons to whom freight may be consigned shall unload and discharge the same and receive freight from the freight-rooms, and to provide the penalties to be paid to consignors and consignees for delays on the part of railroads to conform to such rules, and prescribe the penalty to be paid by consignors and consignees to railroads for failure to observe such rules. [L. '11, p. 575, § 59.]

§ 8626-60. Weighing of Freight—Scale Tests.

The commission shall have power to enforce reasonable regulations for the weighing of cars and freight offered for shipment over any line of railroad, and to test the weights made by any railroad and scales used in weighing freight on cars. [L. '11, p. 576, § 60.]

§ 8626-61. Track Connections.

Whenever the commission shall find, after a hearing made upon complaint or upon its own motion, that the public necessities and conveniences would be subserved by having track connections made, between any two or more railroads at any of the points hereinafter specified, the commission shall order any two or more railroads of the same or similar gauge to make physical connections at any and all crossings, and at all points where a railroad shall begin or terminate at or near any other railroad, and at all towns or cities where two or more railroads enter the limits of the same, so that the cars of any such railroad company may be speedily transferred from one railroad to another, and shall order whether the expense thereof shall be borne jointly or otherwise. [L. '11, p. 576, § 61.]

§ 8626-62. Sidetrack Connections.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that application has been made by any shipper for a switching connection or connections with a lateral line of railway or private sidetrack owned, operated or controlled by such shipper, or that application has been made by any shipper for the installation of a sidetrack upon the property of such railroad, and that such switch connection or sidetrack is reasonably practicable, can be put in with reasonable safety, and

the business therefor is sufficient to justify the same, and that the railroad company has refused to install or provide the same, the commission shall enter its order requiring such connection or the construction of such sidetrack: Provided, Such shipper so to be served shall pay the legitimate cost and expense of constructing such connection or sidetrack as shall be determined in separate items by the commission, and before the railroad company shall be compelled to incur any cost in connection therewith the same shall be secured to the railroad company in such manner as the commission may require. Whenever such lateral line of railway, private sidetrack or sidetrack upon the property of the railroad company shall be constructed under the provisions of this section, any person or corporation shall be entitled to connect therewith or use the same upon the payment to the shipper incurring the primary expense of a reasonable proportion of the cost thereof, to be determined by the commission after notice to the interested parties: Provided, That such connection can be made without unreasonable interference with the right of such shipper incurring the primary expense. [L. '11, p. 576, § 62.]

§ 8626-63. Investigation of Wrecks.

Every public service company is hereby required to give immediate notice to the commission of every accident resulting in death or injury to any person occurring on its lines, plant or system, in such manner as the commission may prescribe. The commission may require reports to be made by any common carrier of all wrecks, collisions or derailments occurring on the line of any such common carrier. Such notice shall not be admitted as evidence or used for any purpose against such public service company giving such notice in any suit or action for damages growing out of any matter mentioned in such notice.

The commission is hereby authorized and directed to investigate all accidents that may occur upon the lines of any common carrier resulting in loss of life, to any passenger or employee, and may investigate any and all accidents or wrecks occurring on the line of any such common carrier, or any accident resulting in death or injury to any person occurring in connection with the plant or system of any public service company. Notice of such investigation shall be given in all cases for a sufficient length of time to enable the public service company affected to participate in the hearing and such notice may be given orally or in writing, in such manner as the commission may prescribe.

Such witnesses may be examined as the commission may deem necessary and proper to thoroughly ascertain the cause of the accident or wreck and fix the responsibility therefor. Such examination and investigation may be conducted by the inspector or any deputy inspector, and such inspector or deputy inspector shall have the power to administer oaths, issue subpoenas and compel the attendance of witnesses, and when such examination is conducted by the inspector or deputy inspector, he shall make a full and complete report thereof to the commission. [L. '11, p. 577, § 63.]

§ 8626-64. Power of Commission to Order Repairs or Changes.

Whenever the commission shall, after a hearing had upon its own motion or upon complaint, find that, additional tracks, switches, terminals, terminal

facilities, stations, motive power or any other property, apparatus, equipment, facilities or device for use by any common carrier in, or in connection with the transportation of persons or property, ought reasonably to be provided, or any repairs or improvements to, or changes in, any theretofore in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission may, after a hearing, either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made. [L. '11, p. 578, § 64.]

§ 8626-65. Commission to Investigate Equipment, Track, etc.

If upon investigation the commission shall find that the equipment or appliances in connection therewith, or the apparatus, tracks, bridges or other structures of any common carrier are defective, and that the operation thereof is dangerous to the employees of such common carrier or to the public, it shall immediately give notice to the superintendent or other officer of such common carrier of the repairs or reconstruction necessary to place the same in a safe condition, and may also prescribe the rate of speed for trains or cars passing over such dangerous or defective track, bridge or other structure until the repairs or reconstruction required are made, and may also prescribe the time within which the same shall be made. Or if, in its opinion, it is needful or proper, it may forbid the running of trains or cars over any defective track, bridge or structure until the same be repaired and placed in a safe condition.

There shall be no appeal from or action to review any order of the commission made under the provisions of this section. [L. '11, p. 579, § 65.]

§ 8626-66. Safety Appliances—Fixing of Standards.

Each locomotive on every railroad in this state shall be equipped with power-driving wheel brakes and appliances for operating the train brake system, so equipped that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand-brakes for that purpose, with couplers coupling automatically by impact, which can be coupled or uncoupled without the necessity of men going between the locomotive and the locomotive or car to which the same is being coupled or from which it is being uncoupled, and with proper flanges, sill steps and grab-irons, or uncoupling levers in lieu of such grab-irons, and, excepting such as may be assigned to daylight runs or switching service exclusively, with electric headlights of approved design and capacity (except that locomotives may be operated without such headlight upon permission and order of the commission), with proper cocks, valves, pistons, valve stems and appliances which will prevent the escape of steam in such volume as to obstruct the view of the engineman operating such locomotive, and, in the case of locomotives used in the switching service, with proper foot-boards and toe-boards, and with a headlight on each end, and with such other appliances, apparatus and machinery necessary for safe operation of the locomotive or the train to which the same is attached, as the commission may prescribe: Provided, That

in case of emergency the commission may permit the use of road engines in switching service.

Each car shall be equipped with couplers coupling automatically, which can be coupled or uncoupled without the necessity of men going between the ends of the cars, with power brakes, with proper hand-brakes, sill steps and grab-irons, and, where secure ladders and running-boards are required, with such ladders and running-boards, and all cars having ladders shall also be equipped with secure hand holds or grab-irons on their roofs at the tops of such ladders, and with such other appliances necessary for the safe operation of such cars, and the trains containing such cars, as may be prescribed by the commission: Provided, That in the loading and hauling of long commodities requiring more than one car, hand-brakes may be omitted from all save one of the cars, while they are thus combined for such purpose: And provided further, That in the operation of trains not less than eighty-five per cent of the cars in such train, which are associated together, shall have their power brakes used and operated by the engineer of the locomotive drawing such train.

Every street-car shall be equipped with proper and efficient brakes, steps, grab-irons or hand-rails, fenders or aprons or pilots, and with such other appliances, apparatus and machinery necessary for the safe operation of such street-car as the commission may prescribe.

The commission shall, as soon as practicable, after the taking effect of this act, designate the number, dimensions, location and manner of application of the appliance provided for herein, or such as may be prescribed by the commission, and shall give notice of such designation to all railroad companies and street railroad companies subject to the provisions of this act, by such means as the commission may deem proper, and thereafter such number, dimensions, location and manner of application as designated by the commission shall remain as the standards of equipment to be used on all cars and locomotives subject to the provisions of this act. The commission shall have power to add to, change or modify said standards of equipment at any time or to provide different standards under different circumstances and conditions: Provided, That the commission may, upon full hearing, for good cause, extend the period within which any railroad or street railroad may comply with the provisions of this section with respect to the equipment of locomotives or cars actually in service at the date of the passage of this act. The commission is hereby given authority to fix the time within which such modification or change shall become effective or obligatory. After the time so fixed it shall be unlawful to use any car, motor, or locomotive which does not comply with the standards so prescribed by the commission: Provided, That when any car, motor or locomotive shall have been properly equipped as provided in this act, and such equipment shall have become defective or insecure while such car, motor or locomotive was being used by such railroad company upon its line of railroad, such car, motor or locomotive may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car, motor or locomotive can be repaired, without liability for the penalties imposed herein if such movement is necessary to make such repairs, and such repairs cannot reasonably be made except at such repair point. Nothing in this proviso shall be

construed to permit the hauling of defective cars by means of chains instead of drawbars in revenue trains, or in association with other cars that are commercially used, unless such defective cars contain livestock or perishable freight.

It shall be unlawful for any railroad company or street railroad company to use or operate any car, motor, locomotive or train that is defective, or any car, motor, locomotive or train upon which any appliance, machinery or attachment thereto belonging is defective, or to knowingly operate its train over any defective track, bridge or other structure, excepting in cases of emergency and under proper precautions: Provided, That this section shall not apply to boarding and outfit cars when moved as work trains, or to trains consisting wholly of logging trucks or of logging trucks and a passenger-car or caboose at the rear end thereof, or of logging trucks and not to exceed five freight-cars at the rear end thereof. [L. '11, p. 579, § 66.]

§ 8626-67. Duties of Inspector of Safety Appliances.

It shall be the duty of the inspector of tracks, bridges, structures, and equipment, and such deputies as may be appointed to inspect all equipment, and appliances connected therewith, and all apparatus, tracks, bridges and structures, depots and facilities and accommodations connected therewith, and facilities and accommodations furnished for the use of employees, and make such reports of his inspection to the commission as may be required. He shall, on discovering any defective equipment or appliances connected therewith, rendering the use of such equipment dangerous, immediately report the same to the superintendent of the road on which it is found, and to the proper official at the nearest point where such defect is discovered, describing the defect. Such inspector may, on the discovery of any defect rendering the use of any car, motor or locomotive dangerous, condemn such car, motor or locomotive, and order the same out of service until repaired and put in good working order. He shall, on discovering any track, bridge or structure defective or unsafe in any particular, report such condition to the commission, and, in addition thereto, report the same to the official in charge of the division of such railroad upon which such defect is found. In case any track, bridge or structure is found so defective as to be dangerous to the employees or public for a train or trains to be operated over the same, the inspector is hereby authorized to condemn such track, bridge or structure and notify the commission and the office in charge of the division of such railroad where such defect is found of his action concerning the same, reporting in detail the defect complained of, and the work or improvements necessary to repair such defect. He shall also report to the commission the violation of any law governing, controlling or affecting the conduct of public service companies in this state.

The inspector, or such deputies as may be appointed, shall have the right and privilege of riding on any locomotive, either on freight or passenger trains, or on the caboose of any freight train, for the purpose of inspecting the track or any railroad in this state: Provided, That the engineer or conductor in charge of any such locomotive or caboose may require such inspector to produce his authority, under the seal of the commission, showing that he is such inspector or deputy inspector.

The inspector, or such deputy inspector or inspectors as may be appointed, shall, when required by the commission, inspect any street railroad, gas plant, electrical plant, water system, telephone line or telegraph line, and upon discovering any defective or dangerous track, bridge, structure, equipment, apparatus, machinery, appliance, facility, instrumentality or building, rendering the use of the same dangerous to the public or to the employees of the company owning or operating the same, report the same to the commission and to the official in charge of such road, plant, system or line. [L. '11, p. 582, § 67.]

§ 8626-68. Safeguarding Frogs and Switches.

Every railroad and street railroad operating in this state shall so adjust, fill, block and securely guard all frogs, switches and guard-rails so as to protect and prevent the feet of persons being caught therein. [L. '11, p. 583, § 68.]

§ 8626-69. Trains shall Stop at Railroad Crossings.

All railroads and street railroads, operating in this state shall cause their trains and cars to come to a full stop at a distance not greater than five hundred (500) feet before crossing the tracks of another railroad crossing at grade, excepting at crossings where there are established signal towers and signal men, interlocking plants or gates. [L. '11, p. 584, § 69.]

§ 8626-70. Gas Plants, Electrical Plants and Water Systems—Repairs, Improvements and Changes.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint, that repairs or improvements to, or changes in, any gas plant, electrical plant or water system ought to be made, or that any additions or extensions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for manufacturing, distributing or supplying gas, electricity or water, the commission may enter an order directing that such reasonable repairs, improvements, changes, additions or extensions of such gas plant, electrical plant or water system be made. [L. '11, p. 584, § 70.]

§ 8626-71. Telephone and Telegraph Companies—Repairs, Improvements and Changes.

Whenever the commission shall find, after a hearing had on its own motion, or upon complaint, that repairs or improvements to, or changes in, any telegraph line or telephone line ought reasonably to be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telegraphic or telephonic communications, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein. [L. '11, p. 584, § 71.]

§ 8626-72. Docks, Wharves and Warehouses—Repairs, Improvements and Changes.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint, that repairs or improvements to, or changes in, any dock, wharf or warehouse ought reasonably to be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or adequate service or facilities for the receipt, storage or handling of freight, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions shall be made in the manner specified therein. [L. '11, p. 585, § 72.]

§ 8626-73. Physical Connections and Joint Rates Between Telephone and Telegraph Companies.

Whenever the commission shall find that any two or more telephone companies, whose lines form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections for the transfer of messages or conversations at common points between different localities which are not reached by the line of either company alone, and that such connections or facilities for the transfer of messages or conversations at common points can reasonably be made, an efficient service obtained and that a necessity exists therefor, or shall find that any two or more telegraph or telephone companies, have failed to establish joint rates or charges for service by or over their said lines, and that joint rates or charges ought to be established, the commission may, by its order, require such connection to be made, and that conversations be transmitted and messages transferred, and prescribe through lines and joint rates and charges to be made, and to be used, observed and in force in the future, and fix the same by order to be served upon the company or companies affected. [L. '11, p. 585, § 73.]

§ 8626-74. Inspectors of Gas, Electric and Water Meters.

The commission may appoint inspectors of gas and water meters whose duty it shall be when required by the commission to inspect, examine, prove and ascertain the accuracy of any and all gas and water meters used or intended to be used for measuring or ascertaining the quantity of gas for light, heat or power, or the quantity of water furnished for any purpose by any public service company to or for the use of any person or corporation, and when found to be or made to be correct such inspectors shall seal all such meters and each of them with some suitable device to be prescribed by the commission.

No public service company shall thereafter furnish, set or put in use any gas or water meter which shall not have been inspected, proved and sealed by an inspector of the commission under such rules and regulations as the company may prescribe.

The commission may appoint inspectors of electric meters whose duty it shall be when required by the commission to inspect, examine, prove and ascertain the accuracy of any and all electric meters used or intended to be used for measuring and ascertaining the quantity of electric current furnished for light, heat or power by any public service company to or for the use of any person or corporation, and to inspect, examine and ascertain the accuracy of all apparatus for testing and proving the accuracy of electric meters, and

when found to be or made to be correct the inspector shall stamp or mark all such meters and apparatus with some suitable device to be prescribed by the commission. No public service company shall furnish, set or put in use any electric meters the type of which shall not have been approved by the commission.

Every gas company, electrical company and water company shall prepare and maintain such suitable premises, apparatus and facilities as may be required and approved by the commission for testing and proving the accuracy of gas, electric or water meters furnished for use by it by which apparatus every meter may be tested.

If any consumer to whom a meter has been furnished shall request the commission in writing to inspect such meter, the commission shall have the same inspected and tested, and if the same, on being so tested, shall be found to be more than four per centum if an electric meter, or more than two per centum of a gas meter, or more than two per centum if a water meter, defective or incorrect to the prejudice of the consumer, the expense of such inspection and test shall be borne by the gas company, electrical company or water company, and if the same, on being so tested shall be found to be correct within the limits of error prescribed by the provisions of this section, the expense of such inspection and test shall be borne by the consumer.

The commission shall prescribe such rules and regulations to carry into effect the provisions of this section as it may deem necessary, and shall fix the uniform and reasonable charges for the inspection and testing of meters upon complaint. [L. '11, p. 585, § 74.]

§ 8626-75. Power to Administer Oaths.

Each commissioner shall have power to administer oaths, certify to all official acts, and to issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the state.

The superior court of the county in which any such inquiry, investigation, hearing or proceeding may be had, shall have power to compel the attendance of witnesses and the production of papers, waybills, books, accounts, documents and testimony as required by such subpoena. The commission or the commissioner before which the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by the subpoena, shall report to the superior court in and for the county in which the proceeding is pending by petition, setting forth that due notice has been given of the time and place of attendance of said witnesses, or the production of said papers, and that the witness has been summoned in the manner prescribed in this act, and that the fees and mileage of the witness have been paid or tendered to the witness for his attendance and testimony, and that the witness has failed and refused to attend or produce the papers required by the subpoena, before the commission, in the cause or proceedings named in the notice and subpoena, or has refused to answer questions propounded to him in the course of such proceeding, and ask an order of said court, compelling the witness to attend and testify before the commission. The court, upon the petition of the commission, shall enter an order directing the witness to appear before said court

at a time and place to be fixed by the court in such order, and then and there show cause why he has not responded to said subpoena. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpoena was regularly issued by the commission, the court shall thereupon enter an order that said witness appear before the commission at said time and place as fixed in said order, and testify or produce the required papers, and upon failing to obey said order, said witness shall be dealt with as for contempt of court. In all proceedings before the commission the commission shall have the right, in their discretion, to limit the number of witnesses testifying upon any subject or proceeding to be inquired of before the commission. [L. '11, p. 587, § 75.]

§ 8626-76. Depositions—Service of Process—Witness' Fees.

The commission shall have the right to take the testimony of any witness by deposition, and for that purpose the attendance of witnesses and the production of books, waybills, documents, papers and accounts may be enforced in the same manner as in the case of hearings before the commission, or any member thereof. Process issued under the provisions of this act shall be served as in civil cases. Each witness who shall appear before the commission under subpoena shall receive for his attendance three dollars (\$3) per day and five (5) cents per mile traveled by the nearest practicable route in going and returning from the place of hearing: Provided, That no witness shall be entitled to fees or mileage from the state of Washington when summoned at the instance of the public service corporations affected. The claim by any witness that any testimony sought to be elicited may tend to incriminate him shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding, excepting in a prosecution for perjury. The commissioner shall have power to compel the attendance of witnesses at any place within the state. [L. '11, p. 588, § 76.]

§ 8626-77. Inspection of Books, Papers and Documents.

The commission and each commissioner, or any person employed by the commission, shall have the right, at any and all times, to inspect the accounts, books, papers and documents of any public service company, and the commission, or any commissioner, may examine under oath any officer, agent or employee of such public service company in relation thereto, and with reference to the affairs of such company: Provided, That any person other than a commissioner who shall make any such demand shall produce his authority from the commission to make such inspection. [L. '11, p. 589, § 77.]

§ 8626-78. Reports.

Every public service company shall annually furnish to the commission a report in such form as the commission may require, and shall specifically answer all questions propounded to it by the commission, upon or concerning which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor and the manner of payment for same, the dividends paid, the surplus fund, if any, and the number of stockholders, the funded and floating debts and the interest paid thereon, the cost and value of the company's property, franchises

and equipment, the number of employees and the salaries paid each class, the accidents to passengers, employees and other persons and the cost thereof, the amounts expended for improvements each year, how expended and the character of such improvements, the earnings or receipts from each franchise or business and from all sources, the proportion thereof earned from business moving wholly within the state and the proportion earned from interstate traffic, the nature of the traffic movement showing the percentage of the ton miles each class of commodity bears to the total ton mileage, the operating and other expenses and the proportion of such expense incurred in transacting business wholly within the state, and the proportion incurred in transacting interstate business, such division to be shown according to such rules of division as the commission may prescribe, the balances of profit and loss, and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such report shall also contain such information in relation to rates, charges or regulations concerning fares, charges or freight, or agreements, arrangements or contracts affecting the same, as the commission may require; and the commission may, in its discretion, for the purpose of enabling it the better to carry out the provisions of this act, prescribe the period of time within which all public service companies subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. Such detailed report shall contain all the required statistics for the period of twelve months ending on the last day of any particular month prescribed by the commission for any public service company. Such reports shall be made out under oath and filed with the commission at its office in Olympia within three months after the close of the designated year for which such report is made, unless additional time be granted in any case by the commission. The commission shall have authority to require any public service company to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matter about which the commission is authorized or required by this or any other law, to inquire into or keep itself informed about, or which it is required to enforce, such periodical or special reports to be under oath whenever the commission so requires.

The commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by public service companies, including the accounts, records and memoranda of the movement of traffic, sales of its product, the receipts and expenditures of money. The commission shall at all times have access to all accounts, records and memoranda kept by public service companies, and may employ special agents or examiners, who shall have power to administer oaths and authority, under the order of the commission, to examine witnesses and to inspect and examine any and all accounts, records and memoranda kept by such companies. The commission may, in its discretion, prescribe the forms of any and all reports, accounts, records and memoranda to be furnished and kept by any public service company whose line or lines extend beyond the limits of this state, which are operated partly within and partly without the state, so that the same shall show any information required by the commission concerning the traffic movement, receipts and expenditures appertaining to those parts of the line within the state. [L. '11, p. 589, § 78.]

§ 8626-79. Production of Books and Records.

In case any public service company shall refuse to exhibit at its principal office in the United States any book, record or document to the commission or to any member thereof, or to any agent or employee thereof properly authorized, or to furnish a sworn copy of such book, record or document on demand the commission may require from any such company the production within the state, at such time and place as it may designate, of any books, records or documents kept by such company without the state.

The commission may require from any public service company the production of any books, records or documents kept by such company in any office or place without the state of Washington. Such demand shall be served upon the public service company in the manner provided for the service of orders herein. Such public service company shall have the right to appear before the commission and show cause, if any there be, why such order should not be complied with and such order shall be made after such hearing as the commission may deem proper. [L. '11, p. 591, § 79.]

§ 8626-80. Complaints.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: Provided, That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: Provided, further, That when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: Provided, All grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission. [L. '11, p. 592, § 80; L. '13, p. 452, § 1.]

§ 8626-81. Hearings, Orders and Record.

At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission. [L. '11, p. 593, § 81.]

§ 8626-82. Increase in Rates—Suspension.

Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justness thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge, rental or toll for a

period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: Provided, That if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days. If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or if appealed to the supreme court by such supreme court. [L. '11, p. 594, § 82.]

§ 8626-83. Order Requiring Joint Action.

Whenever any order of the commission shall require joint action by two or more public service companies, such order shall specify that the same shall be made at their joint cost, and the companies affected shall have thirty days, or such further time, as the commission may prescribe, within which to agree upon the part or division of cost which each shall bear, and costs of operation and maintenance in the future, or the proportion of charges or revenue each shall receive from such joint service and the rules to govern future operations. If at the expiration of such time such companies shall fail to file with the commission a statement that an agreement has been made for the division or apportionment of such cost, the division of costs of operation and maintenance to be incurred in the future and the proportion of charges or revenue each shall receive from such joint service and the rules to govern future operations, the commission shall have authority, after further hearing, to enter a supplemental order fixing the proportion of such cost or expense to be borne by each company, and the manner in which the same shall be paid and secured. [L. '11, p. 594, § 83.]

§ 8626-84. Remunerative Charges cannot be Changed.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint as herein provided, that any rate, toll, rental or charge with has been the subject of complaint and inquiry is sufficiently remunerative to the public service company affected thereby, it may order that such rate, toll, rental or charge shall not be changed, altered, abrogated or discontinued, nor shall there be any change in the classification which will change or alter such rate, toll, rental or charge without first obtaining the consent of the commission authorizing such change to be made. [L. '11, p. 595, § 84.]

§ 8626-85. Rules and Regulations.

The commission is hereby authorized and empowered to adopt, promulgate and issue rules and regulations covering the bulletining of trains, showing the time of arrival and departure of all trains, and the probable arrival and departure of delayed trains; the conditions to be contained in and become a part of contracts for transportation of persons and property, transmission and delivery of messages and conversations, and the furnishing and supply of gas, electricity and water, and any and all services concerning the same, or connected therewith; the time that station rooms and offices shall be kept open; rules governing demurrage and reciprocal demurrage, and to provide reason-

able penalties to expedite the prompt movement of freight and release of cars, the limits of express deliveries in cities and towns, and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this act. Such rules and regulations shall be promulgated and issued by the commission on its own motion, and shall be served on the public service company affected thereby as other orders of the commission are served. Any public service company affected thereby, and deeming such rules and regulations, or any of them, improper, unjust, unreasonable, or contrary to law, may within twenty days from the date of service of such order upon it file objections thereto with the commission, specifying the particular grounds of such objections. The commission shall, upon receipt of such objections, fix a time and place for hearing the same, and after a full hearing may make such changes or modifications thereto, if any, as the evidence may justify. The commission shall have, and it is hereby given, power to adopt rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings: Provided, No person desiring to be present at such hearing shall be denied permission. Actions may be instituted to review rules and regulations promulgated under this section as in the case of orders of the commission. [L. '11, p. 595, § 85.]

§ 8626-86. Review.

Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. [L. '11, p. 596, § 86.]

§ 8626-87. Supersedeas.

The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

No order so restraining or suspending an order of the commission relating to rates, fares, charges, tolls or rentals, or rules or regulations, practices, classifications or contracts affecting the same, shall be made by the superior

court otherwise than upon three days' notice and after hearing, and if a supersedeas is granted the order granting the same shall contain a specific finding, based upon evidence submitted to the court making the order, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage: Provided, however, That when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court by such supreme court.

In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended.

The court may, in addition to or in lieu of the bond herein provided for, require such other or further security for the payment of such excess charges or damages as it may deem proper. [L. '11, p. 597, § 87.]

A railroad company is bound by an order of the railroad commission ordering the construction and maintenance of a spur track to serve a warehouse, and cannot have the same reviewed on certiorari on the theory that the order was a continuing one, where the company complied with the order by building the spur at the shipper's expense, which was paid, and took no

appeal, this section providing that on appeal the superior court may in its discretion restrain or suspend the order pendente lite: *Great Northern R. Co. v. Public Service Commission*, 69 Wash. 579, 125 Pac. 948.

As to compelling railroads to light track within city, see note in 41 L. R. A. 422.

§ 8626-88. Appeal to the Supreme Court.

The commission, any public service company or any complainant may, within twenty days after the entry of judgment in the superior court in any action of review, prosecute an appeal to the supreme court of the state of Washington. The appellant shall have fifty days after the entry of such judgment in which to serve and file his opening brief, and the respondent shall have thirty days after the service of such opening brief in which to answer the same. The appellant shall have twenty days after the service of respondent's brief in which to reply to the same. After the filing of such brief, or the expiration of the time for filing briefs, the cause shall be assigned for hearing at the earliest motion day of the court, or at such other time as the court shall fix, and the clerk of the court shall notify the attorneys for the respective parties of the date set for the hearing in time to permit the parties to participate in the hearing. Such appeal shall be taken by giving a notice of appeal in open court at the time of the rendition of judgment, or by the service and filing of a notice of appeal within twenty days from and after the entry of the judgment.

The original transcript of the record and testimony filed in the superior court in any action to review an order of the commission, together with a

transcript of the proceedings in the superior court, shall constitute the record on appeal to the supreme court.

No appeal shall be effective, when taken by a public service company or a complainant, unless a cost bond on appeal in the sum of two hundred dollars (\$200) shall be filed within five days after the service of the notice of appeal.

The superior court may, in its discretion, suspend its judgment pending the hearing in the supreme court, upon the filing of a bond, with good and sufficient surety, conditioned as provided for bonds upon actions for review, or upon such other or further terms and conditions as it may deem proper. The general laws relating to appeals to the supreme court shall, so far as applicable and not in conflict with the provisions of this act, apply to appeals taken under the provisions of this act. [L. '11, p. 598, § 88.]

§ 8626-89. Rehearings.

Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint, and such orders may be reviewed as are other orders of the commission: Provided, That no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission. [L. '11, p. 599, § 89.]

§ 8626-90. Commission may Change Orders.

The commission may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it, and any order or rule rescinding, altering or amending any prior order or rule shall, when served upon the public service company affected, have the same effect as herein provided for original orders and rules. [L. '11, p. 600, § 90.]

§ 8626-91. Overcharge.

When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed

by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission. [L. '11, p. 600, § 91.]

§ 8626-92. Valuation of Property—Procedure.

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain, in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business, and the sum required to meet fixed charges and operating expenses on intrastate business, and the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, the relative proportion of the revenue which should be derived therefrom.

It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase, or diminish.

It shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic and business of common carriers.

It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

The commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the state of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreason-

able, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, That such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing. [L. '11, p. 601, § 92; L. '13, p. 662, § 1.]

See notes to § 8638.

§ 8626-93. Summary Proceedings.

Whenever the commission shall be of opinion that any public service company is failing or omitting, or about to fail or omit, to do anything required of it by law, or by order, direction or requirement of the commission, or is doing anything, or about to do anything, or permitting anything, or about to permit anything to be done contrary to or in violation of law or of any order, direction or requirement of the commission authorized by this act, it shall direct the attorney general to commence an action or proceeding in the supe-

rior court of the state of Washington for Thurston county or in the superior court of any county in which such company may do business, in the name of the state of Washington on the relation of the commission, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. The attorney general shall thereupon begin such action or proceeding by petition to such superior court, alleging the violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding twenty days after the service of the copy of the petition, within which the public service company complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct, without other or formal pleadings, and without respect to any technical requirement. Such persons or corporations as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction, or both, issue as prayed for in the petition, or in such other modified form as the court may determine will afford appropriate relief. An appeal may be taken to the supreme court from such final judgment in the same manner and with the same effect as appeals from judgments of the superior court in actions to review orders of the commission. All provisions of this act relating to the time of appeal, the manner of perfecting the same, the filing of briefs, hearings and supersedeas, shall apply to appeals to the supreme court under the provisions of this section. [L. '11, p. 605, § 93.]

§ 8626-94. Penalties for Violations of Act or Orders.

Every public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this act, so long as the same shall be and remain in force. Any public service company which shall violate or fail to comply with any provision of this act, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this act shall be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense. [L. '11, p. 606, § 94.]

§ 8626-95. Officers and Employees Subject to Penalty.

Every officer, agent or employee of any public service company, who shall violate or fail to comply with, or who procures, aids or abets any violation by any public service company of any provision of this act, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids or abets any such public service company in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor. [L. '11, p. 606, § 95.]

§ 8626-96. Corporations Violating Act or Orders—Penalty.

Every corporation, other than a public service company, which shall violate any provision of this act, or which shall fail to obey, observe or comply with any order of the commission under authority of this act, so long as the same shall be and remain in force, shall be subject to a penalty of not to exceed the sum of one thousand dollars (\$1,000) for each and every offense. Every such violation shall be a separate and distinct offense, and the penalty shall be recovered in an action as provided in section 8626-98. [L. '11, p. 607, § 96.]

§ 8626-97. Persons Violating Act—Penalty.

Every person who, either individually, or acting as an officer or agent of a corporation other than a public service company, shall violate any provision of this act, or fail to observe, obey or comply with any order made by the commission under this act, so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this act, or in its failure to obey, observe or comply with any such order, shall be guilty of a gross misdemeanor. [L. '11, p. 607, § 97.]

§ 8626-98. Suit for Penalties.

Actions to recover penalties under this act shall be brought in the name of the state of Washington in the superior court of Thurston county, or in the superior court of any county in or through which such public service company may do business. In all such actions the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the state under this act shall be paid into the treasury of the state. [L. '11, p. 607, § 98.]

§ 8626-99. Orders and Rules Conclusive.

In all actions between private parties and public service companies involving any rule or order of the commission, and in all actions for the recovery of penalties provided for in this act, or for the enforcement of the orders or rules issued and promulgated by the commission, the said orders and rules shall be conclusive unless set aside or annulled in a review as in this act provided. [L. '11, p. 608, § 99.]

§ 8626-100. Findings Prima Facie Correct.

Whenever the commission has issued or promulgated any order or rule, in any writ of review brought by a public service company to determine the reasonableness of such order or rule, the findings of fact made by the commission shall be prima facie correct, and the burden shall be upon said public service company to establish the order or rule to be unreasonable or unlawful. [L. '11, p. 608, § 100.]

§ 8626-101. Commission shall Enforce Laws.

It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal. [L. '11, p. 608, § 101.]

§ 8626-102. Companies Liable for Damages.

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this act or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation. [L. '11, p. 608, § 102.]

§ 8626-103. Commission to Furnish Copy of Rates, etc.—Fees.

Upon application of any person the commission shall furnish certified copies of any classification, rate, rule, regulation or order established by such commission, and the printed copies published by authority of the commission, or any certified copy of any such classification, rate, rule, regulation or order, with seal affixed, shall be admissible in evidence in any action or proceeding, and shall be sufficient to establish the fact that the charge, rate, rule, order or classification therein contained is the official act of the commission. When copies of any classification, rate, rule, regulation or order not contained in the printed reports, or copies of papers, accounts or records of public service companies filed with the commission shall be demanded from the commission for proper use, the commission shall charge a reasonable compensation therefor. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation. [L. '11, p. 609, § 103.]

§ 8626-104. Effect of Act—Release of Damages.

This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state; and all penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to the recovery of any other: Provided, That no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting livestock by railway from liability of a common carrier, or carrier of livestock, which would exist had no contract, receipt, rule or regulation been made or entered into. [L. '11, p. 609, § 104.]

§ 8626-105. Effect of Act upon Municipal Utilities.

Nothing in this act shall authorize the commission to make or enforce any order affecting rates, tolls, rentals, contracts or charges or service rendered, or the safety, adequacy or sufficiency of the facilities, equipment, instrumentalities or buildings, or the reasonableness of rules or regulations made, furnished, used, supplied or in force affecting any street railroad, telephone line, gas plant, electrical plant or water system owned and operated by any city or town, but all other provisions enumerated herein shall apply to public utilities owned by any city or town. [L. '11, p. 610, § 105.]

§ 8626-107. Public Service Commission to Act as Railroad Commission.

Whenever the terms "Railroad Commission of Washington," "Railroad Commissioner," or "Railroad Commission" occur in any law, contract or document, or whenever in any law, contract or document reference is made to such commission or commissioners, such terms or reference shall be deemed to refer to and include the public service commission as established by this act, so far as such law, contract or document pertains to matters within the jurisdiction of the said public service commission. [L. '11, p. 610, § 107.]

§ 8626-108. Constitutionality.

If any section, subdivision, sentence or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act. [L. '11, p. 611, § 108.]

§ 8626-110. Transfer of Records.

The railroad commission of Washington shall transfer and deliver to the public service commission hereby created all books, maps, papers and records, furniture, equipment, instruments and supplies in its possession at the date of the taking effect of this act. [L. '11, p. 611, § 110.]

§ 8626-111. Pending Actions and Proceedings.

This act shall not affect pending actions or proceedings, civil or criminal, brought by or against the railroad commission of Washington, or by any other person or corporation, under the provision of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplemental thereto, but the same may be prosecuted or defended in the name of the railroad commission of Washington, or otherwise, with the same effect as though this act had not been passed. Any investigation, examination or proceeding undertaken, commenced or instituted by the railroad commission of Washington prior to the taking effect of this act may be conducted and continued to a final determination by the public service commission hereby created, in the same manner, under the same terms and conditions, and with like effect as though the railroad commission of Washington had not been abolished.

No cause of action arising under the provisions of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplementary thereto, or dependent thereon, shall abate by reason of the passage of this act, whether a suit or action has been instituted thereon at the time of the taking effect of this act or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though said chapter (and the acts amendatory thereof or supplemental thereto) had not been repealed.

All findings, orders and rules made, issued or promulgated by the railroad commission of Washington under the provisions of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplemental thereto, shall continue in force and have the same effect as though this act had not been passed, and the public service commission hereby created is empowered to enforce said findings, orders and rules in the same manner and under the same conditions as though said findings, orders and rules had been made, issued or promulgated by the public service commission hereby created. [L. '11, p. 611, § 111.]

For the act referred to, see Rem. & Bal. Code, §§ 8627-8671.

§ 8626-112. Construction of Act—Terms of Commissioners.

This act, in so far as it embraces the same subject matter, shall be construed as a continuation of chapter 81 of the Laws of 1905, and the acts amendatory thereof and supplemental thereto, and the members of the railroad commission of Washington created by said act of 1905 shall during the remainder of their terms of office respectively constitute the public service commission created by this act. At the expiration of the term of each commissioner a commissioner shall be appointed under the provisions of this act. [L. '11, p. 612, § 112.]

§§ 8627-8661.

Repealed. See L. '11, p. 611, § 109.

§ 8629.

An order of the railroad commission reducing switch charges, based largely upon an old rate that had been continued in force for some time, and upon conflicting evidence as to the time consumed in the service and as to the other services performed by the switching crew, is aided by the presumption that a rate continued in force for some time is presumed to be remunerative and by the presumption that the findings of the commission are correct; and the order will not be disturbed on appeal although the testimony is meager, indefinite, and unsatisfactory: *Northern Pac. R. Co. v. Railroad Com.*, 57 Wash. 134, 106 Pac. 611.

As to state regulation of railroad rates, see note in 62 Am. St. Rep. 289.

The provision in this section, giving to railroad companies the right of appeal from orders of the superior court on reviewing orders of the railroad commission, was not intended to restrict the right of appeal to railroad companies, in view of constitution, article 4, section 4, giving the supreme court appellate jurisdiction in all civil cases, and section 1716, providing that any party aggrieved may appeal from the final judgment in any action or proceeding: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

This section is mandatory, and contemplates a compensatory bond to supersede the judgment pending the appeal to the supreme court, especially in view of the provision allowing appeal "as in other civil cases," and section 1722, providing for a stay in all cases: *State ex rel. Puget Sound Elec. R. v. Mitchell*, 60 Wash. 660, 111 Pac. 873.

An order of the railroad commission requiring a railroad to furnish modern flush-toilets at a depot waiting-room in a town of two thousand inhabitants is unreasonable, where there is no proof as to the inadequacy of existing facilities; and the same cannot be sustained on the theory that the commission found it necessary on

"a view of the premises," since the law contemplates that all the evidence be preserved in the record for the purposes of review: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

Orders of the railroad commission requiring a railroad to furnish running water for drinking purposes at its stations in small towns is unreasonable, in the absence of any evidence showing delinquency on the part of the company in the present service: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

As to protection of corporations against undue burdens sought to be imposed under legislative power, see note in 62 Am. St. Rep. 165; also note in Ann. Cas. 1912C, 703.

Under this section of the railroad commission act, making the commission an intermediate tribunal with original jurisdiction to hear and determine questions relating to the duty of common carriers to furnish additional transportation facilities, the power to fix the time within which a depot must be completed is conferred by necessary implication: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

A railroad company having failed to avail itself of the right to appeal from a decision of the railroad commission ordering the construction of a depot within a specified time, is precluded from questioning its reasonableness or legality; the statute making the decision final if not appealed from: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

As to right of state to compel railroad company to equip its road, see note in 13 L. R. A., N. S., 320.

As to right of state to compel railroad to establish and maintain depot in every incorporated city, see note in Ann. Cas. 1912A, 227.

Under this section, providing that an order of the railroad commission for furnishing additional facilities shall be served on the company by delivering a certified copy, an oral announcement by the chairman at the end of a hearing is not an order binding on the company, and does not preclude the commission from later

entering a formal order and serving a copy on the company: *State ex rel. Railroad Com. v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3.

In a proceeding to recover a penalty for failing to comply with an order of the railroad commission for the erection of a depot, complaint cannot be made of the order that it was indefinite as to the size and location of the building, where the company accepted and acted upon the order except as to the time for its erection, and it was definite as to such time: *State ex rel. Railroad Com. v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3.

A penalty for failing to obey an order of the railroad commission to construct a depot within a specified time attaches at the expiration of the time limited, and it is no defense that the depot was constructed before suit for the penalty was commenced: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

In a prosecution to recover a penalty for failing to obey an order of the railroad commission to construct a depot within a specified time, which became final and conclusive because not appealed from, it is no defense that the defendant's system of work entailed such delay that the time fixed for performance was unreasonably short, where these facts were well known to the company at the time the order was made and the objection could have been raised on direct appeal from the order: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

In such a case, it is no defense that unprecedented floods delayed the performance, where such floods occurred after the expiration of the time prescribed by the order for performance: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

As to penalty as distinguished from liquidated damages, see note in 13 L. R. A. 671.

An order of the railroad commission requiring a railroad depot to be moved five hundred feet, in a town of seventy-five people, is unreasonable, where the only reason therefor was to bring the depot to the point on the railroad nearest the business center of the town: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

An order of the railroad commission requiring the extension of a spur track so as to permit teams to load and unload cars at all points of the extension is not unreasonable, where it appears that there is such a necessity for team facilities to avoid inconvenience and delay; and it is not unreasonable in that it directs the particular manner in which the service shall be furnished, where the railroad company failed to show that the service could be furnished in some other manner less burdensome to

it: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

The original charter of the Northern Pacific Railway Company, authorizing it to maintain and enjoy a "continuous railroad" between its terminals, does not require it to operate all its through passenger-trains from terminus to terminus; but it maintains and enjoys a "continuous railroad" from terminus to terminus when it operates one passenger train daily each way directly between its terminals without change of cars or deviation, affording adequate service for all who desire to travel over its line; and mandamus will not issue to require it to do more: *State ex rel. Whitehouse v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24.

It would be immaterial that its through trains were not run over the main line as originally laid out, where changes were made to reduce curves and grades, and the old line received an adequate local service: *State ex rel. Whitehouse v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24.

Orders of the railroad commission respecting railroad service and facilities will not be set aside on appeal as unreasonable, unless they clearly so appear, the presumption being that they are reasonable: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

An order of the railroad commission requiring a railroad to stop one of its passenger trains on flag at a town of seventy-five people, one and one-half miles from another town of the same size, where its trains stop, is not unreasonable, where there is a siding at such place, doing a freight business of two thousand seven hundred and thirty-eight dollars in a year, a sawmill and a paint-mill: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

Orders of the railroad commission requiring a railroad to stop trains on flag at towns of two hundred and fifty inhabitants, which were business centers of considerable importance, are not unreasonable, where such service would enable residents to visit their county seat and transact business and return the same day: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

An order of the railroad commission requiring an additional train from Anacortes to Burlington and return, to connect with the noon trains on the main line, is not unreasonable, in the absence of proof that its operation would result in a loss, where it appears that Anacortes is a city of five or six thousand inhabitants at the western terminus of a branch line, sixteen miles from the main line, doing a freight business of twenty thousand dollars per month, and eight hundred dollars for passenger fares, the present service furnishing only a morning mail service and no close connection with the noon trains in both di-

rections on the main coast line: *State ex rel. Great Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

An order of the railroad commission requiring a daily mixed freight and passenger service over a branch line fourteen miles long is unreasonable, where the income from passenger travel resulting therefrom was only nine cents per mile, and cost over thirty cents per mile, the present bi-weekly freight service was adequate, and a financial loss to the company, which loss would be increased by the change without any great necessity for it: *State ex rel. Northern Pac. R. Co. v. Railroad Com.*, 62 Wash. 193, 113 Pac. 252.

An order of the railroad commission requiring a railroad to designate the name of a station in its tariffs, folders, and tickets as Bingen and White Salmon is unreasonable, where it appears that its station, in the village of Bingen of one hundred inhabitants, is but one and one-half miles from the business center of the town of White Salmon, having a population of eight hundred or more, the latter being the more appropriate name for the district, and the railroad company having recently changed the name of its station from Bingen to White Salmon in deference to the wishes of a majority of the patrons of the station, since the naming of its stations will not be interfered with in the absence of any public necessity therefor: *State ex rel. Spokane etc. R. Co. v. Railroad Com.*, 69 Wash. 523, 125 Pac. 953.

§ 8631.

The railroad commission act providing penalties for failure of the company to comply with orders of the commission for furnishing additional facilities cannot be held unconstitutional as in contravention of the fourteenth amendment of the federal constitution, in that the penalties are excessive, the imposition of penalties for disregard of police regulations being entirely within the control of the state: *State ex rel. Railroad Com. v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3.

Under this section, prescribing a penalty if a railroad company "refuse or neglect" to obey any order of the railroad commission, the penalty is imposed for neglect, as well as refusal, to obey an order to construct a depot within a specified time, and the penalty cannot be restricted to cases of willful or contumacious refusal to obey an order, the word "neglect" meaning omission or forbearance, irrespective of carelessness or imprudence: *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

§ 8632.

A complaint filed by the railroad commission before itself, alleging that the depot facilities of the defendant at its

various stations are inadequate, is a sufficient compliance with this section, requiring all grievances to be set out in the complaint, and confers jurisdiction to enter an order requiring the company to erect suitable depots at certain stations within a specified time: *State ex rel. Railroad Com. v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3.

Objection that complaint of a railroad company's depot facilities at all its stations was too general and indefinite to authorize an inquiry as to the facilities at a specific station is waived where the company entered upon the trial of the issue without objection, and took no appeal to the courts from the order of the commission requiring the erection of a depot, sections 8629 and 8632 providing for pleading, trial, and appeal, and that issues shall be made up without delay as in civil cases; and the objection cannot be first raised in a subsequent proceeding to collect the penalty for failure to comply with the order: *State ex rel. Railroad Com. v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3.

§ 8638.

Where the value of railway property has been fixed by the state railway commission pursuant to this section, passed March 8th and approved March 16, 1907, the state tax commission has no power to fix another valuation for the purposes of taxation, under section 9141, passed February 20th and approved March 6th, in view of both the object to be accomplished by the railway commission act and the fact that it was passed subsequently to the passage of the other act: *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7.

The two acts are repugnant, except in so far as the state tax commission may estimate the value until such time as the valuation is fixed by a more certain method by the state railway commission, and this construction should be adopted in order to harmonize two acts passed at the same session, especially in view of the amendatory act of 1911 (section 8626-92), expressly making the railway commission valuations applicable for the purposes of assessment and taxation: *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7.

As to erroneous or invalid levy or assessment as ground for enjoying collection of tax, see notes in 3 Ann. Cas. 564, and 12 Ann. Cas. 764.

In an action by a shipper for unjust discrimination by a common carrier, seeking to recover switching charges paid, a complaint alleging that the defendant falsely represented that such charges were paid by other shippers when in fact the defendant was absorbing or itself paying

the switching charges of many other shippers, is insufficient where it fails to allege that the defendant had failed to comply with the provisions of the act to regulate commerce with reference to the filing of a schedule of rates and that the rate charged exceeded the rate shown on the schedule: *Lilly Co. v. Northern Pac. R. Co.*, 64 Wash. 589, 117 Pac. 401.

In fixing reasonable rates for an interurban railroad, there should be allowed an annual renewal fund upon which to draw for necessary replacement; but, where the company has failed to provide the same for a number of years, it cannot ask that the traffic for any future year or years shall bear all the deterioration of past years: *Puget Sound Electric Ry. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

The right of a carrier to fix rates which will earn a fair return on its investment is qualified by the rule that it cannot exact rates higher than the service is reasonably worth or more than the traffic will bear: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

Where an interurban railroad had been charging rates that did not net an adequate return on its investment, and advanced all rates to such an extent that new rates within the ten mile zones of the terminal cities and a few other points, approximating ten per cent of the schedule and twenty-five per cent of the revenue from passenger traffic, were more than such traffic would bear, an order of the railroad commission is justified restoring the old rates within those zones, where that was all the patrons could afford to pay, and such reduced service was not rendered at a loss, and with increases at other points will produce a revenue of seven per cent on its investment: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

Seven per cent upon the investment of an interurban railroad is shown to be a reasonable profit where it appears that the company loaned over two million dollars at six per cent to an allied corporation doing business in the same locality with approximately the same attendant risk as the interurban company: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

The findings of a railroad commission upon the reasonableness of railroad rates, the determination of which calls for the exercise of economic as well as legal principles, should not be disturbed on appeal to the courts, unless it appears that they were made arbitrarily and without a full and due consideration of the facts: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

The reduction of rates as to ten per cent of the passengers carried by an interurban

road to a figure that will give a profit on the actual cost of that part of the haul, although not an adequate return upon the investment, is justified where the company thereby earns a revenue that it could not otherwise obtain and its profits on its other business is not affected and when the same is all that such patrons can afford to pay for the service; and such a rate is not unjust discrimination against persons and places: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

It is not unjust discrimination to reduce the rates of an interurban railroad below the amounts charged by steam railroads touching certain points, where the railroads are not seeking to handle that class of traffic and have not the facilities or the time schedules to make them in reality competing lines: *Puget Sound Electric R. v. Railroad Com.*, 65 Wash. 75, Ann. Cas. 1912B, 763, 117 Pac. 739.

§ 8641.

The fact that a railway company's published tariff of rates is greater than the amount agreed upon between the railway and a logging company for the carriage of its logs is not conclusive evidence that the latter is discriminatory, where an independent consideration passed between the parties in addition to the rates charged: *Sultan R. & Timber Co. v. Great N. R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020.

This act, prohibiting discrimination between shippers by common carriers, does not prevent a railway company from entering into a contract with a shipper to carry particular goods at a fixed rate for a given time, or to the amount of a given quantity: *Sultan R. & Timber Co. v. Great N. R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020.

The law prohibiting discrimination between shippers is not violated by a contract of a railway company to carry the logs of a logging company between certain points at a specified rate, where part of the consideration therefor was the logging company's forbearance of the right to cross the railway at grade; and such contract is not void as against public policy: *Sultan R. & Timber Co. v. Great N. R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020.

As to discrimination between shippers by carriers of goods, see note in 1 Ann. Cas. 55.

The commerce act (U. S. Comp. Stats., Supp. 1909, pp. 1149-1153, sec. 6), prohibiting carriers from charging any greater or less fee for transportation than the rates and fares specified in their published tariffs, or from extending any other privileges, renders inoperative a prior contract whereby the railroad company, in consideration of land conveyed to it, agreed to give the grantor annual passes for the rest of his life, since the same must have been made

subject to the constitutional power of Congress to regulate interstate commerce: *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A., N. S., 559, 123 Pac. 998.

Where a railway company seeks to avoid a contract to carry goods on the ground that the same is void as against public policy, it must, as between itself and the carrier, establish the invalidity by direct evidence of the fact: *Sultan R. & Timber Co. v. Great N. R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020.

Where, after substantial performance, a contract for annual passes became illegal through the operation of the commerce act of 1887, the railroad company cannot be held for damages for failure to further perform the contract: *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A., N. S., 559, 123 Pac. 998.

As to impossibility of performance as defense, see note in 70 Am. St. Rep. 832.

§ 8648.

LIABILITIES OF CARRIERS OF LIVESTOCK: See 4 Remington's Digest,

"Carriers," §§ 36-1 to 42-2; *Buck v. Oregon R. & Nav. Co.*, 53 Wash. 113, 101 Pac. 491; *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 Pac. 794; *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487; *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 27 L. R. A., N. S., 975, 108 Pac. 613; *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509.

This section, providing that no contract shall exempt a carrier of livestock from liability that would exist had no contract been entered into, does not invalidate an agreement with the shipper as to the value of the stock and limiting liability to such value; and the same is not void as against public policy when freely and fairly made in consideration of the rate given, a higher valuation being available at a higher rate: *Carstens Packing Co. v. Northern Pac. R. Co.*, 64 Wash. 256, 116 Pac. 625.

As to carriers of livestock as common carriers, see note in 63 Am. St. Rep. 548.

CHAPTER II.

RIGHT TO CONSTRUCT AND OPERATE LINES.

§§ 8662, 8668.

See notes to § 8740.

§ 8670.

The consent of the Secretary of War to construct a bridge over a navigable stream is not a condition precedent to condemna-

tion of tide lands to be reached by way of the bridge, inasmuch as the state has given its consent by sections 8670 and 8737, providing that bridges across navigable streams shall be so constructed as not to interfere with or obstruct navigation: *State ex rel. Hulme v. Gray's Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

CHAPTER III.

EQUIPMENT REGULATIONS.

§ 8682.

Laws of 1899, page 49, section 1, providing that any person or company operating a railroad is required on or before the first day of October, 1899, to guard frogs and switches, applies to railroads organized after the act went into effect: *Alberg v. Campbell Lumber Co.*, 66 Wash. 84, 119 Pac. 6.

It also applies to a logging road of a mill company used in getting out logs to the mill, and not engaged in public service as

a common carrier: *Alberg v. Campbell Lumber Co.*, 66 Wash. 84, 119 Pac. 6.

§ 8683.

This section does not limit the right of action to injuries from which death results, the object being only to extend the liability to actions for wrongful death: *Alberg v. Campbell Lumber Co.*, 66 Wash. 84, 119 Pac. 6.

§ 8687-1. Full Train Crews.

It shall be unlawful for any person, corporation, company, or officer of court operating any railroad or railway, or part of any railroad or railway, in the state of Washington, and engaged, as a common carrier, in the transportation of freight or passengers, to operate over its road or any part

thereof, or suffer or permit to be run over its road outside of the yard limits, any passenger, mail or express train consisting of four or more cars with less than a full passenger crew consisting of five men, to wit: one engineer, one fireman, one conductor, one brakeman and one flagman (said flagman to have had at least one year's experience in train service) and none of the said crew shall be required or permitted to perform the duties of train baggagemen or express messenger while on the road. [L. '11, p. 650, § 1.]

§ 8687-2. Six Men Crew—Exceptions.

It shall be unlawful for any person, corporation, company, or officer of court operating any railroad or railway, or part of any railroad or railway, in the state of Washington, and engaged, as a common carrier, in the transportation of freight or passengers, to operate over its road or any part thereof, or suffer or permit to be run over its road outside of the yard limits, any freight train consisting of twenty-five or more cars exclusive of engine and caboose, with less than a full train crew consisting of six men, to wit: one engineer, one fireman, one conductor, two brakemen and one flagman (said flagman to have had at least one year's experience in train service): Provided, however, That light engine, without cars, shall have the following crew, to wit: one engineer, one fireman and one conductor. [L. '11, p. 651, § 2.]

§ 8687-3. Separate Offenses.

Each train or engine run in violation of section 8687-1 or 8687-2 shall constitute a separate offense: Provided, That nothing in this act shall be construed as applying in the case of disability of one or more of any train crew while out on the road between division terminals, wrecking trains, or to any line, or part of line, where not more than two trains are run in each twenty-four hours. [L. '11, p. 651, § 3.]

§ 8687-4. Penalty—Fine.

Any person, corporation, company, or officer of court operating any railroad or railway, or part of any railroad or railway in the state of Washington, and engaged, as a common carrier, in the transportation of freight or passengers, who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each offense. [L. '11, p. 651, § 4.]

§ 8687-5. Duty of Commission.

It shall be the duty of the railroad commission to enforce this act. [L. '11, p. 652, § 5.]

CHAPTER IV.

TRANSPORTATION REGULATIONS.

§§ 8691-8716.

Repealed. See L. '11, p. 611, § 109.

CHAPTER VII.

FENCES AND CROSSINGS.

• § 8729.

This section, requiring railroads, where the same person owns land on both sides of the track, to put in and maintain necessary crossings and gates, was impliedly repealed by the acts of 1903 and 1907, covering the same subject, section 8730, which provided that the owner shall have the right to put in gates for his use at such

places as may be convenient: *Huffman v. Oregon R. & Nav. Co.*, 57 Wash. 494, 107 Pac. 362.

As to rule of construction determining repeal of statutes by implication, see note in 88 Am. St. Rep. 272.

§§ 8733—8735.

Repealed. See L. '13, p. 88, § 23.

§ 8733-1. Grade Crossings—Definitions.

The term "commission," when used in this act, means the Public Service Commission of Washington.

The term "highway," when used in this act, includes all state and county roads, streets, alleys, avenues, boulevards, parkways, and other public places actually open and in use, or to be opened and used, for travel by the public.

The term "railroad," when used in this act, means every railroad, including interurban and suburban electric railroads, by whatsoever power operated, for the public use in the conveyance of persons or property for hire, with all bridges, ferries, tunnels, equipment, switches, spurs, sidings, tracks, stations and terminal facilities of every kind, used, operated, controlled, managed, or owned by or in connection therewith. The said term shall also include every logging and other industrial railway owned or operated primarily for the purpose of carrying the property of its owners or operators or of a limited class of persons, with all tracks, spurs and sidings used in connection therewith. The said term shall not include street railways operating within the limits of any incorporated city or town.

The term "railroad company," when used in this act, includes every corporation, company, association, joint stock association, partnership or person, its, their or his lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any railroad, as that term is defined in this section.

The term "over-crossing," when used in this act, means any point or place where a highway crosses a railroad by passing above the same.

The term "under-crossing," when used in this act, means any point or place where a highway crosses a railroad by passing under the same.

The term "over-crossing" or "under-crossing," shall also mean any point or place where one railroad crosses another railroad not at grade.

The term "grade crossing," when used in this act, means any point or place where a railroad crosses a highway or a highway crosses a railroad or one railroad crosses another, at a common grade. [L. '13, p. 74, § 1.]

§ 8733-2. Grade Crossing Prohibited.

All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or high-

way at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: •
 Provided, That this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry. [L. '13, p. 75, § 2.]

§ 8733-3. Petitions for New Crossings—Hearing—Notice—Damage.

Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade, and whenever the county commissioners of any county, or the municipal authorities of any city or town, or the state officers authorized to lay out and construct state roads, desire to lay out or extend any highway across any railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. If the highway involved is a state road, the state highway commissioner shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. If upon investigation the commission shall find that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of

changing and deflecting the highway as proposed for the purpose of securing an over-crossing, under-crossing, or safer grade crossing. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated and abandoned shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing on the petition, the commission shall make and file its findings of fact in writing concerning the matters inquired into, and shall determine the location of the crossing which may be constructed, and whether the same shall be an under-crossing, over-crossing, or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an over-crossing, under-crossing, or safer grade crossing. If the commission shall find and determine that a change in route of an existing highway, or abandonment and vacation of a portion thereof is necessary or advisable, it shall further find and determine what private lands, property, or property rights, if any, it is necessary to take, damage, or injuriously affect, for the purpose of laying out and constructing the highway along a new route, and what private lands, property or property rights, if any, will be affected by the proposed abandonment and vacation of a portion of an existing highway. The lands, property, and property rights found necessary to be taken, damaged, or affected shall be described in said findings with reasonable accuracy, and the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided. In any action brought to acquire the right to take, damage, or injuriously affect any such lands, property, or property rights, the findings of the commission shall be conclusive as to the necessity for taking, damaging, or injuriously affecting the same. A copy of said findings shall be served upon all parties to the cause. [L. '13, p. 76, § 3.]

§ 8733-4. Petitions for Change in Existing Crossings—Notice—Findings—Order.

The mayor and city council, or other governing body of any city or town, or the county commissioners of any county within which any highway is crossed by any railroad, or any railroad company whose road is crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires an alteration in the method and manner of such crossing, and its approaches, the location of the highway or crossing, the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable to change such crossing from grade or to close and discontinue the same, the opening of an additional crossing for the partial diversion of travel and praying that the same may be ordered. Upon such petition being filed, the commission shall fix a time and place for hearing the petition and shall give not less than ten days' notice thereof to the petitioner, the railroad company and the municipality or county in which the crossing is situate. If the highway involved is a state highway, like notice shall be given to the state high-

way commissioner. If the change petitioned for requires that private lands, property, or property rights be taken, damaged, or injuriously affected to open up a new route for the highway, or requires that any portion of any existing highway be vacated and abandoned, ten days' notice of the hearing shall be given to the owner or owners of the private lands, property, and property rights which it is necessary to take, damage or injuriously affect, and to the owner or owners of the private lands, property, or property rights that will be affected by the proposed vacation and abandonment of the existing highway. The commission shall also cause said notice of hearing to be published once in some newspaper of general circulation in the community where such crossing is situate, which publication shall appear at least two days prior to the date of hearing. At the time and place fixed in the notice, all persons and parties interested shall be entitled to be heard and introduce evidence. At the conclusion of the hearing the commission shall make and file its written findings of fact concerning the matters inquired into in like manner as provided in the preceding section for findings of fact upon petition for new crossings. The commission shall also enter its order based upon said findings of fact, which shall specify whether the highway shall continue at grade or whether it shall be changed to cross over or under the railroad or whether said highway shall be closed and travel thereon diverted to another channel, or any other change that the commission may find advisable or necessary. In case the order made requires that private lands, property, or property rights be taken, damaged, or injuriously affected, the right to take, damage, or injuriously affect the same shall be acquired as hereinafter provided.

Petition for the change in any existing grade crossing, or for the elimination thereof, may be filed by the commission on its own motion, and proceedings thereon shall be the same as herein provided for the hearing and determination of a petition filed by a railroad company. [L. '13, p. 78, § 4.]

§ 8733-5. Duty to Maintain Crossings.

When a highway crosses a railroad by an over-crossing or under-crossing, the framework and abutments of the over-crossing or under-crossing, as the case may be, shall be maintained and kept in repair by the railroad company, and the roadway thereover or thereunder and approaches thereto shall be maintained and kept in repair by the county or municipality in which the same are situated, or if the highway is a state road, the roadway over or under the railroad shall be maintained and kept in repair as provided by law for the maintenance and repair of state roads: Provided, however, That this section shall not apply to over-crossings or under-crossings constructed prior to the passage of this act under special contracts between a railroad company and any county, municipality, or the state, in which different provision is made for the maintenance and repair of the under-crossing or over-crossing. [L. '13, p. 79, § 5.]

§ 8733-6. Apportionment of Cost of Crossings.

Subd. A. Whenever, under the provisions of this act, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the existing highway, or changing the route thereof, for the purpose mentioned in this subdivision, shall be paid by the railroad company.

Subd. B. Whenever, under the provisions of this act, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed, the entire expense of constructing an over-crossing, under-crossing, or safer grade crossing, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road, between the railroad and the state, as justice may require, regard being had for the benefits accruing to the railroad, municipality, county, or state by reason of the improvement. If the highway involved is a state road, the amount not apportioned to the railroad company shall be paid as provided by law for constructing such state road. When an existing grade crossing is ordered eliminated by the construction of an over-crossing or under-crossing, the commission may in its discretion pay an amount not to exceed ten per cent of the cost thereof out of the appropriation provided in this act, and in such cases the state auditor is hereby authorized and required upon the requisition of the commission, to draw warrants on the state treasury payable to the party designated by the commission for such amount, and the state treasurer is hereby authorized and required to pay such warrants on presentation.

Subd. C. Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an over-crossing, under-crossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county, or to the state, shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given. [L. '13, p. 80, § 6.]

§ 8733-7. Payment of Costs and Apportionment of Construction Work.

In the construction of new railroads across existing highways, the railroads shall do or cause to be done all the work of constructing the crossings and road changes that may be required, and shall acquire and furnish whatever property or easements may be necessary, and shall pay, as provided in the preceding section, the entire expense of such work including all compensation or damages for property or property rights taken, damaged or injuriously affected. In all other cases the construction work may be apportioned by the commission between the parties who may be required to contribute to the cost thereof as the parties may agree, or as the commission may

consider advisable. All work within the limits of railroad rights of way shall in every case be done by the railroad company owning or operating the same. The cost of acquiring additional lands, rights or easements to provide for the change of existing crossings shall, unless the parties otherwise agree, in the first instance be paid by the municipality or county within which the crossing is located; or in the case of a state road, shall be paid in the manner provided by law for paying the cost of acquiring lands, rights or easements for the construction of state roads. The expense accruing on account of property taken or damaged shall be divided and paid in the manner provided for dividing and paying other costs of construction. Upon the completion of the work and its approval by the commission, an accounting shall be had, and if it shall appear that any party has expended more than its proportion of the total cost, a settlement shall be forthwith made. If the parties shall be unable to agree upon a settlement, the commission shall arbitrate, adjust and settle the account after notice to the parties. In the event of failure and refusal of any party to pay its proportion of the expense, the sum with interest from the date of the settlement may be recovered in a civil action by the party entitled thereto. In cases where the commission has settled the account, the finding of the commission as to the amount due shall be conclusive in any civil action brought to recover the same if such finding has not been reviewed or appealed from as herein provided, and the time for review or appeal has expired. If any party shall review or appeal from any finding or order of the commission apportioning the cost between the parties liable therefor, the superior court or the supreme court, as the case may be, shall cause judgment to be entered in such review proceedings for such sum or sums as may be found lawfully or justly due by one party to another. [L. '13, p. 81, § 7.]

§ 8733-8. Plans and Specifications—Proposals.

Plans and specifications of changes in existing crossings proposed under this act, and an estimate of the expense thereof, shall be submitted to the commission for its approval before the commencement of the work. In case the work is to be done by contract, the proposals of the contractor shall be submitted to the commission and if it shall determine that the bids are excessive it shall have power to require the submission of new proposals. [L. '13, p. 82, § 8.]

§ 8733-9. Temporary Crossings.

The commission, in its discretion, good cause appearing therefor, and upon such conditions as it may prescribe, shall have power, without notice or hearing, to grant a permit to construct and maintain a temporary grade crossing for a period not exceeding six months, and may revoke such permit at any time: Provided, That nothing contained in this section shall be construed to prohibit the commission, after notice and investigation, from permitting the maintenance of a temporary grade crossing for a longer period than six months. Any order granting, refusing to grant, or revoking a permit for a temporary grade crossing shall not be reviewable. [L. '13, p. 83, § 9.]

§ 8733-10. Commission may Fix Time.

The commission, in any order requiring work to be done, shall have power to fix the time within which the same shall be performed and completed: Provided, That if any party having a duty to perform within a fixed time under any order of the commission shall make it appear to the commission that the order cannot reasonably be complied with within the time fixed by reason either of facts arising after the entry of the order or of facts existing prior to the entry thereof that were not presented, and with reasonable diligence could not have been sooner presented to the commission, such party shall be entitled to a reasonable extension of time within which to perform the work. An order of the commission refusing to grant an extension of time may be reviewed as provided for the review of other orders of the commission. [L. '13, p. 83, § 10.]

§ 8733-11. Practice and Procedure Before Commission.

Modes of procedure under this act, unless herein otherwise provided, shall be as provided in the Public Service Commission law, being chapter 117, of the Laws of 1911 for procedure under that act. The commission is hereby given power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings under this act. [L. '13, p. 83, § 11.]

The reference in this section is to §§ 8626-1 to 8626-112 herein.

§ 8733-12. Notices—Form and Manner of Service.

All notices required to be served by this act shall be in writing, and shall briefly state the nature of the matter to be inquired into and investigated. Notices may be served in the manner provided by law for the service of summons in civil cases, or by registered United States mail. When service is made by registered mail, the receipt of the receiving postoffice shall be sufficient proof of service. When, under the provisions of this act, it is necessary to serve notice of hearings before the commission on owners of private lands, property, or property rights, and such owners cannot be found, service may be made by publication in the manner provided by law for the publication of summons in civil actions, except that publication need be made but once each week for three consecutive weeks, and the hearing may be held at any time after the expiration of thirty days from the date of the first publication of the notice. [L. '13, p. 84, § 12.]

§ 8733-13. Review and Appeal.

Upon the petition of any party to a proceeding before the commission, any finding or findings, or order or orders of the commission, made under color of authority of this act, except as otherwise provided in section 8733-9, may be reviewed in the superior court of the county in which the crossing is located, and the reasonableness and lawfulness of such finding or findings, order or orders inquired into and determined, as provided in the Public Service Commission law (chapter 117, Laws 1911) for the review of findings and orders made under that act. An appeal may be taken to the supreme court from the

judgment of the superior court in like manner as provided in said public service commission law for appeals to the supreme court. [L. '13, p. 84, § 13.]

See note to § 8733-11.

§ 8733-14. Employment of Engineers and Other Employees.

The commission may employ temporarily such experts, engineers, and inspectors as may be necessary to supervise changes in existing crossings undertaken under this act; the expense thereof shall be paid by the railroad upon the request and certificate of the commission, said expense to be included in the cost of the particular change of grade on account of which it is incurred, and apportioned as provided in this act.

The commission may also employ such engineers and other persons as permanent employees as may be necessary to properly administer this act, and the expense thereof shall be paid out of the appropriation herein provided. [L. '13, p. 85, § 14.]

§ 8733-15. Eminent Domain.

Whenever to carry out any work undertaken under this act it is necessary to take, damage, or injuriously affect any private lands, property, or property rights, the right so to take, damage, or injuriously affect the same may be acquired by condemnation as hereinafter provided.

Subd. A. In cases where new railroads are constructed and laid out by railroad company authorized to exercise the power of eminent domain, the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by the railroad company by a condemnation proceeding brought in its own name and prosecuted as provided by law for the exercise of the power of eminent domain by railroad companies, and the right of eminent domain is hereby conferred on railroad companies for the purpose of carrying out the requirements of this act or the requirements of any order of the commission.

Subd. B. In cases where it is necessary to take, damage, or injuriously affect private lands, property, or property rights to permit the opening of a new highway or highway crossing across a railroad, the right to take, damage, or injuriously affect such lands, property, or property rights shall be acquired by the municipality or county petitioning for such new crossing by a condemnation proceeding brought in the name of such municipality or county as provided by law for the exercise of the power of eminent domain by such municipality or county. If the highway involved be a state highway, then the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by a condemnation proceeding prosecuted under the laws relative to the exercise of the power of eminent domain in aid of such state road.

Subd. C. In cases where the commission orders changes in existing crossings to secure an under-crossing, over-crossing, or safer grade crossing, and it is necessary to take, damage, or injuriously affect private lands, property, or property rights to execute the work, the right to take, damage, or injuriously

affect such lands, property, or property rights shall be acquired in a condemnation proceeding prosecuted in the name of the state of Washington by the attorney general under the laws relating to the exercise of the power of eminent domain by cities of the first class for street and highway purposes: Provided, however, That in the cases mentioned in this subdivision the full value of any lands taken shall be awarded, together with damages, if any accruing to the remainder of the land not taken by reason of the severance of the part taken, but in computing the damages to the remainder, if any, the jury shall offset against such damages, if any, the special benefits, if any, accruing to such remainder by reason of the proposed improvement. The right of eminent domain for the purposes mentioned in this subdivision is hereby granted. [L. '13, p. 85, § 15.]

§ 8733-16. Illegal Crossings Enjoined or Abated as Nuisance.

If an under-crossing, over-crossing, or grade crossing is constructed, maintained, or operated, or is about to be constructed, operated, or maintained, in violation of the provisions of this act, or in violation of any order of the commission, such construction, operation, or maintenance may be enjoined, or may be abated, as provided by law for the abatement of nuisances. Suits to enjoin or abate may be brought by the attorney general, or by the prosecuting attorney of the county in which the unauthorized crossing is located. [L. '13, p. 86, § 16.]

§ 8733-17. Mandamus.

If any railroad company, county, municipality, or officers thereof, or other person, shall fail, neglect, or refuse to perform or discharge any duty required of it or them under this act or any order of the commission, the performance of such duty may be compelled by mandamus, or other appropriate proceeding, prosecuted by the attorney general upon the request of the commission. [L. '13, p. 87, § 17.]

§ 8733-18. Penalty for Violation by Railroad.

If any railroad company shall fail or neglect to obey, comply with, or carry out the requirements of this act, or any order of the commission made under it, such company shall be liable to a penalty not to exceed five thousand dollars, such penalty to be recovered in a civil action brought in the name of the state of Washington by the attorney general. All penalties recovered shall be paid into the state treasury. [L. '13, p. 87, § 18.]

§ 8733-19. Obstructions in Highways.

Whenever, to carry out any work ordered under this act, it is necessary to erect and maintain posts, piers, or abutments in a highway, the right and authority to erect and maintain the same is hereby granted. [L. '13, p. 87, § 19.]

§ 8733-20. No New Right of Action Conferred.

Nothing contained in this act shall be construed as conferring a right of action for the abandonment or vacation of any existing highway or portion

thereof in cases where no right of action exists independent of this act. [L. '13, p. 87, § 20.]

§ 8733-21. Act When not Operative.

This act shall not be operative within the limits of cities authorized to frame their own charters, and it shall not be construed to apply to street railway lines operating in, on, through, along, over, or across any street, alley or other public place within the limits of any incorporated city or town, except that no street-car line outside of cities authorized to frame their own charters shall cross a railroad at grade without express authority from the commission. [L. '13, p. 88, § 21.]

§ 8733-22. Constitutionality.

If any section, subdivision, sentence, or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. [L. '13, p. 88, § 22.]

§ 8736.

Upon condemnation of a railroad crossing under this section, the court may, in view of the settled rule that the right can be limited and exercised in a stipulated manner, adjudge the public use subject to defendant's right to use a logging road and upon condition that the petitioner shall construct and keep in repair an overhead crossing for the logging road: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

An adjudication of public use and necessity for condemning a railroad crossing, on condition that the petitioner construct and maintain an overhead crossing for the defendant's logging road, is not objectionable, in that it is not accompanied by specifications for the construction of a trestle and grade, since that can be left to the trial and the determination of damages to be paid under a particular and designated use, to be shown by plats and appropriate specifications: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

An adjudication of a public use and necessity for condemning a railroad crossing is not objectionable in that the petitioner must

acquire other lands in order to carry out the scheme for an overhead crossing: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

In condemning a railroad crossing on condition that the petitioner construct and keep in repair an overhead crossing for defendant's logging road, the court may limit the damages to the right condemned and the manner in which it is sought to be exercised: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

As to use enjoyed only by a limited number, see note in 102 Am. St. Rep. 819.

§ 8737.

See notes to § 8670.

§ 8738.

A railroad company may make a change in its location in order to correct an error in engineering, where it was found that high water in a river did not admit of a grade line upon the route as surveyed and adopted, both at common law and by virtue of this section: State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487.

CHAPTER VIII.

APPROPRIATION OF LANDS AND HIGHWAYS FOR CORPORATE PURPOSES.

§ 8739.

This section and section 8740, granting to railway corporations the right of eminent domain, do not authorize condemnation of land held in trust for the public as a city street, since the law must be construed to relate to private property only, in the absence of an express or implied authority to take public lands: State ex rel. Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.

As to power to take property already devoted to a public use by a governmental or political agency, see note in 37 L. R. A., N. S., 101.

§ 8740.

See notes to §§ 927, 8739.

There is a sufficient showing of reasonable necessity for the condemnation of land for a new depot and terminal grounds where it appears that the company's present depot

is more than one mile from the business center of the city and inconvenient to patrons, that the present site is inadequate in size, and without sufficient trackage facilities to meet present necessities: State ex rel. Northern Pac. R. Co. v. Superior Court, 68 Wash. 397, 123 Pac. 529.

The power conferred by this section, authorizing a railway company to condemn lands for depots, yards, terminals, etc., is a continuing power, not exhausted by its exercise in the first instance, and may be

resorted to to change the location of the depot; hence it is unnecessary, in condemning a connection between a main line and new terminals in a city, that there be a resolution of the board of directors in any particular form, as required by sections 8662 and 8668, relating to the construction of branch lines, those sections being inapplicable: State ex rel. Northern Pac. R. Co. v. Superior Court, 68 Wash. 397, 123 Pac. 529.

TITLE LXXI. REAL PROPERTY.

CHAPTER II.

DEEDS AND OTHER INSTRUMENTS AFFECTING REAL PROPERTY.

§ 8745.

An oral agreement by a real estate agent having land for sale that if the plaintiff would purchase the land from the owner he would resell it within nine months, or if failing to do so, would refund the purchase price, is not an agreement for an interest in real estate within the statute of frauds: *Herkenrath v. Ragley*, 59 Wash. 52, 109 Pac. 279.

As to oral contracts to transfer interest in realty, see note in 3 L. R. A. 337.

A deed made to defendants in compromise of a suit to quiet title, pursuant to agreement, and delivered to and retained by their attorney with their knowledge, is accepted by them: *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

As to what constitutes delivery and acceptance of deed, see note in 53 Am. St. Rep. 537.

An oral lease entered into in May, 1904, for the cropping season of 1905, is void by reason of the statute of frauds: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

As to validity, under statute of frauds, of lease for more than one year, see note in 17 Am. St. Rep. 752.

As to lease to commence at future time; what is lease for one year, see note to 10 L. R. A. 726.

Under this section, requiring all conveyances of real estate to be by deed, and section 8746, requiring deeds to be acknowledged, and section 8802, providing that leases for any term not exceeding one year shall be valid without acknowledgment, an unacknowledged lease for one year with the privilege of renewal is void and unenforceable: *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499.

An assignment of a lease is valid without acknowledgment under the laws of this state: *American Sav. Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 Pac. 1015.

An oral agreement abrogating a written contract for standing timber is void, as it involves an interest in land which must be in writing: *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225.

As to growing trees as within the meaning of land as the subject of sale under the statute of frauds, see notes in 9 Ann. Cas. 192 and 18 Ann. Cas. 971.

A deed absolute in form, but in trust for the grantors, is an express trust which can-

not be proved by parol evidence: *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 385.

Under this section an express trust in lands cannot be proved by parol testimony; and to give any standing in court, the trust must be *ex maleficio*: *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340.

As to parol evidence to vary deed, see note in 11 Am. St. Rep. 844.

It is competent to prove an express trust, under a deed reciting a nominal consideration, by a contemporaneous writing signed by the trustee acknowledging that he held the land in trust; and such writing need not be acknowledged pursuant to the statute of frauds: *Holmes v. Holmes*, 65 Wash. 572, Ann. Cas. 1913B, 1021, 38 L. R. A., N. S., 645, 118 Pac. 733.

As to proof of express trust by written declaration of trustee, see note in Ann. Cas. 1913B, 1023.

A conveyance to the grantor's husband to retain title for a limited time, to be reconveyed on request, creates an express trust which cannot be established by parol: *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074.

Payment of the consideration of an oral contract for an interest in land is not such a part performance as to take the case out of the operation of the statute of frauds: *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225.

As to part payment as effecting a taking a sale of land out of the statute, see note in 125 Am. St. Rep. 394.

Possession does not take an oral sale of land out of the operation of the statute of frauds, where it was not referable to or in execution of the contract, but was without the consent of the vendor or after he had repudiated the sale or taken possession himself: *Blakely v. Sumner*, 62 Wash. 206, 113 Pac. 257.

As to possession of one of several parcels of land as part performance sufficient to satisfy statute, see note in 8 Ann. Cas. 80.

As to sufficiency of possession alone to take the contract out of the statute, see note in 8 L. R. A., N. S., 870.

Permitting another to cut wood on the land is not the taking of such possession by the vendee as to take an oral sale out of the statute of frauds: *Blakely v. Sumner*, 62 Wash. 206, 113 Pac. 257.

A parol lease of a logging right of way for a longer period than one year will not be set aside at the instance of the landlord,

where the lessee took possession with the lessor's consent, constructed a road at an expense of five thousand dollars, benefited the land by ditches, and purchased the lessor's timber as an incident to procuring the right of way, as such course would be inequitable: *Northcraft v. Blumauer*, 53 Wash. 243, 132 Am. St. Rep. 1071, 101 Pac. 871.

Taking possession of land under an oral lease for the next season, plowing, cultivating, and summer-fallowing the land, is such part performance as to take the same out of the operation of the statute of frauds: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

An unacknowledged lease for a logging right of way, for a period of ten years, for a small annual rental, is taken out of the operation of the statute of frauds by part performance, where the lessee went into possession, built its road at a cost of forty thousand dollars, and complied with a contemporaneous agreement (which was the consideration for the lease) by clearing the land and a stream, and building fences and a bridge, involving the expenditure of a large amount of money, and increasing the rental value of the land: *Koschnitzky v. Hammond Lumber Co.*, 57 Wash. 320, 106 Pac. 900.

An unacknowledged lease for more than one year becomes binding upon the lessee so as to entitle the lessor to recover damages as upon a valid lease, where the lessor, in consideration of the agreement to pay rent for the full five year term, made improvements not beneficial to the estate, for the sole use and benefit of the lessee, who took possession and performed the lease for two years, during which time the lessor made further expenditures for the same purposes: *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.

As to kind of possession necessary to take out of the statute a contract with reference to real estate, see note in 3 L. R. A., N. S., 807.

When an oral contract for the sale of standing timber to be cut immediately is executed, it cannot be attacked as affecting an interest in lands, within the statute of frauds, since, if not valid as a sale of personal property, it is valid as a license to enter and sever the timber: *Bay View Land Co. v. Ferguson*, 53 Wash. 323, 101 Pac. 1093.

As to effect of contract with respect to standing timber to pass title to same, see note in 6 L. R. A., N. S., 469.

An oral agreement by a widow to allow her community interest in real estate to go under her husband's will cannot be shown to divest her of her community interest, the statute requiring such conveyance to be by deed: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974.

§ 8746.

See notes to § 8745.

Where a deed of all standing and lying timber contained an agreement that the grantee shall have three years from and after its date within which to "remove the timber," the grantee's interest ceases as to all timber not removed after that date, which then reverts to the grantor, since the intent of the parties controls the construction irrespective of distinctions, between the covenants and forfeitures or other technical questions: *Allen & Nelson Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622.

Whether there was a contract for the sale of timber is for the jury, where the evidence was conflicting and one of the parties testified to the making of the contract, after all other negotiations had failed, and it appeared that he gave a check for the amount to be paid, indorsed on the face "payment in full for all timber" on the tract in question, which check was cashed: *Haines & Spencer v. Kelley*, 57 Wash. 219, 106 Pac. 776.

Under a deed of standing timber "to be cut and removed within two years from the date hereof" the grantee has no right to remove the timber after the expiration of the time fixed: *Belcher v. Kleeb*, 59 Wash. 166, 109 Pac. 798.

As to time within which standing timber reserved in a conveyance must be removed, see note in 6 Ann. Cas. 249.

As to rights of grantee under conveyance of timber not specifying time for removal, see note in 12 Ann. Cas. 918.

As to right to cut and remove timber after expiration of time specified in contract of sale, see notes in 4 Ann. Cas. 1050 and 12 Ann. Cas. 731.

In a deed of land reserving all timber and right to enter for the purpose of removing the timber and the construction and maintenance of a logging road thereon forever, the word "forever" will not be construed to refer only to the maintenance of the logging road because set off by commas with that clause, since punctuation is of little aid in construction, and the real value and essence of the reservation was the timber and right forever to remove it: *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645.

As to punctuation as affecting construction of statutes, see note in 10 Ann. Cas. 1083.

As to grammatical construction of contracts, see note in 6 Ann. Cas. 55.

Where a deed of a half interest in a blacksmith-shop passed between father and son in consideration of a collateral contract for the payment to the grantor of six dollars per week, and the minds of the parties did not meet, one understanding that the money was to be paid for life, and the other only while the grantor worked in the shop, the deed and whole transaction should be set

aside: *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92.

As to mutuality of obligation where one party's obligation is not definite and certain, see note in 1 L. R. A., N. S., 445.

Equity will afford relief by the cancellation of an option on the mistake of only one party as to its meaning, where his manifest intent was to grant an option limited to one year for the purpose of perfecting title, the agreement as drawn failed to express the agreement intended, and after three years the title was not perfected and might never be, and the other party could be placed in his former position without working any injustice: *Murray v. Sanderson*, 62 Wash. 477, 114 Pac. 424.

As to contract for option, see note in 21 L. R. A. 129.

Where the lien of a purchase money mortgage was lost through a mistake in registering the land under the Torrens act, a new mortgage given to revive the lien is not, in the ordinary sense, given for an antecedent debt, and may be treated in equity as reinstating the lien of the original mortgage: *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

As to right to reinstatement of mortgage released or discharged by mistake, see note in 26 L. R. A., N. S., 816.

Fraud will not be inferred and a deed set aside for want of capacity, where it appears that the grantor, an aged inmate of a charity hospital, upon inheriting an estate of the value of twenty thousand dollars through the death of his son, suffered a general breakdown and made voluntary conveyances of all the property to one heir to the exclusion of others, without any natural reason therefor, at a time when his mind was so weakened that he was peculiarly susceptible to influence, and he probably did not have sufficient intelligence to understand the nature of the transaction: *Hattie v. Potter*, 54 Wash. 170, 102 Pac. 1023.

As to capacity to contract and therein of contracts between general contract capacity and marriage capacity, see note in Ann. Cas. 1913B, 1238.

A claim of fraud and duress in securing a deed from the plaintiff in a settlement is not established where there was evidence that she took the advice of counsel and executed the deed after being advised not to do so; that defendant's threatened foreclosure of a mortgage placed her in no danger, and that she accepted the benefits accruing to her through the settlement and had not offered to return the same: *Drew v. Bouffleur*, 69 Wash. 610, 125 Pac. 947.

Fraud by the grantee, as ground for the cancellation of deeds, must be proved by clear and convincing evidence, and is not shown by the mere breach of the vendee's contract to pay certain debts as part of the consideration, since the necessary preconceived intention not to perform is not established merely by subsequent failure to per-

form: *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374.

In an action to cancel deeds for fraud, under a complaint asking general relief, the plaintiff may be given damages for partial failure of consideration although failing to establish the fraud: *Hewett v. Dole*, 69 Wash. 163, 134 Pac. 374.

As to right of grantor to cancellation of deed on ground of misrepresentation by grantee as to condition, value, etc., of property, see note in Ann. Cas. 1912A, 405.

Where an addition contained twelve blocks numbered from 1 to 12 consecutively, each consisting of sixteen lots numbered from 1 to 16, consecutively, a deed of lots 7 and 8 in said addition is not void for uncertainty, as between grantor and grantee, where the grantors owned no lots 7 and 8 in said addition except in block 5, since the defect is latent and is explainable by extrinsic evidence: *Wetzler v. Nichols*, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867.

A deed of the "west half of the south of the southwest section twenty-two" is indefinite and uncertain, and insufficient to show title to the north half of the southwest quarter of the southwest quarter of the section: *Brodsky v. Nelson*, 57 Wash. 671, 107 Pac. 840.

As to effect of conveyance of part of tract of land acreage or fraction, see note in 2 Ann. Cas. 918.

A deed of the southwest quarter of a section is shown by the contemporaneous acts of the parties to have been executed by mistake as to the description of the tract intended to be conveyed, where it appears that the government quarter corner on the west side of the section was originally located by mistake nearly twenty chains north of its proper location, that when the deal was made this fact was unknown to the purchaser, who refused to consummate the deal until all the corners were located by a survey, whereupon a deputy county surveyor, with the parties attending, located all the corners except the unknown quarter corner which could not be found, and which he re-established halfway between the north and south lines of the section, and that the deal was thereupon consummated by the deed in question, and a fence was built on the line established by the survey, and possession taken and maintained by the parties for years in accordance with such survey and in ignorance of the true location of the quarter corner: *Town v. Greed*, 53 Wash. 350, 102 Pac. 239.

As to reformation of instruments on the ground of mistake, see note in 65 Am. St. Rep. 484.

Where grantors owned timber land beyond the granted land, and a sawmill to which the timber must be brought across the land conveyed, a reservation in the deed "excepting a strip of land thirty feet wide . . . for road purposes," must be reasonably construed as for the benefit of the grantor; and the use of a portion of the strip for a

logging road, retaining the right of ingress and egress to the grantees, is not inconsistent with the terms of the exception clause, in view of the attendant facts and circumstances: *Delano v. Luedinghaus*, 70 Wash. 573, 127 Pac. 197.

As to effect of uncertainty, in deed or contract of sale, of description of land excepted or reserved, see note in 19 Ann. Cas. 1209.

Under this section, the acknowledgment of a fully prepared mortgage which the mortgagor inadvertently omitted to sign, and which contains the mortgagor's name as grantor, is equivalent in law to a signing of it, or to the adoption of the entire instrument, including the name written thereon as grantor: *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, Ann. Cas. 1913A, 390, 116 Pac. 837 (overruled on rehearing).

Under this section, the acknowledgment of a mortgage which the mortgagor inadvertently omitted to sign, and her intention to sign, is not equivalent to, or a substitute for, an actual signing, which is required by the statute in order to pass title, nor can it be said that she intended to adopt as her signature her name written in the mortgage as the grantor (overruling, on rehearing, 64 Wash. 54): *American Savings Bank & Trust Co. v. Helgesen*, 67 Wash. 572, Ann. Cas. 1913A, 390, 122 Pac. 26.

As to essentials to execution of deeds, see note in 13 L. R. A. 676.

As to estoppel by grantor to deny proper execution, see note in 2 L. R. A. 530.

Leaving a deed for the grantees with the notary who took the acknowledgment is a sufficient delivery to give the same priority over a judgment subsequently filed: *Bender v. Ragan*, 53 Wash. 521, 102 Pac. 427.

As to what constitutes delivery of a deed, see note in 53 Am. St. Rep. 537.

The delivery of a deed in favor of grandchildren to the grandparents, at whose request it was made, to be effective on the death of the grandparents, is in effect a delivery to the grandchildren: *Simons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

As to deed not to be delivered until after grantor's death, see note in 54 L. R. A. 869.

The procuring of a deed from a railroad company by a banker, who looked after the interests of the grantee, and made final payment, is a sufficient delivery to the grantee, with acceptance and ratification by him, where he thereafter tried to obtain a statement from the banker and settle with him: *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749.

As to the delivery of a deed to grantee subject to a future extrinsic condition, see note in 16 L. R. A., N. S., 941.

As to validation of an undelivered deed by ratification or estoppel of grantor, see note in 9 L. R. A., N. S., 945.

The evidence is insufficient to show mental incapacity to execute a deed, where it appears that the parties to the deed were

brothers, who had lived together as bachelors and accumulated considerable property held by them in common under an agreement that the first to die should execute a deed to the survivor to avoid a testamentary disposition of the property, that the deed was executed the day after the grantor was taken to a hospital suffering from an illness from which he died a month later, that three witnesses present at the time clearly established that he fully understood the nature of the business, and the only evidence to the contrary being that of nonexperts as to the grantor's appearance during his stay at the hospital: *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946.

As to opinion evidence as to mental capacity of person to execute contract or deed, see note in 4 Ann. Cas. 888.

The fact that a deed, absolute in form, was intended as a mortgage must be established by clear, satisfactory and convincing evidence, and is not shown where the grantor was indebted to the grantee, and conveyed to a trustee who had full power to sell for the amount of the debt, which was done, and no note or written evidence of the indebtedness was given: *Washington Safe Deposit & Trust Co. v. Lietzow*, 59 Wash. 281, 109 Pac. 1021.

As to whether a deed, absolute on its face, but intended as a mortgage, conveys the legal title, see note in 11 L. R. A., N. S., 209.

An obligation to build a canal and furnish water for irrigation, together with a contract for stipulated damages in case of default, to be performed in the future, is secured by an absolute deed, intended as a mortgage, where the same was not discharged by the deed but was left subsisting, and the performance of the contract was prosecuted after the deed was given: *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682.

Clear and convincing evidence is required to establish that an absolute deed was intended as a mortgage, even if there is a contemporaneous written agreement for a resale; and the same is insufficient, where the conveyance was made upon the grantee's furnishing money to redeem the property from a mortgage foreclosure sale, the grantor was given a mere option to repurchase, and remained in possession under an agreement to pay rent, especially where the option declared that it was the only contract, except the lease, existing between the parties, and there was no evidence that any debt was created: *Kegley v. Skillman*, 68 Wash. 637, 123 Pac. 1081.

As to right to foreclose, as an equitable mortgage, a deed intended as security for a debt, see note in 22 L. R. A., N. S., 572.

CONSTRUCTION AND OPERATION.—The mortgagor's after-acquired title inures to the benefit of the purchaser at the mortgage foreclosure, although the then owners of the title were not made parties to the

foreclosure suit: *Gough v. Center*, 57 Wash. 276, 106 Pac. 774.

Where a creditor made at different times two conveyances in fraud of creditors, a return of an execution *nulla bona* is *prima facie* evidence that there was no other property out of which to satisfy the debt, subjecting both conveyances to attack; and the burden is upon the defendants to show affirmatively that the second conveyance, which was set aside, was sufficient to satisfy the debt, in order to sustain the first conveyance on the theory of solvency at that time: *Adams v. Wingard*, 53 Wash. 560, 102 Pac. 426.

As to burden of proving insolvency, see note in 20 Am. St. Rep. 633.

When an aged parent conveys all his property to a daughter to the exclusion of other heirs, without any consideration for his future support, the burden of proof is upon the grantee to show by clear and convincing evidence that it was fair and fully understood by the grantor: *Hattie v. Potter*, 54 Wash. 170, 102 Pac. 1023.

As to burden of proof as to fraud against creditors in transfer from husband to wife, see note in 56 L. R. A. 323.

A deed and lease will not be set aside for fraud or mistake unless the evidence is clear and convincing: *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914.

Possession of a deed by the grantee raises a strong presumption of delivery, which is not overcome by the evidence of an extreme partisan, disappointed in not receiving a portion of the estate granted, who testified, seven years after the occurrence and several years after the death of both parties to the deed, that the grantor, who was on his death-bed at the time and had executed a deed to his brother, pursuant to a previous agreement, directed the notary to take care of the deed until he called for it, which he would do as soon as he got well, the notary having testified that the grantor executed the deed in order, as he stated, that his brother should have the estate in case of his death: *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946.

A deed is presumptively executed and delivered on the date of its execution and acknowledgment: *State v. Dana*, 59 Wash. 30, 109 Pac. 191.

The presumption that a deed, properly executed and in the possession of the grantees, was duly delivered, can only be overcome by clear and convincing proof; and such proof is not made where it appears that the grantors voluntarily surrendered the granted premises to the grantees, entered upon premises taken in exchange, and consumed personal property received in exchange, and paid an agent's commission and long after the alleged fraud in securing possession of the deed from one of the grantors while intoxicated: *Anderson v. Woolley*, 61 Wash. 236, 112 Pac. 271.

As to presumption of delivery of deed, see notes in 12 L. R. A. 175 and 13 L. R. A. 677.

Where a mortgagor deeds the mortgaged premises to the mortgagee, taking back a lease with an option to purchase the property at the end of the term, the notes and mortgage being concealed, there is no presumption that the deed was intended as a mortgage, but clear and convincing evidence is required to overthrow the presumption that the written instruments are what they purport to be: *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21.

Where property was purchased in the name of a son, and the father built a house and lived on the property, the fact that the deed to the son was not recorded and was kept in the possession of the father until his death is not sufficient to overcome the presumption that the deed speaks its true intent and was not intended as a mortgage to secure advances made by the son: *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755.

As to undelivered deed as memorandum to satisfy statute of frauds, see note in 22 L. R. A. 273.

EVIDENCE.—There is sufficient evidence to warrant the cancellation of a deed for incapacity of the grantor, where it appears that he was a weak old man, eighty-eight years of age, incoherent in his talk, with delusions that his son and others were trying to poison him, and a physician testified that he was totally incompetent to transact business, and he had sold the land worth three thousand dollars for twelve hundred and fifty dollars: *Castle v. Dole*, 54 Wash. 585, 103 Pac. 828.

The evidence sustains the findings that deeds and leases executed by an aged couple to their nephews were void and without the assent of the parties, where it appears that the grantors were French Canadians, unable to read or write the English language and had little comprehension of English or of the difference between wills, deeds, and leases; that they set out with the intention to make a will in favor of two nephews for one-third interest in their lands, with a ten-year lease in their favor; but upon deciding to will one-half to their daughter and one-fourth to the nephews, and with that intent, upon the advice of an attorney that the effect would be the same, they executed deeds for such interests, taking back life leases; and that upon learning of the consequence of their acts, they repudiated the transaction and refused to recognize the leases or accept a division of the crops thereunder: *Sanpere v. Sanpair*, 57 Wash. 524, 107 Pac. 369.

There is sufficient evidence of fraud entitling the grantor to a cancellation of his deed, where it appears that he was induced to make a trade of his property for thirty-two lots represented to be in a city center and worth one hundred dollars a lot, when they were seven miles from the business

center and not worth over a dollar a lot, that the deed was not to be delivered until he had received two thousand dollars on a sale of twenty of the lots to a pretended purchaser, who paid fifty dollars without any intention of completing the purchase, and that delivery of the deed was wrongfully secured by the agent, who acted for both parties in the trade and was guilty of the frauds practiced: *Hoerling v. Lowry*, 58 Wash. 426, 108 Pac. 1090.

As to presumptions of undue influence sufficient to warrant cancellation of deed, see note in 94 Am. St. Rep. 104.

The evidence is sufficient to establish that a deed of certain blocks and lots in an upland plat, which overlapped tide lands belonging to the state at the time the plat was filed, was intended to convey only the upland portion of the overlapping blocks and lots mentioned, which was the only legal portion of the plat when filed, where it appears that the grantor had also acquired title to the tide lands from the state, that the deed made no mention of the overlapping tide lands as designated in the state tide land plat, and excluded the grantor's other lots and blocks of the upland plat which were wholly tide lands, that the tide land plat had been filed nine years, and the grantor and grantee testified that was the intention to convey only the uplands: *Cook v. Hensler*, 57 Wash. 392, 107 Pac. 178.

As to mistakes constituting grounds for canceling deeds, see note in 117 Am. St. Rep. 228.

Evidence contradicting a certified copy of the record of a deed, and showing that the grantors did not in fact execute and acknowledge the same, must be "clear, cogent and convincing"; and is insufficient where it merely appears that one of the grantors, on an improper cross-examination, could not say whether she executed the deed, and she did not deny that she had acknowledged it, having left everything to her attorney, and the attorney testified that the deed had been executed and delivered for the purpose of conveying the title: *Thompson v. Schoner*, 58 Wash. 642, 109 Pac. 116.

As to admissibility of parol evidence to show unauthorized alteration of written instrument, see note in 12 Ann. Cas. 985.

The evidence is insufficient to warrant the setting aside of a deed as fraudulent as to creditors, although the grantor was converting his real property into money with fraudulent intent to avoid payment of a judgment in a pending suit, where it appears that the grantee, a cousin of the grantor, was also a creditor and took the conveyance in discharge of an antecedent indebtedness, and it was not shown that he had such knowledge of the pending suit or so participated in the grantor's fraud as to cause him to lose the preference, the burden of proof to establish such notice being upon the plaintiff: *National Survey Co. v. Udd*, 65 Wash. 471, 118 Pac. 347.

The forgery of a deed is sufficiently established where qualified experts compared the signatures with one proven to be genuine by a witness who saw the grantor sign, and were of the opinion that they were not written by the same person, and no attempt was made by the other parties to disclose the circumstances or explain the absence of the original deed: *O'Brien v. McKelvey*, 66 Wash. 18, 118 Pac. 885.

As to forgery as a ground for cancellation of deed, see note in 92 Am. St. Rep. 272.

The plaintiff cannot complain of the admission of evidence of the intent of the grantor as to the lands sought to be conveyed by a deed, where the complaint did not rely upon the description, but tendered an issue as to the intent, which was met by the answer: *Cook v. Hensler*, 57 Wash. 392, 107 Pac. 178.

A deed may be shown by parol to have been intended as a mortgage, but the evidence must be clear, cogent, and convincing: *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755.

As to when a deed absolute on its face cannot be construed as a mortgage, see note in 1 L. R. A. 240.

A deed of the "north half" of an irregular tract of land (a rectangle less a considerable triangle cut off the northeast corner) conveys an equal half of the area of the tract, and is unambiguous; hence it is inadmissible to explain, by testimony of transactions and conversations prior to the execution of the deed, the intent of the parties to convey that part of the tract lying north of a line midway between its north and south lines: *Robinson v. Taylor*, 68 Wash. 351, 123 Pac. 444.

A warranty deed of mortgaged premises to the mortgagee, a bank, by the mortgagor, who took back a lease with an option to purchase the property at the end of the term, is not shown by clear and convincing evidence, to have been intended as a mortgage, and findings to that effect are not sufficiently supported by testimony of the mortgagor that it was agreed that the deed should be the same as a mortgage in order to satisfy the bank examiner, that he gave a new note for the amount of the indebtedness at that time and that the property was worth twice the amount of the indebtedness, where his testimony was contradicted by the other witnesses, letters from the bank demanding "interest" and the bank-books indicating that the matter had been carried as a loan instead of real estate were satisfactorily explained, and the trial court found that no new note was given, and after the burning of a mill on the property, the mortgagor abandoned the property after expiration of the option, giving no heed to the maturity of payments due to perfect title, or to notice from the bank that he could have a reasonable time to effect a sale of the property: *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21.

In such a case the disparity between the amount of the indebtedness and the value of the property is not such as to lead to the conclusion that the deed was intended as security, where a number of experts testified that the property had no market value when the deed was given, the value being at that time less than the indebtedness, and the property was sold about nine years later in good faith for sixteen thousand dollars, the indebtedness amounted to fifteen thousand dollars, although the trial court found, upon the testimony of other witnesses, a disparity of about eight thousand dollars at the time the deed was given, which had greatly increased by enhanced value of the real estate after a period of financial depression: *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21.

Upon a conveyance of real estate to secure an antecedent debt, the grantee is not a bona fide purchaser: *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

As to right of creditor having knowledge of the insolvency to secure himself, see note in 34 Am. St. Rep. 396, and see note in 10 L. R. A. 709.

As to who are bona fide purchasers, see note in 31 L. R. A. 612.

Where a contract for life support, in consideration of the conveyance of property, was not performed in a suitable manner as it should have been, the court may place the parties as nearly as possible in the position which they previously occupied, by canceling the conveyance upon payment of certain expenses incurred, taking into consideration the rental value of the property: *Mordicott v. Caldwell*, 68 Wash. 49, 122 Pac. 316.

As to remedy of grantor in conveyance given to secure his support on breach of condition by grantee, see note in 12 Ann. Cas. 899.

Where a contract for annual passes in consideration of the conveyance of property has become illegal by reason of the commerce act of 1887, the contract has been substantially performed, and the property has greatly increased in value, a court of equity will not decree a rescission and restitution of the property, rescission resting upon discretion and not absolute right: *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A., N. S., 559, 123 Pac. 998.

A deed of land by metes and bounds including calls "to the harbor limit" and "parallel to said harbor line," which reserves a strip of land thirty feet wide off the northeast corner for a distance of one hundred and forty-eight and three-tenths feet for the purpose of a public road, must be taken to convey to the inner shore or high-water line, and not to the meander line, which was about one hundred feet distant where the water was from four to eight feet deep at high water, especially where the strip at high-water mark had been used as a roadway for several years prior to the execution of the deed, and was thereafter used by the

public continuously as a road for more than ten years prior to the commencement of the action: *Brown v. Bremerton*, 69 Wash. 474, 125 Pac. 785.

The fact that a common grantor in his last deed reserved a strip of land thirty feet wide along the meander line for a public road does not show that a like reservation in a deed of a contiguous tract made six years previously of thirty feet "along the shore line" was intended to mean along the meander line: *Brown v. Bremerton*, 69 Wash. 474, 125 Pac. 785.

Evidence examined and held to establish that part of the consideration for deeds was the assumption of specified debts of the grantor: *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374.

Where a grantor conveyed "his one-half undivided interest" in four lots "and" two other lots, in which last two he held the whole title, without specifying whether he intended to convey the whole or only a half interest in the last two lots, the deed must be construed to convey only a half interest therein, as against a subsequent bona fide purchaser: *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*, 71 Wash. 581, 129 Pac. 93.

A strict construction of a deed against a grantor will not be indulged where the description was not so ambiguous as to call for extrinsic aid, and other rules did not fail, and where no possession was taken under the deed: *Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men*, 71 Wash. 581, 129 Pac. 93.

Where a grantor of the northeast quarter of a section reserved the right to itself and assigns to pass over the lands for hauling timber products and transporting logs and timber, and at the time the deed was made, it also owned the northwest quarter of the section, from which it had sold the timber with right of removal within five years, the intent of the reservation was to preserve its right to remove its timber from the northwest quarter, and was for the benefit of the purchaser of the timber, to whom the right reserved could be assigned: *Campbell Lumber Co. v. Deep River Logging Co.*, 71 Wash. 70, 127 Pac. 566.

RELIEF AWARDED.—Whether an absolute deed was intended as a mortgage to secure a debt depends generally upon whether there was an existing indebtedness or liability which was still left subsisting and not discharged: *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682.

The dismissal, on the merits, of an action to cancel a deed has the effect of quieting the title of the defendants: *Simmons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

A deed made without fraud, while the grantor was under no disability or infirmity, in consideration of a collateral contract which was in no sense an integral part of the deed, is not to be canceled for breach

of the contract, since enforcement of the contract should be sought at law: *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92.

Where a father, after conveying a life estate, deeded the reversion in consideration of an agreement that the grantees should care for and educate his three infant children until they became eighteen years of age, and the grantee failed to care for the children, but allowed the life tenants to perform the consideration and treat the land as their own for sixteen years, and then agreed to and participated in a different testamentary disposition of the property by the life tenants, they cannot claim a mutual mistake and want of consideration in agreeing to such testamentary disposition because of representations by the life tenants to the effect that the first deed conveying a life estate was lost and that the life tenants had since acquired the fee simple title: *Simmons v. Macomber*, 60 Wash. 469, 111 Pac. 579.

An action by judgment creditors to set aside a fraudulent conveyance cannot be maintained after the judgment has become dormant and the lien has expired: *Seattle Brewing & Malting Co. v. Donofrio*, 59 Wash. 98, 109 Pac. 335.

In an action to set aside a conveyance on the ground of fraud and duress, an answer alleging a voluntary sale upon full consideration without fraud or duress states a good defense: *Mitchell v. Lidgerwood*, 50 Wash. 290, 97 Pac. 61.

§ 8747.

In an action on a covenant of general warranty of public lands, applied for by the grantor, but for which patent had not issued, it would be a good defense to the action if the grantee, knowing the conditions, upon consideration, agreed to perfect and complete the title, and the title failed through his neglect and default: *Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720.

A covenant against encumbrances protects against a building restriction in the chain of title of which the grantee had notice by record, as it covers known as well as unknown defects: *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496.

A covenant of ownership in fee simple is one of seisin in praesenti, and is broken, if at all, when made: *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462.

Notice of an outstanding lease does not estop the grantee from recovering damages for breach of covenants against encumbrances: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

The fact that grantees are estopped by their own acts to recover possession of the granted premises does not prevent recovery from the grantor of damages for breach of covenant against encumbrances by reason of

an unexpired lease: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

In an action for breach of covenant against encumbrances, evidence of the loss of a sale of the property by reason of the encumbrance is inadmissible to show the diminished value of the property: *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496.

In an action to quiet title, the plaintiff's title is sufficiently shown by a warranty deed, without having deraigned her title, where the defendants claimed under a common source through a void tax foreclosure naming the plaintiff as owner, and the validity of the plaintiff's deed was not disputed, in view of this section, providing that a warranty deed shall be deemed and held a conveyance in fee simple: *Darrin v. Humes*, 60 Wash. 537, 111 Pac. 767.

As to covenant of warranty, or against encumbrances, as binding covenantor to pay expenses of successfully defending against assault on title, see note in Ann. Cas. 1913B, 873.

The erection of a garage and storeroom on the street line of a lot is not a violation of a building restriction forbidding the erection of a "flat building or tenement house on said premises" or "any residence or other dwelling-house . . . nearer to the street line" than certain specified dwellings on adjoining property, such restrictions being construed strictly against the grantor and not extended beyond the clear meaning of the words used: *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166.

There can be no forfeiture of land conveyed by absolute deed without conditions, pursuant to a contract to erect thereon a manufacturing plant, where the only condition precedent to the making of the conveyance was the expenditure of five thousand dollars in preparing the ground, which was fulfilled, and the contract fixed no time for the completion of the plant, the construction of which had simply been suspended and not abandoned, since the preliminary matters were merged in the deed, which could not be set aside for breach of condition not expressed in it: *Jones-Thompson Inv. Co. v. Cascade Steel Foundry Co.*, 59 Wash. 601, 110 Pac. 417.

Conditions subsequent in a deed do not affect the estate until they are broken: *Aumiller v. Dash*, 51 Wash. 520, 99 Pac. 583.

As to the right to make and enforce building restrictions in deeds, see note in 21 Am. St. Rep. 494.

The grant of land with the "appurtenances" does not infer the grant of a right of way leading to the land over an existing road, where there was no existing easement: *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446.

As to the tendency of courts to deny the existence of an easement by implication, see note in 122 Am. St. Rep. 207.

The grant of a "right of way" fourteen feet wide, on condition that it shall be forfeited if the grantee erect any structure of any kind or fence or place any material or obstruction on said right of way other than the construction and repair of walks, is not limited to a walk for footmen; and the same would not be forfeited by the placing thereon of forty or fifty loads of earth for making the same more accessible and convenient for a driveway and which was not an obstruction, since forfeitures are to be strictly construed, and the violations of a condition must be willful and substantial and not merely technical: *Central Christian Church v. Lennon*, 59 Wash. 125, 109 Pac. 1027.

As to the elements of an easement, see note in 136 Am. St. Rep. 681.

A deed conveying a determinable fee may embrace a fee upon condition, entitling the tenant, for the time being, to all the rights of a fee simple: *Aumiller v. Dash*, 51 Wash. 520, 99 Pac. 583.

As to the nature and creation of determinable fees, see note in 15 L. R. A. 231.

A right of way deed releasing and forever quitclaiming a strip for railway purposes, to revert to the grantors if ceased to be used for such purposes, grants an easement only, although some language in the granting and habendum clause is appropriate to convey the fee: *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578.

As to what is a right of way, see note in 4 L. R. A. 275.

A connected title from the government is not shown, where the patent was to the heirs of the original entryman, there appearing to be two sons, and the title in question was derived from only one of them: *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

Where a deed of land subject to mortgage recited immediately after the description "clear of all encumbrances except" the mortgage, only the equity of redemption subject to the mortgage was granted; and a general warranty in the habendum clause, covenanting that the property is free of all encumbrances and that the grantor will warrant and defend the same against all lawful claims of all persons whomsoever, is qualified by the prior recital of the lien, and applies only to the estate granted and not to the lien: *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072.

As to provision in deed whereby grantee assumes existing mortgage as covenant running with land, see note in 15 Ann. Cas. 1055.

As to construction and effect of absolute covenant in deed conveying property expressly subject to encumbrance, see note in 15 Ann. Cas. 982.

A building restriction in the chain of title, whereby the grantor in a warranty deed was prohibited from erecting certain kinds of

buildings after ten years or building within a certain distance of the street, constitutes a breach of a covenant against encumbrances; and a right of action accrues immediately before assertion of any right under the restriction: *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496.

As to existence of restriction on use of land as breach of covenant against encumbrances, see note in Ann. Cas. 1913B, 1065.

Where one-half of the cost of a party-wall was secured by the party-wall agreement as a lien upon the lot, the same constitutes an encumbrance thereon and is a breach of covenant against encumbrances, notwithstanding the owner of the lot, upon payment of one-half of the cost, acquired a beneficial easement in the adjoining lot and party-wall; hence it is no defense in an action for breach of the covenant against encumbrances to allege that the plaintiff had paid for the wall, constructed a building thereon using the wall, and had derived benefits and advantages equal in value to the cost and expense incurred; and the defendant is not entitled to offset against the damages the value of the party-wall easements acquired and used by the plaintiff: *Hoffman v. Dickson*, 65 Wash. 556, Ann. Cas. 1913B, 869, 39 L. R. A., N. S., 67, 118 Pac. 737.

As to covenant to maintain division fence as covenant running with land, see note in 15 Ann. Cas. 57.

The unexpired term of a valid lease, subsisting at the date of the execution of a deed, is an encumbrance and a breach of covenants of warranty, and entitles the grantee to damages: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

As to existence of right to enter and take minerals, as breach of covenant against encumbrances, see note in Ann. Cas. 1912D, 1140.

As to existence of right of way, for water ditch across premises as breach of covenant against encumbrances, see note in Ann. Cas. 1912D, 1119. See, also, 122 Am. St. Rep. 860 and 3 L. R. A. 790.

As to existing lease as encumbrance where grantee has notice, see note in 4 L. R. A., N. S., 313.

An action for breach of covenants of warranty lies where the defendant had previously sold the timber on the land to a third person, and the plaintiff was deceived and had no notice thereof, and did not know that the timber was being removed until it was gone; and it is no defense that the plaintiff was in possession as a bona fide purchaser with superior title, since the trespass and taking of the timber were by authority of the defendant, the covenant of warranty being broken on the delivery of the deed: *Thomas v. West & Wheeler*, 64 Wash. 344, 116 Pac. 1074.

As to actions for breach of warranty, see note in 2 L. R. A. 334.

Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the measure of damages is the rental value of the premises during the withholding: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the grantee cannot recover the costs incurred in a prior action to recover possession, where the court held in that action that they were estopped by their own acts to maintain that action, such judgment being conclusive: *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

It cannot be objected that damages for breach of covenant against encumbrances by reason of building restrictions are not susceptible of ascertainment with mathematical accuracy, the measure of damages being the diminished value of the land: *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496.

A covenant of warranty against encumbrances is one of indemnity and only nominal damages can be recovered for a breach, where the plaintiff fails to allege either an eviction or a discharge of the encumbrances: *International Dev. Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

Damages for a breach of a covenant against encumbrances and warranting the title against all "lawful" claims, cannot be recovered for attorney's fees and expense incurred in successfully defending an action by third persons to foreclose a party-wall lien which was decreed to be inferior to the title conveyed by the deed of warranty: *Hoffman v. Dickson*, 65 Wash. 556, Ann. Cas. 1913B, 869, 39 L. R. A., N. S., 67, 118 Pac. 737.

As to measure of damages in action for breach of covenant against encumbrances, see note in 3 L. R. A. 791.

As to attorneys' fees as damages, see note in 8 Am. St. Rep. 158.

Where lots in a plat included shore lands, which were afterward included in the state plat of the shore lands, the measure of damages for breach of covenant of quiet

enjoyment in the deed of the lots is the proportion of the purchase price paid to the state which the area overlapped by the state plat bore to the total area of the lots: *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252.

No actual eviction is necessary in order to recover damages for breach of a covenant of quiet enjoyment, where a decree awarded an undivided interest to a tenant in common and the grantor had assumed to sell the whole interest as a unit: *Black v. Barto*, 65 Wash. 502, Ann. Cas. 1913B, 846, 118 Pac. 623.

As to effect of covenant for quiet enjoyment, see note in 2 L. R. A. 334.

As to measure of damages in action for breach of covenant for quiet enjoyment, see note in 53 Am. St. Rep. 120.

§ 8749.

A right of way deed releasing and forever quitclaiming a strip for railway purposes, to revert to the grantors if ceased to be used for such purposes, grants an easement only, although some language in the granting and habendum clause is appropriate to convey the fee: *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578.

As to the use to which railroad right of way may be devoted as against owner of the fee, see note in 36 L. R. A., N. S., 512.

As to distinction between conveyance of land and that of mere interest in land, see note in 29 L. R. A. 37.

§ 8750.

A mortgage to secure future advances is valid and takes precedence over laborers' liens for services performed after the mortgage is recorded: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

As to the validity of mortgages to secure future advances, see note in 116 Am. St. Rep. 690.

§ 8751.

See notes to § 5289.

§ 8754. Acknowledgments, Who Authorized to Take.

Acknowledgments of deeds, mortgages, and other instruments in writing may be taken, in this state, before a judge of the supreme court, or the clerk thereof, or the deputy of such clerk, before a judge of the superior court in this state, or the clerk thereof, or the deputy of such clerk, or before a justice of the peace, or a county auditor, or the deputy of such auditor, or a qualified notary public, or any qualified United States commissioner appointed by any district court of the United States for the state of Washington. All deeds, mortgages, and other instruments in writing at any time heretofore acknowledged according to the provisions of this act are hereby declared legal and valid, in so far as such acknowledgment is concerned. [L. '13, p. 29, § 1.]

A written grant of an interest in land—an easement for water-pipes—is valid without acknowledgment, as between the parties and subsequent purchasers with notice: *Little v. Gibb*, 57 Wash. 106 Pac. 491.

As to physical conditions which will charge purchaser of servient estate with notice of easement, see note in 8 L. R. A., N. S., 418.

§ 8756.

The execution and delivery of a deed in blank authorizes the party to whom it was intrusted to fill in the name of a grantee and vests title in the grantee: *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081.

As to validity of deed to blank grantee, see note in Ann. Cas. 1912A, 538.

As to the implied authority to fill in blank, see note in 38 L. R. A., N. S., 423.

Deeds and a bill of sale disposing of all the grantor's property during his last illness, and in view of approaching death, will not be set aside at the suit of persons as to whom there was no more than a bare possibility of heirship, and there was only the most meager testimony of mental incapacity on the part of the grantor, consisting principally of statements attributed to the physician that he was in a "dying condition," witnesses testified to his competency, and the witnesses to the deed were not called: *Spackman v. Webb*, 63 Wash. 5, 114 Pac. 877,

§ 8759.

This section applies to acknowledgments taken in this state: *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.

§ 8760.

The acknowledgment of instruments required by statute to be acknowledged cannot be proved by parol, nor by any evidence other than the certificate of an officer authorized to take acknowledgments, written or annexed thereto; hence a lease not acknowledged on its face cannot be reformed to show that it was in fact ac-

knowledged: *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.

A mere denial that a grantor did not acknowledge a deed she had signed is outweighed by the fact that she went before the notary for the purpose of acknowledging it, where there was other evidence that she actually acknowledged it: *Drew v. Bouffleur*, 69 Wash. 610, 125 Pac. 947.

§ 8765.

See notes to § 8748.

Under this section, and independently thereof, an after-acquired title inures to the benefit of the grantee, and this rule applies to titles acquired through mortgage foreclosures: *Gough v. Center*, 57 Wash. 276, 106 Pac. 774.

As to inuring of after-acquired title to the benefit of grantee, see note in 2 L. R. A. 335.

As to the effect of the covenant of warranty upon after-acquired title, see note in 2 L. R. A. 335.

As to the validity of mortgage of after-acquired title see note in 109 Am. St. Rep. 524. See, also, note in 21 L. R. A., N. S., 843.

§ 8766.

A deed from one spouse to another, reciting a consideration of ten thousand dollars, which is not attacked, is presumed to be made to a bona fide purchaser for value: *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033.

A deed from one member of the community to another has the effect to make the land the separate property of the grantee, and this applies to a preference right to purchase shore lands through the conveyance of lots below high-water mark, where the community owned the upland, under section 6754, providing that a bona fide purchase of such lots from the upland owner gives the purchaser such preference right: *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033.

CHAPTER III.

RECORDING INSTRUMENTS.

§ 8781.

The title of an act to amend a section "concerning the recording of deeds and mortgages," is broad enough to include a provision relating to the recording of assignments of mortgages: *Seattle National Bank v. Ally*, 66 Wash. 610, 120 Pac. 94.

The record of a deed of lots 7 and 8 in an addition without specifying the block is sufficient to put a subsequent purchaser on notice, where the grantors only owned lots

7 and 8 in block 5 of the addition, and where an inquiry of the grantor or grantees would have disclosed that the grantees were claiming the lots under such deed: *Wetzler v. Nichols*, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867.

As to record of instrument out of line of title, as constructive notice, see note in 18 Ann. Cas. 13.

The grantee in a quitclaim deed, for value and without notice of a prior un-

recorded quitclaim deed, is a bona fide purchaser, within this section, providing that all deeds shall be recorded and shall then be valid against subsequent bona fide purchasers: *McDougall v. Murray*, 57 Wash. 76, 26 L. R. A., N. S., 159, 106 Pac. 490.

As to priority between unrecorded conveyances, and effect of recording conveyance after subsequent conveyance is given, see note in *Ann. Cas.* 1912A, 194.

As to right of purchaser of or from heir as against grantee in unrecorded conveyance from ancestor, see note in *Ann. Cas.* 1912B, 1289.

As between real estate mortgages given as security for pre-existing debts, the one first executed and delivered takes priority, although the other was first recorded, a mortgagee for a pre-existing debt not being a bona fide purchaser, within this section: *McDonald & Co. v. Johns*, 62 Wash. 521, 33 L. R. A., N. S., 57, 114 Pac. 175.

A purchase money mortgage does not, under our recording acts, take priority over others unless they concur in time or the priorities are controlled by contract or equities between the several mortgagees: *Wakefield v. Fish*, 62 Wash. 564, 114 Pac. 180.

As to priority of purchase money mortgage to dower right, see note in 4 L. R. A. 607.

Actual notice of an executory contract for the sale of real estate, recorded in the wrong book, is not to be imported from the fact that one of the vendees had slashed about two acres of the tract, where he had subsequently abandoned the same; nor by the fact that the cattle of such vendee and of others ranged upon the property; nor by the fact that one of the vendees lived in a small house either on the property or in a county road, where such vendee did not assert any claim or right to possession in conversations with the bona fide purchasers: *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

Construing together the recording acts, executory contracts for the sale of real estate, while not expressly mentioned, are included within the meaning of the words "deeds, grants and transfers of real property," and may be recorded, especially in view of the custom to record the same:

Bernard v. Benson, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

A purchaser without notice may rely on the record chain of title: *Burr v. Dyer*, 60 Wash. 603, 111 Pac. 866.

As to the effect of statutes requiring actual notice as equivalent to registration, see note in 13 L. R. A., N. S., 62.

The purchaser of real estate is charged with notice of a right of way by open and visible use of the easement, although the contract therefor was not recorded: *Kalinowski v. Jacobowski*, 5 Wash. 359, 100 Pac. 852.

As to physical conditions which will charge purchaser with notice of easement, see note in 8 L. R. A., N. S., 418.

One taking a deed of land with notice that the grantor had no equitable interest therein, paying no present consideration, is not an innocent purchaser for value: *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655.

The purchaser with notice of a party-wall agreement, from a former purchaser without notice, may claim the immunity of his vendor: *Hawkes v. Hoffman*, 56 Wash. 120, 24 L. R. A., N. S., 1038, 105 Pac. 156.

A bona fide purchaser from a bona fide purchaser is not affected by subsequent notice given to his vendor: *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

A purchaser of lots with actual notice of a lien thereon has the burden of proving that one of his predecessors in interest was a bona fide purchaser without notice, if he would free the lots of the lien: *Biggs v. Hoffman*, 60 Wash. 495, 111 Pac. 576.

As to purchaser with notice, see note in 29 L. R. A. 34.

§ 8785.

Under this section, requiring the county auditor to procure such "books for records as the business of the office requires," and in view of the uniform custom to record instruments affecting the title to real property in Deed Records, and of personal property in Miscellaneous Records, the record of an executory contract for the sale of real estate in Miscellaneous Records does not import notice: *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

CHAPTER IV.

SATISFACTION AND ASSIGNMENTS OF MORTGAGES.

§ 8800.

There is no law authorizing the recording of an assignment of a claim, and the record thereof is not constructive notice to the debtor: *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

As to unauthorized record as notice, see note in 1 L. R. A. 192.

Under this section and section 8781, providing that all deeds, mortgages, and assignments of mortgages shall be recorded and shall thereafter be valid as against

bona fide purchasers, subsequent bona fide encumbrancers may rely upon an unauthorized satisfaction by an original mort-

gagee whose assignee had failed to record his assignment: *Seattle National Bank v. Ally*, 66 Wash. 610, 120 Pac. 94.

CHAPTER V.

LEASES.

§ 8802.

See notes to § 8745.

Under this section, requiring leases for more than one year to be acknowledged, the acknowledgment which is essential to the validity of a lease is that of the lessor, although the statute does not so provide in terms; and a lease acknowledged only by the lessee is void: *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.

This section goes to the validity of the lease, and not to the prerequisites for recording it: *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.

Where plaintiff erected a building under an agreement with defendant to lease the same for a period of five years, and defendant refused to take possession because of a statute passed subsequently preventing its use for saloon purposes, the breach of contract is actionable, regardless of whether or not the relation of landlord and tenant was created; and the measure of damages is the difference between the rental value during the term and the rent specified in the contract: *Oldfield v. Angles Brewing & Malting Co.*, 62 Wash. 260, Ann. Cas. 1912C, 1050, 35 L. R. A., N. S., 426, 113 Pac. 630.

Where premises leased by a husband alone were occupied by the husband and wife and rent paid for the full term, the wife is estopped, as a member of the community, from disputing the title of the landlord, in an action for unlawful detainer, notwithstanding that the community relation was not considered in making the lease and that she did not sign the lease: *Monroe v. Stayt*, 57 Wash. 592, 30 L. R. A., N. S., 1102, 107 Pac. 517.

As to estoppel against married woman by representations, silence and conduct, see note in 57 Am. St. Rep. 178.

A contract whereby a party agrees to pay the assignee of a lease, for the use of the leased premises, a fixed sum monthly during the term of the lease in addition to the rent, signed by both parties, is on its face a mutual contract and enforceable: *American Savings Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 Pac. 1015.

The assignee of a lease is not entitled to the use of a cottage which was expressly excepted in the assignment, in the absence of fraud, deceit or mutual mistake in reserving the cottage: *Johnson v. Zufeldt*, 56 Wash. 5, 104 Pac. 1132.

A contract to transfer a lease by a good title is provisional where the assignee knows that the lease contains a clause prohibiting assignment without consent to the landlord: *Merritt v. Lillybalde*, 57 Wash. 159, 106 Pac. 621.

A written contract whereby a party desiring to purchase a lease agreed to pay for the use of the premises, to the assignee of the lease, monthly during its term, a fixed sum in addition to the monthly rent which the original assignee is obliged to pay to the lessor, is in law an assignment of the lease: *American Sav. Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 Pac. 1015.

Damages cannot be recovered by the assignees of a lease by reason of the assignor's breach of her agreement to procure the written consent of the landlord, where the assignees were not disturbed in their possession and the landlord waived a forfeiture of the lease by accepting rent from the assignee, after notice of the assignment: *Batlew v. Dewalt*, 56 Wash. 431, 105 Pac. 1029.

A landlord's acceptance of rent from assignees of the lease, after notice of the assignment, waives the right to forfeit the lease for assignment without the landlord's consent, although receipt for the rent was given in the name of the original lessees: *Batley v. Dewalt*, 56 Wash. 431, 105 Pac. 1029.

As to effect of acceptance of rent from assignee as waiver by lessor of condition in lease against assigning, see note in 47 Am. St. Rep. 199. See, also, note in Ann. Cas. 1913A, 1202.

After the landlord has given notice terminating a tenancy, whereby a bonus to the tenant attaches, he cannot revoke the notice upon the ground of his own mistake, without the consent of the tenant: *Wisner v. Richards*, 62 Wash. 429, Ann. Cas. 1912D, 160, 113 Pac. 1090.

Where a lease provides for a bonus to the tenant in case the landlord gives notice, terminating the term, tender of the bonus need not be given with the notice, and surrender of the premises without demanding the bonus in advance does not waive the tenant's right to recover the bonus: *Wisner v. Richards*, 62 Wash. 429, Ann. Cas. 1912D, 160, 113 Pac. 1090.

A lease with option to purchase is shown to be abandoned and mutually surrendered, where on the insolvency of the lessee, its president acquired the lease by assignment and removed the buildings, and in

an action by the lessors to enjoin the removal of the buildings, the assignee filed an answer disclaiming any interest in the lease, whereupon the lessors abandoned the suit, relying on the answer as a surrender, retook possession, and refused subsequent tenders of rent: *Sandberg v. Light*, 55 Wash. 189, 104 Pac. 205.

An option to purchase, contained in a lease with renewal privileges, expires on any termination of the lease, without any express stipulation that time is of its essence, the continuance of the lease being essential to the option: *Sandberg v. Light*, 55 Wash. 189, 104 Pac. 205.

As to validity of option to purchase by stipulation in lease, see note in 15 Ann. Cas. 380.

As to right of assignee of lease to enforce option to purchase, see note in 5 Ann. Cas. 914.

The exercise of an option to terminate a lease by payment of a bonus presents no features of a forfeiture: *Wisner v. Richards*, 62 Wash. 429, Ann. Cas. 1912D, 160, 113 Pac. 1090.

Where a lease of a room for a restaurant, in a hotel building, which had a front entrance on the street, and a side entrance into the lobby of the hotel which was a convenience but not necessary to the beneficial use of the property, the side entrance is not an appurtenance and there is no implied easement rendering the landlord liable in damages for closing the same: *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 19 Ann. Cas. 1199, 30 L. R. A., N. S., 926, 104 Pac. 820.

The forfeiture of the lessees' right to compensation for a building erected by them, under the terms of the lease, by reason of default in payments of rents and re-entry by the landlord, is not affected by the fact that an action for unlawful detainer is pending and undetermined, where it appears that the lessees admitted their purpose to pay no more rent and did nothing in the detainer action to tender rent, protect their interests, or prevent re-entry: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

A stipulation in a lease requiring a landlord to pay the lessee for improvements, at the end of the term, is one for compensation, and the intent of the parties, construing the lease as a whole, determines whether the same is dependent upon the payment of rents, irrespective of the fact that the improvements have become part of the real estate: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

Where a lease for a term of years, at a stipulated ground rent payable monthly with right of re-entry in case of default, provides that the lessees shall erect a building which shall become the property of the lessors at the end of the term upon payment of a sum equal to two-thirds of

its value, the covenant to pay rent and the covenant to pay for the building are mutual and dependent, and the lessee cannot, after abandonment or forfeiture for condition broken and re-entry, recover the value of the building or any part thereof: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

The fact that a lease, with right of re-entry for condition broken, contains no forfeiture clause, does not prevent a forfeiture of the lessees' right to compensation for improvements, upon re-entry for nonpayment of rents, where the stipulation for rents and for compensation were mutual and dependent covenants: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

As to rights of landlord and tenant respectively as to fixtures, see notes in 5 L. R. A. 150; 9 L. R. A. 700; 10 L. R. A. 722.

The owner of an office building, who had leased the basement to different tenants, approached by a flight of outside steps which were in reasonably safe condition, is not under obligation to protect them from the elements, and is not liable to a customer of one of the tenants who was injured by a fall caused by a thin coat of ice on the steps; since the landlord is liable in such case only for general repairs and not for temporary obstructions arising from natural causes such as the accumulation of ice and snow: *Oerter v. Ziegler*, 59 Wash. 421, 109 Pac. 1058.

As to landlord's obligation to have premises safe for tenant's guests, see note in 34 L. R. A. 824.

As to liability of landlord to stranger for injuries received from alleged bad condition of area way, see note in 26 L. R. A. 198.

A lessee, for one night only, for the purpose of giving a public entertainment, of a new state armory, constructed under laws providing for rigid supervision by state officials and experts employed by them, owes no duty to spectators to make an expert inspection of a balcony rail which was apparently safe, only reasonable, and not extraordinary, care being required: *Greene v. Seattle Athletic Club*, 60 Wash. 300, 32 L. R. A., N. S., 713, 111 Pac. 157.

The owner of leased premises is not liable to one visiting an exhibition therein, for injuries caused by snow and ice on an outside stairway landing, where the tenant giving the exhibition was in exclusive possession and control of the premises, including the stairway, and when leased the premises were in safe condition and free from snow and ice: *Spoar v. Spokane Turnverein*, 64 Wash. 208, 116 Pac. 627.

Damages need not be shown with precision and accuracy, and a verdict for two hundred and fifty dollars for damages to leased premises, by reason of negligence

of the landlord in repairing a building, is not unsupported or based on conjecture, where the walls were injured and the place of business closed while tenants made repairs, at an expense estimated by them at five or six hundred dollars: *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 19 Ann. Cas. 1199, 30 L. R. A., N. S., 926, 104 Pac. 820.

The entire rent is not forfeited by failure of the lessor to deliver all of the leased property at the time agreed upon, as it could only defeat a recovery of the rent pro tanto: *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

Default in the payment of rents, and re-entry by the landlord under process in an action for unlawful detainer, works a forfeiture of all right to rents subsequently earned: *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A., N. S., 1082, 104 Pac. 641.

An entry made by a third person with the consent of the lessee does not amount to an eviction, avoiding the payment of rents, merely because the landlord also consented to the entry: *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

Where the plaintiff, being assignee of a lease, sold the same to defendant, and defendant's corporation in possession afterward went into the hands of a receiver, acceptance of the rent for two months from the receiver, and receipt of the key will not prevent the plaintiff from recovering from the defendant the balance due on the contract, where the evidence shows he did not intend to release the defendant: *American Sav. Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 Pac. 1015.

Upon a partial assignment of a lease, which contained no reference to the share of the rent which the assignee was to pay, the law implies an agreement to pay a proportional share only, according to the value of the respective interests, and upon payment of the entire rent by the assignee, he is entitled to recover from the assignor the proportional part admitted by the pleadings to be chargeable to the interest of the assignor: *Johnson v. Zufeldt*, 56 Wash. 5, 104 Pac. 1132.

The assignee of a lease, after breach, and sale of the lease at his request to lessen the damages is liable for the rent to the time of the breach, and for the present value of the monthly payments due to the assignor in the future, at the legal rate of interest, less the sum for which the lease was sold: *American Sav. Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 Pac. 1015.

The landlord's consent to the assignment of a lease is not necessary to transfer title to the crop where there was no nonassignment clause in the lease, nor where the crop had been harvested and marketed by the assignees and the right of re-entry had been lost by nonaction of

the lessor: *Cupples v. Level*, 54 Wash. 299, 23 L. R. A., N. S., 519, 103 Pac. 430.

A tenancy in common in a crop is created by a lease of land to be cropped under a contract for a specific division of the crop: *Fuhrman v. Interior Warehouse Co.*, 64 Wash. 159, 37 L. R. A., N. S., 89, 116 Pac. 666.

As to croppers and cotenancy in crop, see note in 98 Am. St. Rep. 953.

The graveling of a leased right of way for a logging road that was to have been timbered is not such waste as to warrant a cancellation of the lease, where the rental value of the land was not impaired, drainage ditches benefited the land in excess of the damage, and the lessee can be compelled to remove the gravel or respond in damages at the end of the term: *Northcraft v. Blumauer*, 53 Wash. 243, 132 Am. St. Rep. 1071, 101 Pac. 871.

A lessee, who created a building on the premises under a recorded lease giving her the right to remove it, cannot recover the alleged price of the building from the lessor on his sale of the premises to one having notice of the lease, since the building still belonged to the lessee who remained in possession with the right of removal: *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058.

Where, by the terms of a lease, the premises were to be arranged by the lessors for a cafe and kitchen, and the lessees were prohibited from making any other use of the same, the lessor cannot recover rent without complying with the lease, nor invoke the general rule that there is no implied warranty of the fitness of demised premises: *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059.

A lease providing that the lessor shall arrange the premises for a kitchen and cafe "as in its judgment shall be best," and prohibiting the lessee from making other use of the same, does not make the lessor the sole judge of the fitness of the place to the extent of relieving it of all obligation to produce the results contemplated: *Hardman Estate v. McNair*, 61 Wash. 75, 111 Pac. 1059.

As to liability for rent as affected by fact that property cannot be devoted to use intended without alterations to conform to police regulations, see note in 39 L. R. A., N. S., 350.

The statement in a lease of a store-room that it was "for the purpose of conducting a bakery therein" is not a restriction which would prevent its use and occupation for the purpose of selling groceries, since the building was adapted thereto, and the use was not materially different from the bakery business: *Noon v. Mironski*, 58 Wash. 453, 108 Pac. 1069.

Where the lessor of two blocks subleased the undivided one-half interest in one block and the easterly half of the

other block, and the sublease covenanted that the sublessee could conduct certain specified amusements on the east half of the block leased and that the lessor therein should not conduct any amusement on "said premises," the sublease does not operate to restrain the lessor from conducting amusements on the west half of the block not included in the sublease: *Loeff v. Seattle Park Co.*, 59 Wash. 217, 109 Pac. 806.

In the absence of any restrictions in a lease, the premises may be used for any lawful purpose: *Rockwell v. Eiler's Music House*, 67 Wash. 478, 39 L. R. A., N. S., 894, 122 Pac. 12.

Where an amusement company leased a portion of its premises, described as five certain lots, for the purpose of an amusement park, the lessee agreeing to pay as rent a percentage of the gate receipts, and not to conduct any bathing establishment, cafe, restaurant or skating-rink on the leased premises, and for a time all the property was included within a common inclosure, and the lessor conducted a bathing establishment, cafe, and skating-rink on property reserved and not mentioned in the lease, a clause in the lease that the whole of said "eight lots" shall be open to the public upon the payment of a general admission, is meaningless, and the covenants of the lease can refer only to the five lots described; hence the lessee has no right to control the admission to or the nature of amusements conducted on the lessor's portion of the premises reserved from the lease, and an injunction will therefore not lie to close the lessor's public entrances to the common inclosure and forbidding the lessor to call attention to his free entrances to the grounds, the lessee's remedy being to inclose his own portion of the premises, or by suit to reform the lease, if it does not express the agreement of the parties: *Loeff v. Seattle Park Co.*, 70 Wash. 363, 126 Pac. 902.

In such a case, the fact that for several years the only public entrance to the grounds was in charge of the lessee during the summer months while his amusement park was in operation, and that the lessor conducted no amusements on its property other than those prohibited to the lessee, does not aid the construction of the writings, when their subject matter does not cover the lessor's reserved property, and where the subsequent conduct of the parties may have been the result of independent agreements: *Loeff v. Seattle Park Co.*, 70 Wash. 363, 126 Pac. 902.

Where a lease of ground floor to be used for a theater entrance provided that the lessee may at his own expense install heat, water and light by such piping and wiring as may be necessary, the lessee is authorized to bore holes in the floor and connect with water-pipes by way of an

unoccupied basement, although the basement was expressly reserved to the lessor, where it appears that there was no other way to make the connections, which did not in any way interfere with the lessor's reasonable use of the basement: *Burns v. Dufresne*, 67 Wash. 158, 121 Pac. 46.

In an action by a lessor for damages by reason of the lessee's abandonment of the premises, the lessor may recover general damages by reason of the violation of the terms of the lease and special damages to the premises committed by the lessee in making alterations; and hence cannot be required to make an election between the two causes of action: *Forrester v. Reliable Transfer Co.*, 65 Wash. 602, 118 Pac. 753.

The adoption of local option prohibiting the sale of liquors in a town does not terminate a lease of premises used for a saloon, or relieve the lessee from the payment of rent, where the lease merely provided that the lessee may conduct a saloon on the premises in conformity to the ordinances of the town and the laws of the state then in force or thereafter enacted, since it is merely permissive and not restrictive as to the uses to which the property may be put: *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 37 L. R. A., N. S., 432, 119 Pac. 739.

As to rights of landlord and tenant inter se under lease of premises for saloon purposes where subsequently tenant is unable so to use premises, see note in 15 Ann. Cas. 1103. And see note in 19 L. R. A., N. S., 964.

On the termination of the relation of landlord and tenant, the right to accrued rent is fixed by the terms of the lease, whether the termination was by re-entry or surrender, and whether the rent was payable in advance for a period beyond the time of the surrender, or already paid up in advance: *Rockwell v. Eiler's Music House*, 67 Wash. 478, 39 L. R. A., N. S., 894, 122 Pac. 12.

Under a lease of a space to be used as a theater entrance, covenanting that the same shall not be assigned without the written consent of the lessor, and providing that the portion of the premises not required for such purpose may be used by the lessee for any lawful purpose, the lessee may sublet such portions without the consent of the lessor, conditions against assignment and subletting being strictly construed: *Burns v. Dufresne*, 67 Wash. 158, 121 Pac. 46.

An injunction will not be granted at the suit of the owner against a sublease for the purpose of maintaining a cigar-store and saloon, on the theory that no saloon license can be granted without the owner's consent under section 6290, where the lease contained no restrictions, since plaintiff can withhold his consent and prevent the issuance of the saloon license,

and the sublessee is entitled to conduct any other lawful business on the premises: *Burns v. Dufresne*, 67 Wash. 158, 121 Pac. 46.

The acceptance by the lessor of rent after notice of the assignment is a waiver of the right to forfeit the lease on account of an oral assignment without written consent of the lessor, and estops the latter from asserting the invalidity of the parol assignment: *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 36 L. R. A., N. S., 488, 118 Pac. 329.

The assignment of a lease, under an unqualified consent by the lessor, may reassign the lease for the purpose of riding herself of liability to the lessor for rent accruing thereafter, although she had agreed with the original lessee on accepting the assignment to perform all the covenants and obligations in the lease: *Harvard Investment Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

Where the landlord gave an unqualified consent to the assignment of a lease, the assignee is liable for rent only during occupancy, and upon reassigning the lease, there is no consideration for a reservation whereby the landlord consented to the reassignment on condition that the first assignee should remain bound for the rent; and hence all subsequent assignees are liable for rent only during occupancy: *Harvard Investment Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

Where defendant promised to execute a lease to plaintiffs on specified terms, provided defendant's wife would sign the lease, and plaintiffs paid six hundred dollars as one month's rent, to be forfeited as liquidated damages if they failed to sign the lease, an allegation in plaintiffs' complaint for damages that defendant's wife did sign a lease but that defendant neglected and refused to deliver it, must be construed as implying that the lease so executed was such a lease as the plaintiffs were ready to accept; and, on issue joined on such allegation, it appearing that plaintiffs refused to accept the lease signed and tendered, they are not entitled to recover as damages the six hundred dollars paid as rent, although evidence was offered tending to show that the lease tendered was not such as was contemplated by the agreement, since such evidence was outside the issues: *Michaels v. Levinson*, 68 Wash. 364, 123 Pac. 520.

The measure of the lessee's damages for breach of covenant to erect a building being the diminished market rental value of the premises, the same may be recovered under an allegation of general damages without pleading the same as special damages: *Ingalls v. Beall*, 68 Wash. 247, 122 Pac. 1063.

Upon breach of the landlord's covenant to complete a building on the leased premises, the tenant cannot be required to

mitigate his damages by performing the covenant: *Ingalls v. Beall*, 68 Wash. 247, 122 Pac. 1063.

A tenant who leased part of a building, intending to use the same as a theater, cannot recover damages for breach of the lease in that the landlord "did not disclose" that the building could not, under the ordinances of the city, be used for that purpose until an exit had been constructed, where the lease provided that the tenant should, at his own expense, make all changes and improvements in the building, and it was not alleged that the landlord refused to permit him to construct the exit, and did not mislead him as to the ordinances, since one contracting in a city with reference to matters governed by police regulations is charged with notice of the ordinances: *Rockwell v. Eiler's Music House*, 67 Wash. 478, 39 L. R. A., N. S., 894, 122 Pac. 12.

Under a lease of rooms to be sublet for furnished lodgings, the measure of damages for breach of the lessor's covenant to furnish heat is the difference between the value of the use of the rooms as furnished by the lessee and heated as contemplated by the contract, and the value of the use as in fact heated by the lessor: *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89.

As to duty and liability of landlord of apartments as to heating, see note in 37 L. R. A., N. S., 1213.

In an action for breach of a covenant in a lease to furnish heat for rooms to be sublet for lodgings, evidence to show that lodgers suffered discomfort and illness by reason of failure to properly heat the rooms is relevant, where proper instructions on the measure of damages eliminated all elements of damages suffered by the lodgers: *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89.

In such case, refusal to instruct that there could be no recovery if the rooms were kept as full as when properly heated is harmless: *Purcell v. Warburton*, 70 Wash. 129, 126 Pac. 89.

A finding that a lease was modified by an oral agreement to allow the lessee to pay rent to a third party, and to remain in possession without payment of rent pending the termination of litigation between the lessor and the third party, will not be disturbed where the evidence is conflicting and the lessee was corroborated by the fact that the lessor continuously refrained from demanding and collecting the rentals, which were paid to the third party, and that the litigation had not been finally determined: *Oregon etc. R. Co. v. Elliott Bay Mill & Lumber Co.*, 70 Wash. 148, 126 Pac. 406.

A lessee is liable for rent upon accepting a lease, although it did not go into possession or sign the lease: *Starwich v.*

Washington Cut Glass Co., 64 Wash. 42, Ann. Cas. 1913A, 262, 116 Pac. 459.

As to binding effect on lessee of lease not signed by him, see note in Ann. Cas. 1913A, 264.

Where defendant agreed to lease premises, provided his wife would sign the lease, he would not be liable for damages for failure to perform unless his wife executed a lease which the lessees were willing to accept: *Michaels v. Levinson*, 68 Wash. 364, 123 Pac. 520.

A lease for one year with the privilege of two years renewal at a rental satisfactory to both lessor and lessee is a single contract, calling for renewal at a reasonable rental, and not subject to the objection that the agreement for renewal was without consideration or unenforceable: *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499.

The retaking of possession for default in the payment of rent does not waive the lessor's right to the liquidated damages stipulated for in the lease: *Barrett v. Monro*, 69 Wash. 229, 40 L. R. A., N. S., 763, 124 Pac. 369.

A stipulation in a lease that a deposit of twelve hundred dollars made at the beginning of the term shall be held by the lessors to indemnify them against any loss or damage which they may sustain by reason of any violation of the terms of the lease on the part of the lessees, as liquidated damages, is one for liquidated damages and not merely for security, and entitles the lessor to retain the whole deposit, upon termination of the lease for nonpayment of rent, the actual damages from default being incapable of exact determination: *Barrett v. Monro*, 69 Wash. 229, 40 L. R. A., N. S., 763, 124 Pac. 369.

Upon a subletting for the full term, which is an assignment pro tanto, the landlord may acquire the interests of the subtenant without incurring any liability except for unpaid rent: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

Inasmuch as a lease granting quiet enjoyment does not insure against third

parties who are wrongdoers, the landlord is not liable for damages to the leasehold by reason of work done by a city in grading a street: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

Where the tenant assumes the obligation to repair the building, he cannot recover damages by reason of a leaky roof: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

A tenant in possession who pays rent cannot claim that the landlord's interference with his enjoyment during occupancy amounts to an eviction: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

§ 8803.

A holding under oral agreement for the payment of a monthly rental is a tenancy from month to month, under this section, and may be terminated at the end of any month by giving the statutory notice: *Oregon & Washington R. Co. v. Vulcan Iron Works*, 57 Wash. 372, 106 Pac. 1120.

An unacknowledged lease for a term exceeding one year being void, except as a lease from month to month, may be terminated by proper notice before the expiration of the year: *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499.

An unacknowledged lease for more than one year creates a tenancy from month to month only: *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

§ 8805.

See notes to § 204.

This section, authorizing an action to recover reasonable rents from a tenant by sufferance, changes the common-law rule that such rent is not recoverable, and the action lies against one claiming an adverse title, where the possession was not adverse and hostile in the beginning, but was obtained under an express written contract: *Sheppard v. Coeur d'Alene Lum. Co.*, 62 Wash. 12, Ann. Cas. 1912C, 909, 112 Pac. 932.

CHAPTER VI.

REGISTRATION OF LAND TITLES.

§§ 8809, 8823.

See notes to § 8834.

§ 8834.

The superior court has no jurisdiction to try out conflicting titles and refuse the applicant a dismissal without prejudice, in a special proceeding to register land titles under the Torrens act, this section having provided that the superior court shall dismiss the proceeding if

the title is not a proper one for registration which dismissal may be without prejudice, and that the applicant may dismiss at any time on terms fixed by the court, and sections 8809 and 8823, providing for the registration only of such titles as are found to be in the applicant, with admitted liens or outstanding interests, and that the applicant proceeds at his peril if there are hostile or conflicting interests: *Krutz v. Dodge*, 66 Wash. 178, Ann. Cas. 1812C, 869, 118 Pac. 188.

§ 8838.

See notes to § 8852.

§ 8852.

The first mortgage registered takes priority over other instruments, although previously executed, under this section, the act of registration being expressly made the operative act to convey or affect the land: *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

One cannot be a bona fide purchaser of land registered under the Torrens act until his conveyance is registered, although by sections 8838, 8857, it appears that the act was for the protection of bona fide purchasers of registered land: *Brace v.*

Superior Land Co., 65 Wash. 681, 118 Pac. 910.

A person who holds a prior mortgage of land registered under the Torrens act, and who failed to have his instrument registered because unwilling to pay the taxes necessary to obtain registration, is estopped by laches from asserting a priority over one who paid the taxes to secure registration of a new mortgage, given to revive the lien of an earlier mortgage omitted from the memorial in the registration decree by mutual mistake of the parties: *Brace v. Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

§ 8857.

See notes to § 8852.

TITLE LXXII.

SOLDIERS AND SAILORS.

CHAPTER I.

SOLDIERS' HOME.

§ 8908. Who may be Admitted to—Regulations.

All honorably discharged Union soldiers, Mexican war veterans, veterans of Washington Indian wars, sailors, marines, soldiers of the Spanish-American war, and also members of the state militia disabled while in the line of duty, may be admitted to the home provided for in the last preceding section of this chapter under such rules and regulations as may be adopted by the state board of control: Provided, Such applicants are bona fide citizens of the state, and honorably discharged soldiers, sailors, marines, soldiers of the Spanish-American war, who are married and living with their wives at the date of the passage of this act, and who have been actual bona fide residents of this state for a period of two years at the time of their application and who are indigent and unable to earn a support for themselves and their families, and the widows, who have not remarried, of such soldiers, sailors, marines, veterans of Washington Indian wars and soldiers of the Spanish-American war who are indigent and unable to earn a support for themselves, whose husbands were members of the State Soldiers' Home, who reside within the corporate limits of Orting precinct adjoining said home and the Veterans' Home at Port Orchard, may be admitted to said homes and be members of said homes to all intents and purposes, and subject to all rules and regulations of said homes, except the requirements of fatigue duty, and said married members aforesaid shall, through rules and regulations adopted by the state board of control, be supplied with medical attendance from the home dispensary, and rations from the home supplies not to exceed seven dollars (\$7) per month, and clothing not to exceed sixteen dollars (\$16) per annum. [L. '11, p. 621, § 1.]

CHAPTER III.

PENSION FOR INDIAN WAR VETERANS.

§ 8923.

This section, granting pay for services performed by the Indian war veterans, is a gift in the nature of a pension, limited by its terms to the veteran in propria persona, and in case of his death pending

his application, payment cannot be made to his heir or personal representative, since no provision is made therefor: Whitaker v. Clausen, 57 Wash. 268, 106 Pac. 745, 107 Pac. 832.

TITLE LXXIII. STATE AND STATE BOARDS.

CHAPTER III-A.

STATE BOARD OF PARK COMMISSIONERS.

§ 8967-1. Board—Of Whom Composed.

A state board of park commissioners is hereby created to consist of the governor, state land commissioner, state auditor and state treasurer, and one other person to be appointed by the governor. [L. '13, p. 346, § 1.]

§ 8967-2. Duties.

Said state board of park commissioners shall have authority to receive and accept donations of lands for state park purposes and shall have the management and control of all lands donated or acquired for state park purposes, and may from time to time recommend to the legislature the purchase or condemnation of lands for state purposes. [L. '13, p. 346, § 2.]

§ 8967-3. Compensation.

The members of said board shall serve without compensation, except necessary traveling expenses. [L. '13, p. 347, § 3.]

CHAPTER V.

STATE HUMANE BUREAU.

§ 8974-1. Humane Bureau—Members.

There is hereby created a bureau, which shall be known as the State Humane Bureau, which bureau shall consist of the governor, the superintendent of public instruction, the attorney general, and two members to be appointed by the governor. [L. '13, p. 312, § 1.]

§ 8974-2. Duties of Bureau.

It shall be the duty of said bureau to promote and aid in the enforcement of the laws for the prevention of wrongs to children, idiots, imbeciles and insane, feeble-minded and defective persons, and persons who by reason of age or for any other reason are helpless or unable to care for themselves; and to promote and aid in the enforcement of the laws for the prevention of cruelty to animals; to promote the organization of county and other local societies to aid such bureau in carrying out the provisions of this act, and to appoint local and state agents for that purpose; to aid such local societies and agents in carrying out the provisions of this act; and to promote the growth of education and sentiment favorable to the enforcement of the laws hereinabove enumerated. [L. '13, p. 312, § 2.]

§ 8974-3. Annual Meeting.

The said bureau shall hold an annual meeting on the second Monday in November in each year, at the state capitol, for the election of officers

and for the transaction of such other business as will aid in carrying out the provisions of this act. [L. '13, p. 312, § 3.]

§ 8974-4. Reports.

Said bureau shall make and file, in the office of the secretary of state, on or before the first Monday in January of each year, a report of its proceedings for the preceding year, with statistics showing the accomplishments of the bureau and its agents, and the county and local societies organized under the advice and supervision of the bureau, together with such recommendation as the bureau may deem advisable for the further protection of incompetents, children and animals; which report shall be edited and published as are the reports of other state officers. [L. '13, p. 312, § 4.]

§ 8974-5. Officers of Bureau.

The governor shall be president of said bureau, and said bureau may elect a secretary, prescribe his duties, not inconsistent with the provisions of this act, and fix his compensation; and may appoint and employ such other subordinate agents as it may deem advisable, define their duties and fix their compensation. [L. '13, p. 313, § 5.]

TITLE LXXIV.

STATE OFFICERS.

CHAPTER VII.

JUDGES OF THE SUPREME COURT.

§ 9043. Time of Election—Terms.

At the next general election, and at each biennial general election thereafter, there shall be elected three judges of the supreme court, to hold for the full term of six years, and until their successors are elected and qualified, commencing with the second Monday in January succeeding their election. [L. '11, p. 613, § 1.]

§ 9043-1. Election to Fill Vacancy—Commencement of Term.

A person elected judge of the supreme court to fill a vacancy for an unexpired term shall not qualify for office until the second Monday in January succeeding his election. [L. '11, p. 614, § 2.]

CHAPTER VIII.

JUDGES OF THE SUPERIOR COURTS.

§ 9050-1. Additional Judges.

Hereafter there shall be two judges of the superior court in and for Snohomish county; two judges in and for Yakima county; nine judges in and for King county; for the county of Lewis, one superior judge; for the counties of Pacific and Wahkiakum, one superior judge; for the counties of Cowlitz, Skamania and Klickitat, one superior judge; for the county of Clarke, one superior judge; and for the counties of Thurston and Mason, two superior judges. [L. '11, p. 134, § 1; L. '11, p. 332, § 1; L. '11, p. 375, § 1; L. '11, p. 642, §§ 1, 2; L. '11, p. 644, §§ 1, 2; L. '13, p. 47, § 1.]

Adapted from the acts cited.

TITLE LXXV.
STREET AND ELECTRIC RAILWAYS.

CHAPTER II.
CORPORATE RIGHTS.

§ 9080.

Charters adopted by cities of the first class are subject to and controlled by general laws; and this section, authorizing, cities to grant franchises to street railroads and to prescribe the terms and conditions thereof, supersedes the city charter of Seattle, article 4, section 23, requiring such franchises to be sold at public auction to the highest bidder: *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

A city may not, in granting a franchise to a street railway company, divest itself of its governmental police power, the exercise of which is necessary for the public welfare or safety: *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661.

An act entitled an act "relating to electric railways . . . and the use of streets and roads thereby" is sufficiently comprehensive to embrace provisions relating to the granting of franchises therefor by the legislative authority of cities: *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

This section authorizes the city, by clear and unmistakable language, to grant a franchise giving a street railway company the right to build a track on a trestle in a portion of the street, excluding the public therefrom, upon condemnation of the abutter's easements of access, light, and air, under section 9081: *State ex rel. Ford v. Superior Court*, 67 Wash. 10, 120 Pac. 514.

TITLE LXXVI

TAXATION.

CHAPTER I.

STATE BOARD OF TAX COMMISSIONERS.

§ 9086-1. County Assessors' Annual Convention.

For the purpose of instruction on the subject of taxation, the county assessors of the state shall meet with the state board of tax commissioners at the capital of the state on the third Monday of January of each year. Each assessor shall be paid by the county of his residence his actual expenses in attending said convention, upon presentation to the county auditor of proper vouchers. [L. '11, p. 46, § 1.]

CHAPTER II.

DEFINITIONS AND EXEMPTIONS.

§ 9092.

See notes to § 9134.

§ 9093.

The assessment of a leasehold fixed by the value of the lessee's improvements, having no basis in law, will be set aside, notwithstanding it could not be reviewed for mere over-valuation: *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, Ann. Cas. 1912C, 943, 113 Pac. 1114.

§ 9094.

Under this section, requiring the assessment of leaseholds as personal property, the tax value of a fifty year lease from the state, the lessee's buildings reverting at the end of the term, is the actual value of the term less rent reserved, to be determined by the present worth from year to year, considering also the term: *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, Ann. Cas. 1912C, 943, 113 Pac. 1114.

§ 9098. Exemptions.

All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say:

First. All lands used exclusively for public burying grounds or cemeteries, all churches built and supported by donations whose seats are free to all, and the grounds whereon such churches are built, not exceeding one hundred and twenty feet by two hundred feet in quantity, together with a parsonage. The parsonage need not be on land contiguous to the church property if the total area exempted does not exceed the area above described: Provided, That such grounds are used wholly for church purposes and not otherwise. Also, all property of Young Men's Christian Associations and Young Women's Christian Associations, or any exhibit deposited in the State Historical Society building, which shall be wholly used, or to the extent solely used, for the religious purposes of such association.

Second. All property, whether real or personal, belonging exclusively to any school district, county, municipal corporation, the state or to the United States.

Third. All fire engines and other implements used for the extinguishment of fires, with the building used exclusively for the safekeeping thereof, and for the meetings of fire companies, providing that such belongs to any town or fire company organized therein.

Fourth. All free public libraries, orphanages, orphan asylums, institutions for the reformation of fallen women, homes for the aged and infirm, and hospitals for the care of the sick, when such institutions are supported in whole or in part by the public donations or private charity, and all of the income and profits of such institutions are devoted, after paying the expenses thereof, to the purposes of such institutions, and the grounds, whenever such libraries, orphanages, institutions, homes and hospitals are built and when used exclusively and not otherwise for the purposes in this subdivision enumerated. In order to determine whether such libraries, orphanages, institutions, homes and hospitals are exempt from taxes, within the true intent of this chapter, the state board of health, the county and city authorities of the county and city wherein such institutions are respectively situated, shall have access to the books of such institutions, and the institution claiming exemption shall provide by its articles of incorporation that the mayor of the city and the chairman of the board of county commissioners wherein such institution is located shall be ex-officio trustees thereof, and shall be notified of each and every meeting thereof, and shall have the same powers as a trustee of such institution. And the superintendent or manager of the library, orphanage, institution, home or hospital claiming exemption from taxation under this chapter shall make oath before the assessor that the income and the receipts thereof, including donations to it, have been applied to the actual expenses of maintaining it, and to no other purpose. He shall also, under oath make annual report to the state board of health of its receipts and disbursements, specifying in detail the sources from which the receipts have been derived and the object to which disbursements have been applied, and shall furnish in the said report full and complete vital statistics for the use and information of the state board of health, who may publish the same in its annual report.

Fifth. All fruit trees, except nursery stock and forest trees artificially grown.

Sixth. All ships, vessels and boats in actual construction and all materials especially designed and set apart for the construction of any such ship, vessel or boat in process of building within this state, shall be exempt from taxation.

Seventh. The personal property of each head of a family or widow liable to assessment and taxation of which such individual is the actual and bona fide owner to an amount of three hundred dollars: Provided, That each person shall list all of his personal property for taxation and the county assessor shall deduct the amount of the exemption authorized by this section from the total amount of the assessment and assess the remainder. [L. '13, p. 351, § 1.]

This section, exempting from general taxation all lands used exclusively for burying grounds or cemeteries, does not exempt such lands from assessments for local improvements: In re Sixth Avenue West, Seattle, 59 Wash. 41, Ann. Cas. 1912A, 1049, 109 Pac. 1052.

As to liability of cemetery to assessment for local improvements, see note in 35 L. R. A., N. S., 36.

A parsonage and lot, some distance and separated from the church lot, is not exempt from taxation, under this section, exempting from taxation all churches supported by donation in which seats are

free to all, and the grounds on which such churches are built, not exceeding one hundred and twenty by two hundred feet in quantity, "together with the parsonage thereon," especially in view of the rule of strict construction of such exemptions: *Foley v. Oberlin Congregational Church*, 67 Wash. 280, 121 Pac. 65.

As to what is included in exemption of religious institutions from taxation, see note in Ann. Cas. 1912A, 354.

As to exemption of parsonage, see note in 39 L. R. A., N. S., 437.

Under principles of public policy and constitution, article 7, section 2, and this

section, exempting state property from taxation, lands purchased by the state in the months of May and August, cannot be subjected to the taxes levied for that year, in view of the fact that the levy of the tax cannot be made until October, since the development of liability for

taxes was arrested the moment public ownership attached: *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667.

As to property of the state as a subject of taxation, see note in 33 Am. St. Rep. 403.

CHAPTER III.

LISTING AND ASSESSMENT OF PROPERTY.

§ 9101.

Where wheat was orally purchased in February, but the title did not pass until it was delivered on March 7th, and the purchaser's manager, without looking up the dates, but knowing that the wheat was delivered after that date, listed the same for taxation as of March 1st, after the assessor informed him that the vendor refused to pay, his error was a mistake of law, and not of fact, which a court of equity cannot relieve by restraining collection of the tax, in the absence of fraud or misrepresentation: *Peacock Mill Co. v. Honeycutt*, 55 Wash. 18, 103 Pac. 1112.

§ 9102.

The failure of the assessor to assess

money, on the erroneous advice of the attorney general who was mistaken as to the law, does not affect the validity of a tax upon other property: *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, Ann. Cas. 1912B, 870, 111 Pac. 562.

An assessor acts in a quasi-judicial capacity, and it requires clear evidence to overcome the presumption that he acted in a proper manner in fixing valuations: *Vancouver Water Works Co. v. Clarke County*, 55 Wash. 112, 104 Pac. 180.

The evidence of a mistake of fact in listing property for taxation must be clear, cogent, and convincing in order to overcome the presumption arising from the sworn detail sheet: *Peacock Mill Co. v. Honeycutt*, 55 Wash. 18, 103 Pac. 1112.

§ 9112. Assessment at True Value—Definitions of.

All property shall be assessed at not to exceed fifty per cent of its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made. The true cash value of property shall be that value at which the property would be taken in payment of a just debt from a solvent debtor. In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands. In valuing any real property on which there is a coal or other mine, or stone or other quarry, the same shall be valued at such price as such property, including the mine or quarry, would sell at a fair, voluntary sale for cash. Taxable leasehold estates shall be valued at such a price as they would bring at a fair, voluntary sale for cash. [L. '13, p. 438, § 1.]

Where the assessing officers have adopted as a measure of value for assessments sixty per cent of the market value, and uniformly applied it, an assessment on a specified tract, conclusively shown

to be in excess of that amount, cannot be sustained by reference to this section, requiring all property to be assessed at its cash value: *Savage v. Pierce County*, 68 Wash. 623, 123 Pac. 1088.

§ 9113.

The presumption being in favor of the regularity of tax proceedings, an assessment of two mining claims in solido instead of in parcels, as required by law, will not be found from the mere fact that the certificate of delinquency was for the total amount: *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

§ 9122.

A dredger built in, and engaged for two years in government work in a county of this state, has its situs for taxation in this state, although its home port and ownership is in another state; and the fact that it was seaworthy and had sufficient power to propel itself on the high seas does not bring it within the rule requiring vessels engaged in interstate traffic or sailing from one port to another to be assessed at their home ports or the domicile of her owners: *North American Dredging Co. v. Taylor*, 56 Wash. 565, 29 L. R. A., N. S., 105, 106 Pac. 162.

The use of a dredger for indefinite periods in a harbor where it may be engaged in work impresses it with a local character, and the declared intention of its nonresident owners to remove it from the state as soon as its contract for work is completed, does not exempt it from taxation at the place where found: *North American Dredging Co. v. Taylor*, 56 Wash. 565, 29 L. R. A., N. S., 105, 106 Pac. 162.

As to situs of personal property for purposes of taxation, see notes in 62 Am. St. Rep. 448; 127 Am. St. Rep. 1092.

§ 9134.

Business property investment bonds held by a national bank are real estate, within the meaning of this section, where bonds, issued by a trust company in a

sum equal to the alleged value of a specified tract of land, each represented and conveyed to the holder one of the "units" in the land created by a deed of trust, under a scheme devised by the trust company to enable persons to invest small amounts in high priced business property, the trust deed requiring the trust company to pay over to the bondholders certain profits and surplus dividends, together with a share of the net income, and finally to sell the property and distribute the proceeds among the bondholders, the only interest in the land retained by the trust company being a prospective right to share in the net income and in the surplus in the ultimate sale price above the face value of the bonds; especially in view of the presumption against a legislative intent to authorize double taxation impliedly prohibited by constitution, article 7, section 2, and in view of section 9092, defining real property for the purposes of taxation to include all rights and privileges thereto belonging or in any way appertaining: *Dexter Horton National Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915.

In the absence of any showing, it will be presumed that a national bank legally acquired its real estate, the assessed value of which it seeks to have deducted from the assessed value of its capital stock: *Dexter Horton National Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915.

The assessment of bank stock for the purposes of general taxation, under this section, is a property and not an excise tax, and hence is subject to the constitutional requirement that taxes be uniform and equal (overruling *Pac. Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936, and *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261): *Spokane & Eastern Trust Co. v. Spokane County*, 70 Wash. 48, 126 Pac. 54.

As to state taxation of national banks, see note in 69 Am. St. Rep. 38.

CHAPTER IV.**ASSESSMENT OF RAILROADS.****§ 9141.**

See notes to § 8638.

The law making it the duty of the tax commissioners to classify railroad property and superintend its assessments, instructions sent out to all assessors fixing the assessment on different classes of railroad track and rolling stock will be presumed to have been sent in conformity to the law, and are binding upon the county assessors; and a larger assessment by an assessor is void, notwithstanding he honestly endeavored to assess it at sixty per cent of its value, uniformly with

other property in the county: *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881.

Where railway property is assessed upon a higher standard than other railway property and an unequal burden is placed upon it, the company is denied the guaranties of the constitution, and may object although the property was assessed at less than its actual value: *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7.

As to the necessity that taxes be levied uniformly and equally, see note in 127 Am. St. Rep. 1045.

An arbitrary order of the state tax commission raising the valuation of railroad property from \$19,500,000 to \$27,529,771, cannot be sustained on appeal from the order, when the record on appeal does not show the introduction of any evidence or any inquiry by the commission such as is contemplated by this section since no presumptions can be indulged on a direct appeal from the finding: *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7.

§ 9148.

A determination by the tax commission

as to the amount to be assessed against railroad tracks being binding upon county assessors, it is immaterial that the commissioners viewed their powers as only advisory: *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881.

In the absence of fraud, the courts cannot review the discretion of the tax commission in determining the amount at which different classes of railroad track shall be assessed: *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881.

§ 9152. Assessments—Realty and Personalty.

In making the assessments of the operating property of railroads, and in the apportionment of the values and the taxation thereof, as hereinbefore provided, all land occupied and claimed exclusively as the right of way for railroads, with all the tracks, and substructures and superstructures which support the same, together with all sidetracks, second tracks, turn-outs, station-houses, depots, roundhouses, machine-shops, or other buildings belonging to the road used in the operation thereof, without separating the same into land and improvements, shall be assessed and taxed as real property. And the rolling stock and other movable property belonging to any railroad company shall be considered as personal property and shall be assessed and taxed as such: Provided, That all of the operating property of street railroads shall be assessed and taxed as personal property. [L. '11, p. 62, § 1.]

CHAPTER VI.

ASSESSMENT OF TELEGRAPH AND TELEPHONE COMPANIES, ELECTRIC LIGHT LINES, ETC.

§ 9175.

Failure of a telegraph company to list all its tangible property for taxation does

not preclude it from resisting a tax on its federal franchise: *Western Union Tel. Co. v. Lakin*, 53 Wash. 326, 17 Ann. Cas. 718, 101 Pac. 1094.

CHAPTER VII.

INHERITANCE TAX.

§ 9183. Tax Graduated—Rate of Levy.

The inheritance tax shall be and is to be levied on all estates subject to the operation of this act on all sums above the first ten thousand dollars, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or lineal descendant of an adopted child, one (1) per centum. On all sums not exceeding the first fifty thousand dollars, of three per centum, where such estate passes to collateral heirs to and including the third degree of relationship, and to six per centum where such estates pass to collateral heirs beyond the third degree, or to strangers to the blood. On all sums above the first fifty thousand dollars and not exceeding the first one hundred thousand dollars, four and one-half per centum to collateral heirs, to and including the third degree, and nine per centum to collateral heirs, beyond the

third degree, or to strangers to the blood. And on all sums in excess of the first one hundred thousand dollars, the tax shall be six per centum to collateral heirs to and including the third degree, and twelve per centum to collateral heirs beyond the third degree or to strangers to the blood. [L. '11, p. 60, § 2.]

State laws in conflict with treaties between the United States and foreign countries are held in abeyance during the existence of the treaty: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

This section [prior to the above amendment], providing for an inheritance tax of twenty-five per cent on all sums passing to collateral relatives who are aliens not residing in the United States, which exceeds the tax upon relatives who are citizens of the United States, violates the treaty between Norway and Sweden and the United States, which provides that the subjects of the contracting parties may freely dispose of their goods and effects by testament and that their heirs in whatever place they shall reside shall receive the succession, exempt from all duty called "droit de

detractation" on the part of the government of the two states respectively, since an inheritance tax is an impost or excise on the right to pass the estate and not a tax upon the property, and the treaty was intended to secure to aliens the right to succeed to property upon the same terms provided by general laws for our own citizens: *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A, 850, 33 L. R. A., N. S., 632, 109 Pac. 343.

§ 9190.

An inheritance tax is properly charged to the beneficiaries: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105.

As to construction of inheritance tax laws, see note in 127 Am. St. Rep. 1052. See, also, notes in 1 Ann. Cas. 30; 12 Ann. Cas. 953.

CHAPTER VIII.

EQUALIZATION OF ASSESSMENTS.

§ 9200.

The assessment of the property of others at a lower rate than that of a complaining taxpayer, whose property is not assessed beyond its cash value, does not invalidate the tax: *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, Ann. Cas. 1912B, 870, 111 Pac. 562.

The failure of the board of equalization to raise the assessment on timber uncruised, or where no notice could be given to the owners, does not prevent a raise on cruised timber on notice to the owners and a hearing: *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, Ann. Cas. 1912B, 870, 111 Pac. 562.

The assessment of a city water company's franchise is not shown to be excessive from the fact that the franchises of telephone and light companies were less, there being no evidence to form a basis of comparison: *Vancouver Water Works Co. v. Clarke County*, 55 Wash. 112, 104 Pac. 180.

In an action to reduce an assessment upon lands containing springs used for a city water supply, it is no evidence of overvaluation that farming lands in the vicinity were assessed at a less rate, or that other things were assessed less, in the absence of proof that they were in demand for a similar use: *Vancouver Water Works Co. v. Clarke County*, 55 Wash. 112, 104 Pac. 180.

A valuation of fifty thousand dollars for the purposes of assessment for taxation, upon two hundred and seventy-six acres of land, chiefly valuable for limestone deposits, is excessive and constructively fraudulent, and should be reduced to fifteen thousand dollars where the assessor stated that he was unable to fix the value of mineral land unless it was tested or developed, the value did not exceed three dollars to five dollars per acre aside from the limestone, and the land had not been developed and a few years ago had sold for ten thousand dollars; and an offer of fifty thousand dollars made and refused is not a sufficient basis upon which to fix the valuation, where the offer was coupled with a condition that six or seven thousand dollars would be expended in development work and the land be demonstrated to contain sufficient limestone to operate a cement plant of one thousand barrels capacity per day for twenty-one years: *Case v. San Juan County*, 59 Wash. 222, 109 Pac. 809.

The action of the board of equalization in raising an assessment on timber that has been cruised, on notice given, cannot be reversed or set aside where the board did not act fraudulently or arbitrarily, but in good faith considered the distance of the property from railroads or logging streams, the contour of the land, and quality of the timber: *Doty Lumber &*

Shingle Co. v. Lewis County, 60 Wash. 528, Ann. Cas. 1912B, 870, 111 Pac. 562.

An assessment cannot be disturbed for mere overvaluation, in the absence of fraud or capriciousness, and clear evidence to overcome the liberal presumption that the assessor performed his duty in a proper manner; and a finding sustaining an assessment will not be disturbed upon conflicting evidence of values, in the absence of fraud: *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178.

As to the principle that taxation shall be in proportion to value or benefit, see note in 2 L. R. A. 826.

Sufficient cause is shown for the vacation of a tax judgment and sale, on petition made within one year, and it is error to deny the same, where it appears that the petitioner lived on the land and had made a good faith effort to ascertain and pay the back taxes prior to the issuance of a delinquency certificate, but was prevented by the act of the county treasurer, and he had had no notice of the suit, summons by publication having been made in a paper of limited circulation at a considerable distance from the property: *Brewer v. Howard*, 59 Wash. 580, 110 Pac. 384.

CHAPTER X.

COLLECTION OF TAXES.

§ 9222-1. Standing Timber—Fish-traps, Nets and Locations.

For the purposes of taxation the following described property shall be deemed personal property and shall be assessed and taxed in the county where situated, viz.:

Standing timber held or owned separately from the ownership of the land upon which it may stand.

Fish-trap, pound-net, reef-net, set-net and drag-seine fishing locations. [L. '11, p. 90, § 1.]

§ 9223a. Penalty, When Delinquent—Distraint for, etc.

On the first Monday in February succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes, and if such taxes are not paid on or before the 15th day of March of such year, he shall notify the sheriff of such county, who shall distraint sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest at the rate of fifteen (15) per cent per annum from the 15th day of March of such year, together with all accruing costs, and shall immediately proceed to advertise the same by posting written notices in three public places in the county in which such property has been levied upon, one of which places shall be at the county courthouse, such notices to state the time when and place where such property will be sold. If the taxes for which such property is distrained and the interest and costs accruing thereon are not paid before the date appointed for such sale, which shall not be less than ten (10) days after the taking of such property, such sheriff shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such taxes with interest and costs, and shall pay to the treasurer the money so collected at such sale, and if there be any overplus or money arising from the sale of any personal property, the treasurer shall immediately pay such overplus to the owner of the property so sold, or to his legal representative: Provided, That whenever it shall become necessary to distraint any standing timber owned separately from the ownership of the land upon which the same may stand, or any fish-trap, pound-net, reef-net, set-net or drag-seine fishing location, it shall be deemed to have been distrained and taken into possession when the said

sheriff shall have, at least thirty (30) days before the date fixed for the sale thereof, filed with auditor of the county wherein such property is located, a notice in writing citing that he has distrained such property, describing it, giving the name of the owner or reputed owner, the amount of tax due with interest, and the time and place of sale. A copy of said notice shall also be sent to the owner or reputed owner at his last known address by registered letter at least thirty (30) days prior to the date of sale: And provided further, That if any personal property upon which taxes have been levied, but not paid, is about to be removed from the county where the same has been assessed, the county treasurer may demand such taxes without the notice provided for in this section, and if necessary may distrain sufficient goods and chattels to pay the same as provided in this act. [L. '11, p. 90, § 2.]

§ 9223-1. Destruction by Fire—Insurance.

In the event of the destruction of personal property by fire after the 15th day of March of any year, the lien of the personal property tax shall attach to and follow any insurance that may be upon said property and the insurer shall pay to the county treasurer from the said insurance money all taxes, interest and costs that may be due. [L. '11, p. 92, § 3.]

§ 9223-2. List Sent Treasurer.

After personal property has been assessed, it shall be unlawful for any person to remove the same from the state until taxes and interest are paid, or until notice has been given to the county treasurer describing the property to be removed and in case of public sales of personal property, a list of the property desired to be sold shall be sent to the treasurer, and no property shall be sold at such sale until the tax has been paid, the tax to be computed upon the consolidated tax levy for the previous year. Any person violating the provisions of this act shall be guilty of a misdemeanor. [L. '11, p. 92, § 4.]

§ 9230.

Under this section, providing that a tax lien shall have priority over all other liens or claims, a tax foreclosure and sale passes the fee freed from a prior easement for a private road, where the owner of the easement prior to foreclosure did not seek a segregation of the tax as to the strip of land affected by the easement: *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927.

§ 9233.

Where taxes are compromised by one claiming ownership of the land of another, his equitable lien therefor is limited to the sum actually paid, and cannot be extended to cover the original tax or services in making the payment: *Vietzen v. Otis*, 63 Wash. 411, 115 Pac. 858.

This section has no application to payments by parties claiming to own the land and making payment for themselves, since the statute was intended to protect parties who pay taxes for the use of other persons, and the rule of ejusdem generis applies in the construction of the words

"any other person": *Vietzen v. Otis*, 63 Wash. 411, 115 Pac. 858.

§ 9234.

By this section, notice of application for apportionment of taxes on a tract of land, by the owner of a part, need not be given where the assessed valuation of the tract is less than two thousand dollars: *Coleman v. Security Sav. Soc.*, 57 Wash. 675, 107 Pac. 842.

Where an act for the apportionment of taxes requires the treasurer to carefully investigate and ascertain the proportionate value of the parts sought to be segregated and divide the assessment on that basis, without providing any procedure, he may adopt the procedure deemed most fitting, and will be presumed to have done his full duty, in the absence of a showing that the apportionment is unjust: *Coleman v. Security Sav. Soc.*, 57 Wash. 675, 107 Pac. 842.

This section, prescribing a remedy for the collection of taxes paid by a mortgagee for the purpose of protecting his

lien, was not intended as an exclusive remedy; and his equitable right of subrogation does not expire with the lien of his mortgage, the statute providing that the lien for taxes shall continue until the taxes are paid: *Childs v. Smith*, 58 Wash. 148, 107 Pac. 1053.

When taxes are paid in good faith to protect the property from seizure, and inure to the benefit of the owner, a lien for repayment of the taxes is imposed on the premises: *Dalpardno v. Trumbull*, 61 Wash. 659, 112 Pac. 928.

§ 9235.

This section, making the lien for taxes on real estate commence by relation on March 1st of the year in which they were levied, creates only an incipient or inchoate lien to become complete only on the mak-

ing of a valid levy: *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667.

Under this section, providing that taxes assessed upon personal property shall be a lien thereon, regardless of transfers made, a vendee under a conditional sale, whereby the title to personal property remained in the vendor, cannot maintain an action to restrain the distraint of the property for personal property taxes, since it is immaterial who holds the title thereto, or to whom it was assessed: *Lewis Construction Co. v. King County*, 60 Wash. 694, 111 Pac. 892.

§ 9240.

There is no implied exemption from the burden of taxation: *Trimble v. Seattle*, 64 Wash. 102, 116 Pac. 647.

CHAPTER XI.

CERTIFICATES OF DELINQUENCY, FORECLOSURE, TAX DEEDS, ETC.

§ 9252.

Under Laws of 1897, page 183, section 98, which designated no particular time for the issuance of a certificate of delinquency to a county, a certificate on the taxes for 1895 could be issued on January 31, 1898: *Cavanaugh v. Roberts*, 50 Wash. 265, 97 Pac. 55.

Where a tax for 1895 became delinquent May 31, 1896, by the law then in force, and a certificate of delinquency issued, August 1, 1901, for taxes for the year 1895, more than five years had elapsed, as required by the act of 1901: *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

A certificate of delinquency for taxes that have been paid by the holder of a prior certificate is void, and cannot sustain an action for foreclosure, although the holder paid the taxes for three subsequent years upon which he might have secured a certificate: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

A certificate of delinquency is invalidated by the inclusion of the attorney's fees and other costs of the foreclosure of a prior certificate which are not allowable in such foreclosures: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

A tax certificate for the year 1905, upon property which was exempt from taxation that year, is not void so as to furnish no jurisdiction for foreclosure, where the holder, as such, paid taxes for five subsequent years when the property was not exempt, and sought foreclosure of the certificate for the subsequent years, as valid liens; since the certificate was prima facie evidence that the property was subject to taxation in 1905, upon which the holder had a right to rely in paying subsequent

taxes, the result of which was to transfer to her the county's tax liens for the subsequent years: *Foley v. Oberlin Congregational Church*, 67 Wash. 280, 121 Pac. 65.

§ 9254.

In this state, the owner is not personally liable for taxes assessed against his real property, the statutory method of enforcing the same as a lien being exclusive: *Clizer v. Krauss*, 57 Wash. 26, 106 Pac. 145.

The applicant for the foreclosure of a certificate of delinquency must pay all taxes due and unpaid on the property: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

A tax foreclosure judgment secured by a private individual by publication of summons without personal service of the summons on the owner to whom the land was assessed, and who lived on the premises, is void, and is properly vacated in an action to set it aside: *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998.

The failure of a summons in a tax foreclosure to properly describe the property, as required by Ballinger's Code, section 1751, vitiates the tax judgment and sale, as the statute must be strictly pursued to obtain jurisdiction: *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462.

The foreclosure of a tax certificate is void where there was no attempt made to personally serve the defendant, who lived in the city and whose name and address was in the city directory, and service was had by publication upon an attorney's affidavit of nonresidence and the sheriff's return of not found, made immediately upon presenting the summons at the sheriff's office without any attempt to find

or serve the defendant: *Olson v. Johns*, 56 Wash. 12, 104 Pac. 1116.

A tax foreclosure proceeding without the service of any process is without jurisdiction and void: *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

A county tax foreclosure of a general delinquency certificate is not void because the summons for publication incorrectly stated the date of the certificate, such requirement being descriptive only and to aid in identification, and is not essential to the jurisdiction of the court nor fatal to the proceedings, in the absence of a showing that the party was misled: *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

A tax foreclosure summons is not so uncertain as to render the judgment void merely because of the use of the word "or" instead of "of" in describing the "N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ " of a certain section, where it was followed by "40 acres," denoting the quantity of the land: *Stanchfield v. Blessing*, 55 Wash. 620, 104 Pac. 800.

As to omission of affidavit for service by publication, see note in 36 L. R. A., N. S., 1064.

A foreclosure of a tax delinquency certificate, under the act of 1899, which did not define the owner or authorize proceedings against the persons appearing as owners on the tax-rolls, is void, where the action proceeded upon personal service against defendants who had no interest in the land, and no publication was had against unknown owners or any other service had, as the owner never had his day in court: *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 166, 105 Pac. 238.

Under this section, subdivision 2, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default: *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193; *Worthington v. La Violette*, 60 Wash. 525, 111 Pac. 784.

A nonresident plaintiff in an action to set aside a tax deed is sufficiently identified as the grantee in a recorded deed from the conceded holder of the title, where he testified that he purchased the lot from such holder, paid for it, and produced tax receipts showing payment by him of taxes thereon, and that he lived in the state given as the residence of the grantee in the deed: *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

In an action to set aside a default judgment in a tax foreclosure, a finding that there was no summons other than a defective publication shown by the files is warranted where the defendants in the foreclosure were nonresidents, did not enter any appearance, or know of the action and were not personally served,

the files show no other service than the defective publication, and there was no affirmative showing that any other service was made: *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

In an action to set aside a default judgment in a tax foreclosure, a finding that there was no summons other than a defective publication shown by the files is warranted where the defendants in the foreclosure were not personally served, the files show no other service than the defective publication, and there was no affirmative showing that any other service was made: *Worthington v. La Violette*, 60 Wash. 525, 111 Pac. 784.

A tax certificate upon land purchased by the state constitutes a mere cloud and not a lien, in view of the fact that there is no statutory authority for enforcing the lien against the state: *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667.

TIME FOR APPEARANCE ON PUBLICATION OF SUMMONS.—Under Laws of 1897, page 182, section 96, subdivision 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default: *Gould v. White*, 54 Wash. 394, 103 Pac. 460; *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837; *Thompson v. Schoner*, 58 Wash. 642, 109 Pac. 116.

An individual tax foreclosure and deed is void as to an owner of a one-sixth interest, and his successor, where there was no personal service and the summons for publication required an appearance within sixty days after service of the summons: *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119.

§ 9257.

Laws of 1897, page 136, section 116, authorizing the foreclosure of prior tax liens is expressly limited to lands forfeited to the county for taxes due and remaining unpaid at the date of the passage of the act, and was not intended to apply to forfeited lands upon which the taxes had already been paid by purchasers and certificates of purchase issued under the law of 1893: *Barker v. Muehler*, 55 Wash. 411, 104 Pac. 637.

§ 9258.

See notes to § 9265.

§ 9259.

See notes to § 9265.

Where the full legal title to land is in a trustee for a minor, the minor cannot redeem the land from tax sale under this

section, his remedy being against the trustee: *Burdick v. Kimball*, 53 Wash. 198, 101 Pac. 845.

This section, permitting any "minor heir" to redeem land sold for taxes does not apply to a minor for whom land had been deeded in trust and who had not inherited the property, as the statute is clear, and the history of the act shows "heirs" to have been advisedly used in order to limit the right to redeem to those who take by descent (*Per Mount, J.*, with whom *Crow, Dunbar, and Parker, JJ.*, concur; *Chadwick, J.*, dissenting, with whom *Rudkin, C. J., Fullerton and Gose, JJ.*, concur.): *Burdick v. Kimball*, 53 Wash. 198, 101 Pac. 845.

The neglect of a party to pay taxes for many years does not amount to laches that would bar an action to redeem the property within the statutory period: *Gould v. White*, 54 Wash. 394, 103 Pac. 460.

Upon setting aside a void tax foreclosure, six per cent interest is properly allowed upon taxes paid, since the statutory penalty of fifteen per cent runs only from the time the certificate is taken out until the taxes are paid, whether voluntarily or by foreclosure: *Gould v. White*, 62 Wash. 406, 114 Pac. 159.

Taxes may be redeemed at any time before a valid tax deed is issued, and insufficiency of the tender therefore is immaterial where the tax title holder refused to consider a tender useless unless another outside claim was also paid: *Stockand v. Hall*, 54 Wash. 106, 102 Pac. 1037.

Proceedings for the apportionment of taxes on a tract of land, followed by a redemption of the part of the applicant, are not affected by a mistake of the taxing officer in describing the land in the redemption certificate: *Coleman v. Security Sav. Soc.*, 57 Wash. 675, 107 Pac. 842.

As to necessity for strict compliance with statute in redeeming from a tax sale, see note in 9 L. R. A. 767.

In a general tax foreclosure prosecuted by the county, the summons is sufficient if the property is properly described, notwithstanding a mistake in the name of the owner: *Patterson v. Toler*, 71 Wash. 535, 129 Pac. 107.

Repeals by implication not being favored, this section, which is a special act permitting a minor to redeem his real property from tax sale, at any time after sale and before the expiration of one year after removal of his disability, was not repealed by the general act of 1907, page 398, Rem. & Bal. Code, section 162, providing a limitation for the bringing of actions to set aside tax deeds or for the recovery of land sold for taxes: *Seattle Land & Improvement Co. v. Blum*, 71 Wash. 530, 128 Pac. 1066.

A tender of taxes by a minor, pursuant to this section, ipso facto operates as a

redemption, the right being highly favored, requiring a liberal construction: *Seattle Land & Improvement Co. v. Blum*, 71 Wash. 530, 128 Pac. 1066.

The right of a minor to redeem his land sold for taxes, within one year after attaining majority, given by this section, is assignable, and may be exercised by his grantee, especially where he warranted the title: *Seattle Land & Improvement Co. v. Blum*, 71 Wash. 530, 128 Pac. 1066.

§ 9260.

A tax foreclosure is a special proceeding for a special purpose, and if it fails, the court cannot retain jurisdiction to grant general relief or establish an equitable lien for taxes paid: *Barker v. Muehler*, 55 Wash. 411, 104 Pac. 637.

Under a statute requiring the judge in a tax foreclosure to order the clerk to enter an order of sale to be signed by the judge and attested by the clerk, and to certify a copy thereof to the treasurer, a judgment, signed by the judge, containing an order of sale is a sufficient order of sale; and failure of the clerk to "attest" the same does not render it void, where the clerk certified a copy thereof to the treasurer: *Trumbull v. Jefferson County*, 62 Wash. 503, 114 Pac. 186.

In a tax foreclosure suit, personal judgment should not be entered for costs: *Sound Inv. Co. v. Bellingham Bay Land Co.*, 53 Wash. 470, 102 Pac. 234.

The foreclosure of a tax certificate being a special proceeding, upon the failure of the action, the court cannot retain jurisdiction to grant relief for taxes paid, and the action should be dismissed without prejudice to an appropriate proceeding to establish an equitable lien: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

Upon a collateral attack of a tax foreclosure sale of mining claims, a notice of sale describing the claims as the R. lode and the C. lode, with the number of acres in each, when the government patents named them as the R. lode and the C. "Fraction," is sufficient, in the absence of a showing that the claims could not be found from the description given: *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

§ 9261.

This section has no application to appeals from judgments in independent actions in equity to set aside a tax foreclosure judgment and sale and to quiet title, which must be taken within ninety days (*McCausland v. Bailey*, 51 Wash. 183, overruled): *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886.

A tax foreclosure judgment and sale is not void because of an overcharge of interest, since the owner has an opportunity to defend and is estopped to raise any but

jurisdictional questions: *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

A tax foreclosure judgment and sale cannot be attacked collaterally because the officer making the sale did not have a certified copy of the order of sale, where the officer in his return recites that the order was "directed and delivered" to him, since all presumptions are in favor of the regularity of the proceedings: *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

An action to recover possession of lands sold for taxes and to set aside the tax judgment is a direct and not a collateral attack upon the tax foreclosure: *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837.

§ 9265.

Where a tenant in common pays a tax judgment and takes an assignment of the judgment, the certificate is merged in the judgment, and the payment operates for the benefit of the remaining tenants in common, subject to a lien for their portion of the tax, under this section, providing that the receipt of redemption money shall operate as a release of all claims by virtue of the certificate, and section 9258, providing that any person interested in lands may pay the taxes and have a lien for the payments made, and section 9259, providing that redemption shall inure to the benefit of the legal or equitable title, subject to the right of reimbursement of the person making the payment: *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

§ 9267.

Efforts of the owner in good faith to pay taxes before delinquency, which were prevented by mistake of the county treasurer in informing him that the taxes were paid, are equivalent to payment, rendering a tax sale therefor void: *Gleason v. Owens*, 53 Wash. 483, 132 Am. St. Rep. 1087, 17 Ann. Cas. 819, 102 Pac. 425.

A tax judgment may be collaterally attacked in a suit to quiet title where the tax has been paid, or the real estate is not subject to taxation, under the express exceptions of this section: *Martin v. Rankert*, 67 Wash. 325, 121 Pac. 817.

As to contesting tax title, see note in 2 L. R. A. 773.

A tax deed, upon foreclosure of a delinquency certificate, is void where, long before the date of delinquency, the owner sent the county treasurer more than enough money to pay all taxes, receipt for which was duly issued, and the certificate of delinquency was issued by mistake of the treasurer, and foreclosure and sale were had without actual notice to the owner: *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086.

The negligence of the county treasurer prevented the payment of taxes and a

county tax deed is void, where the owner attempted in good faith to pay taxes upon platted property, and on furnishing a list was informed by the county treasurer that all delinquent taxes were paid; and it is immaterial whether the lists furnished described the property by government subdivision as assessed at one time, or it has been platted and assessed later: *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122.

A tax foreclosure and deed is void where the owners, in an honest attempt to pay the taxes, delivered to the county treasurer a list of the property and blank checks with authority to fill in the same for the amount, and through an error of the treasurer, not known to the owners, taxes on part of the property were not paid: *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 Pac. 327.

As to right of redemption as affected by error or negligence of tax official, see note in 6 L. R. A. 50.

A sale of land for taxes by a county treasurer to a deputy in his office is void as against public policy: *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772.

A mortgagee cannot acquire a tax title against the mortgaged property and hold the same against the mortgagor, except as a lien for the taxes paid, and one acquiring the tax title under a conspiracy with the mortgagee can acquire no greater right than could the mortgagee: *Maher v. Potter*, 60 Wash. 443, 111 Pac. 453.

A tax deed is not void on its face, where it is in the statutory form, recites the tax proceedings before the sale, and expresses the consideration in the language of the statute: *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850.

The statute does not require a tax deed to be acknowledged: *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850.

A certificate of purchase issued for lands forfeited to a county for taxes under the act of 1893 is void under section 133 of the act, if a deed is not taken out and recorded within one year after the expiration of the time for redemption: *Barker v. Muehler*, 55 Wash. 411, 104 Pac. 637.

A description in a tax foreclosure and deed of a lot "less west two feet," where the boundary line varied about twelve degrees from due north and south, is a sufficiently definite description of the lot, less two feet cut off by a north and south line, measured from the most westerly point of the lot, under a liberal construction of the provisions of Laws of 1899, page 301, requiring the sale of land for taxes to be made by selling a portion of the east side of the tract, determined by "a line drawn due north and south far enough west of the eastern point of the tract to make the requisite quantity": *Lara v. Peterson*, 56 Wash. 70, 105 Pac. 160.

Where land had been assessed for several years under the latest plat, superseding an earlier plat, a duplicate tax resulting from a mistake in again placing the property on the tax-rolls under the earlier plat and descriptions is void, and purchasers at a tax sale thereunder acquire no title: *Martin v. Rankert*, 67 Wash. 325, 121 Pac. 817.

In a collateral attack upon a tax foreclosure sale, the deed is conclusive of the regularity of the proceedings as against mere omissions in the recitals contained in the record, in view of the statute making the deed prima facie evidence that the sale was conducted in the manner required by law: *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

As to tax deed as presumptive evidence of title, see note in 2 L. R. A. 773.

§ 9271.

A certificate of purchase of lands forfeited to a county for taxes, pursuant to Laws of 1893, page 323, sections 115, 134, entitles the holder to a tax deed upon application within one year after the time for redemption expires; and the certificate was not converted into a certificate of delinquency that could be foreclosed by the act of 1897, page 136, section 116, since the legislature could not impair the obligation of the contract; and an action to fore-

close the same is properly dismissed: *Barker v. Muehler*, 55 Wash. 411, 104 Pac. 637.

§ 9272.

The requirement that a tax sale be made at the front door of the courthouse is complied with where it was held inside of the building, twenty-five or thirty feet from and in plain view of the glass front doors and of people upon the street near the front doors: *Trumbull v. Jefferson County*, 62 Wash. 503, 114 Pac. 186.

The principle of equitable estoppel applies against a county's asserting title to land acquired by it in a proprietary capacity at a county tax sale, where, before the running of limitations against an action to set aside the tax deed, upon the advice of its attorney and the existence of a controversy over the validity of the tax deed, the county commissioners allowed the owner to "redeem" by paying all taxes, and executed and delivered to him a quitclaim deed, and thereby induced a bona fide purchaser to rely on the title and to pay taxes for six years, although, under this section, lands acquired by a county at tax sale could only be sold and disposed of at public sale: *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999.

CHAPTER XII.

ASSESSMENT AND COLLECTION OF TAXES IN CITIES OF FIRST CLASS.

§ 9281.

This section does not conflict with the Everett city charter, section 222, limiting the levy to eight mills on the dollar, under the rule that the two must be construed

together and harmonized, if possible, since the statute merely requires the fixing of the rate within the limit, and a levy in excess of eight mills is accordingly void: *McGill v. Hedges*, 62 Wash. 274, 113 Pac. 635.

TITLE LXXVIII.

TOWNSHIPS.

CHAPTER III.

TOWN MEETINGS, POWERS OF TOWNS.

§ 9339½. Powers of Electors.

The electors of each town have power, at their annual town meeting:

First. To determine the number of poundmasters, and location of pounds.

Second. To select such town officers as are required to be chosen.

Third. To direct the institution or defense of actions in all controversies where such town is interested.

Fourth. To direct such sums to be raised in such town for prosecuting or defending such actions as they may deem necessary.

Fifth. To make all rules and regulations for ascertaining the sufficiency of fences in such town and for impounding animals.

Sixth. To determine the time and manner in which certain domestic animals may be permitted to go at large.

Seventh. To impose such penalties on persons offending against any rules or regulations established by said town, except such as relate to the keeping and maintaining of fences, as they think proper, not exceeding ten dollars for each offense, unless herein otherwise provided.

Eighth. To apply such penalties, when collected, in such manner as they may deem most conducive to the interests of the town.

Ninth. To vote to raise such sums of money for the repairs and construction of roads and bridges as they deem necessary, and to determine the amount thereof to be assessed by the supervisors as labor tax and the amount thereof to be assessed and collected as other town taxes. Also to vote such sums of money for other necessary town charges as they deem expedient: Provided, That they may, at their annual town meeting, direct such an amount of the poll and road tax of the town to be expended on the highways in an adjoining town as they deem conducive to the interests of the town, which labor and tax shall be expended under the direction of the supervisors of the town furnishing the same.

Tenth. To vote by ballot to establish a town library for the use of the people thereof and when established to make all by-laws, rules and regulations necessary for the management thereof; to raise a sum not exceeding three hundred (\$300) dollars in any one year for the providing of books, furnishing a place to keep such library, and pay a librarian for his services; said sum to be expended on the direction of the board.

Eleventh. To instruct by vote the board to purchase grounds for a town cemetery; to limit the price to be paid therefor, to raise a tax for payment thereon and to establish rules for the care and management of the same.

Twelfth. To authorize the licensing of dogs.

Thirteenth. To make such by-laws and regulations as may be deemed conducive to the peace, good order and welfare of the town; to license, tax, regulate and control hawkers, peddlers, auctioneers, shows, theatricals, circuses,

lawful games, merry-go-rounds, ferris-wheels, or other amusement devices or places of amusement.

Fourteenth. To acquire land containing pits of gravel or quarries of stone needed by the town for road construction, proceeding in the same manner that land is condemned for road and other public purposes. [L. '11, p. 113, § 1; L. '13, p. 441, § 1.]

See notes to § 6292.

CHAPTER IV.

QUALIFICATIONS OF TOWN OFFICERS.

§ 9357. Overseers and Poundmasters to File Acceptance of Office.

Every person elected or appointed to the office of overseer of highways or poundmaster, before he enters on the duties of his office, and within two weeks after he is notified of his election or appointment, shall file in the office of the town clerk a notice signifying his acceptance of such office. A neglect to file such notice shall be deemed a refusal to serve. Every person elected or appointed to the office of overseer of highways, before he enters upon the duties of his office, and within two weeks after he is notified of his election or appointment, shall take and subscribe before the town clerk or justice of the peace an oath to support the constitution of the United States and of the state of Washington, and faithfully to discharge the duties of his office to the best of his ability. Such overseer of highways shall also execute and deliver to the supervisors of the town and their successors in office a bond, with one or more sureties, to be approved by the board of supervisors, in an amount determined by said board, conditioned for the faithful discharge of his duties. [L. '13, p. 443, § 2.]

§ 9358. Treasurer to Give Bond.

Every person appointed or elected to the office of treasurer, before he enters upon the duties of his office, shall execute and deliver to the supervisors of the town and their successors in office, a bond, with one or more sureties, to be approved by the board of supervisors, in double the probable amount of money to be in his hands at any one time, which amount shall be determined by said board, conditioned for the faithful execution of his duties as such treasurer. [L. '13, p. 444, § 3.]

§ 9362. Effect of Neglect to Give Bond.

If any person elected or appointed to the office of treasurer, constable or overseer of highways does not give such bond and take such oath as is required above, within the time limited for that purpose, such neglect shall be deemed a refusal to serve. [L. '13, p. 444, § 4.]

§ 9364. Officers not to be Interested in Contracts.

No town officer shall become a party to or interested, directly or indirectly, in any contract made by the board of which he may be a member: Provided, This shall not be construed to prohibit the employment of a team or teams belonging to a township officer when a required number of teams, owned in the township, are not otherwise obtainable, or the employment of a township officer as a day laborer. Every contract or payment voted for or made contrary to the provisions of this title is void and any violation of this

section hereafter committed shall be a malfeasance in office, which will subject the officer so offending to be removed from office. [L. '13, p. 444, § 5.]

CHAPTER V.

FILLING VACANCIES.

§ 9366. Vacancies—How Filled.

The board of county commissioners of any county may, for sufficient cause shown to them, accept the resignation of any town officer in any township in their county, and whenever they accept any such resignation, they shall forthwith appoint another elector of the town to the office, and shall give notice thereof in writing to the person so appointed and to the town clerk; or in the case of a vacancy in the office of town clerk or overseer of highways, to the chairman of the board of supervisors of the town. [L. '13, p. 444, § 6.]

CHAPTER VI.

DUTIES OF TOWN SUPERVISORS.

§ 9368. Powers and Duties of.

The supervisors shall have charge of such affairs of the town as are not by law committed to other town officers; and they shall have power to designate the justice of the peace, or other suitable person, as police judge in and for such township; and such police judge shall have the same powers and duties as are conferred by law upon the police judge in cities of the fourth class; and they shall have power to draw orders on the town treasurer for the disbursement of such sums as may be necessary for the purpose of defraying the incidental expenses of the town, and for all moneys raised by the town to be disbursed for any other purpose. They shall have charge of all highways and bridges in their respective townships, and the care and supervision thereof; and shall have power to divide their respective townships into road districts and to appoint one resident elector of each road district as overseer thereof for the first year of township organization; to establish new highways and bridges and to vacate or alter all highways and bridges wholly within the township in the same manner as now provided by law for the establishing of new highways and bridges and the vacation or alteration of the same by the county commissioners in the case of county roads and bridges, except that the duties therein provided to be performed by the county commissioners shall be performed by the township board of supervisors except that all notices therein provided shall be given by the county engineer and all meetings therein provided shall be held at his office in the county courthouse and all records and files maintained therein, and all expenses for the condemnation and procuring of right of ways therein provided shall be met and paid by the township treasurer on order of the board of township supervisors, and it shall be unlawful for any township funds to be expended upon any roads not established in accordance with said law: Provided, Nothing in this act contained shall be construed as prohibiting any county from or denying to any county the power to build, repair, alter and maintain, at the county's expense, such highways and bridges as the county generally is interested in or such as may be of so large cost that a single

township could not undertake the construction of, or such as are located in sparsely settled townships as are unable to construct the same. [L. '11, p. 113, § 1.]

This section does not affect the jurisdiction of the county over a county road wholly within the township sought to be established by the county commissioners,

under sections 5623 to 5656, the township not being forced to aid in its construction: *Strunz v. Spokane County*, 67 Wash. 235, 121 Pac. 75.

CHAPTER VII.

DUTIES OF TOWN CLERK.

§ 9373-1. Duty of Clerk as to Supplies.

It shall be the duty of each township clerk to report to the county auditor on or before the first day of March in each year the amount and the kind of printing supplies, blank books, etc., other than those furnished by the county assessor, needed by the township for the ensuing year. [L. '11, p. 117, § 2.]

§ 9373-2. Supplies Furnished by County.

The county auditor upon receiving the estimates of the various townships shall procure from the lowest bidder the supplies and turn said supplies over to the township ordering the same at actual cost. [L. '11, p. 117, § 3.]

CHAPTER IX.

DUTIES OF TOWN TREASURER.

§ 9392. Shall Draw Money from County Treasurer—Fees.

The town treasurer shall from time to time draw from the county treasurer such moneys as have been received by the county treasurer for the use of his town, and on receipt of such moneys shall deliver proper vouchers therefor. Each town treasurer shall be allowed and entitled to retain, as his official compensation one per centum of all moneys received by him from the county treasurer, and one per centum of all moneys paid out in the redemption of warrants: Provided, however, That the compensation of said treasurer shall in no case exceed the sum of one hundred dollars in any one year. [L. '13, p. 445, § 7.]

§ 9392-1. Township Depository.

Each township treasurer shall annually within thirty days after taking office, designate some bank of the state as a depository of all public funds held and acquired to be kept by him as such treasurer: Provided, That the bank designated by the township treasurer shall furnish, if required by the board of supervisors, to the township an indemnity bond equal in amount to the official bond of said treasurer, such designation shall be filed in writing as part of the minutes of the township board. [L. '13, p. 446, § 9.]

CHAPTER XI.

THE ASSESSMENT OF PROPERTY.

§ 9400. County Assessor to Furnish Assessors' Books and Blanks.

First. The county assessor shall annually provide the necessary assessment-books and blanks at the expense of the county, for and to correspond with each assessment district. He shall make out in the real property assessment-book complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and, if unknown, so stated opposite each tract or lot, the number of acres and the lots and parts of lots or block included in each description of property. The list of real property becoming subject to assessment and taxation every odd-numbered year may be appended to the personal property assessment-book. The assessment-books and blanks shall be delivered to the county assessor on or before the second Saturday of March in each year, and the town assessors shall meet on that day at the office of the county assessor for the purpose of receiving such books and blanks, and for conference with the said county assessor in reference to the performance of their duties and that all township assessors shall perform their duties under the supervision of the county assessor.

Second. The county assessor shall in making up his work for the county board of equalization, add thereto the assessment-rolls of the various townships and the same shall be equalized by the county board of equalization as between townships as other property in such counties is equalized. If it shall be necessary to raise the assessment of a township or townships, the county board of equalization shall serve written notice upon the chairman of the township board of supervisors of its intention so to do and shall also give general notice by publication to the residents of such township or townships at least five days previous to raising such assessment. [L. '11, p. 113, § 1.]

CHAPTER XII.

TOWN TAXES AND CHARGES.

§ 9403. Taxes—When to be Certified.

All taxes shall be levied or voted in specific amounts, and the rates per centum shall be determined from the amount of property, as equalized by the county board of equalization each year, except such general taxes as may be definitely fixed by law. The taxes voted by townships, and not previously returned to the county auditor, and all delinquent poll, road and other taxes to be collected by any town officer, and due and unpaid, shall be certified by the proper authorities to the county auditor on or before the first day of November in each year. There shall be levied annually on each dollar of taxable property in the state [township] (other than such as by law is otherwise taxed), as assessed and entered on the tax lists for the several purposes enumerated, taxes at the rates specified as follows: For township purposes, such sum as may be voted at any legal town meeting, the rate of which shall not exceed, exclusive of such sums as may be voted at the annual town meeting for road and bridge purposes, two mills in any township having a taxable valuation of one hundred thousand dollars or more, and the amount of which shall not exceed one hundred and fifty dollars in any township having a taxable valuation less than one hundred thousand dollars, and the

rate of such tax shall not exceed one-half of one per cent in any township. The rate of tax for road and bridge purposes in any township shall not exceed eight mills per dollar: Provided, That nothing in this section shall be construed to prevent the township supervisors or corporate authorities of any town from levying any tax which by any special law they may be authorized to levy. [L. '13, p. 445, § 8.]

§ 9406-1. County to Set Aside Certain Amounts.

Whenever any county of this state shall have adopted township organization it shall be the duty of the board of county commissioners of such county to set aside from the levy of the current year the following sums, which shall be paid to the township treasurer in the manner provided by law: To each township for current expenses, one hundred dollars; to each township for township roads and bridges, twenty-five per cent of the amount levied upon the property of said township for construction and repair of roads and bridges. [L. '13, p. 446, § 10.]

CHAPTER XIV.

POLL TAX—COLLECTION OF TOWN TAXES.

§ 9411.

An allegation that by reason of the closing of the polls before the time fixed by law many qualified voters were deprived of the right of voting is not sufficient to invalidate the election where it does not appear how long before the closing

hour the polls were closed, or that any voters coming to the polls before that time were prevented from voting: *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 576.

As to irregularity in opening or closing polls as one which will avoid the election, see note in 90 Am. St. Rep. 78.

CHAPTER XV.

FEES OF TOWN OFFICERS.

§ 9414. Poundmaster—Duties—Fees.

The poundmaster shall be allowed the following fees, to wit: For taking into pound and discharging therefrom any horse, ass or mule and all neat cattle, fifty cents each; and for every hog, large or small, sheep or lamb, goat or kid, twenty-five cents each; and fifty cents a day for keeping each head of horses, asses, mules or neat cattle twenty-four hours, and twenty cents for keeping each hog, sheep or goat, for each twenty-four hours. And the poundmaster has a lien on all such animals for the full amount of his legal charges and expenses, and shall be entitled to the possession of such animals until the same are paid; and if the same are not paid, and said animals removed, within four days after they are so impounded, the said poundmaster shall give notice by posting the same in three of the most public places in said town, or by personal notice in writing, if the owner is known, that said animals (describing them) are impounded and that, unless the same are taken away and fee paid within fifteen days after the date of such notice, he will sell the same at public vendue at the place where the town meetings of said town are usually held; and on the day designated in such notice the said poundmaster shall expose the said animals for sale, and sell the same to the highest bidder in cash, for which service he shall receive two per cent of the purchase money for each animal. Out of the money realized from said sale, the said poundmaster shall deduct all his legal fees and charges, and pay

the balance, if any, to the chairman of the town supervisors, at the same time giving to said supervisors an accurate description of the animals sold, and the amount received by him for each animal, and shall take a receipt and duplicate therefor, and file one of them with the town clerk: Provided, That the said supervisors shall, at any time within six months, upon sufficient proof from the owner of any animal so sold, pay to said owner the balance due as received from the said poundmaster; but if said money is not claimed within that time the sum so received shall be retained for the use of said town. [L. '11, p. 113, § 1.]

CHAPTER XXI.

MISCELLANEOUS PROVISIONS.

§ 9436-1. Obligations Against Road Districts Under Township Organization.

Whenever any county has heretofore, or shall hereafter, adopt and take upon itself township organization and government under the provisions of any law passed pursuant to the provisions of section 4, article 11 of the constitution of this state, authorizing such organization and government, and at the time of the adoption of such form of government there shall exist against any road district in such county, previously created and defined by the commissioners of such county, any obligations for debts incurred in the construction or repair of any roads or bridges in such road district, such change in the government of said county shall not in any way affect such existing obligations of any such road district; but all such obligations shall remain and constitute a valid charge upon and against all of the taxable property included within the territorial limits of such road district as it existed at the time of the adoption of such township organization for the full amount of all of said obligations. For the purposes of this act, the territory which comprised said road district shall thereafter comprise and constitute a road tax district of said county, and said road tax district shall be designated by a like number by which said road district was theretofore known. [L. '11, p. 47, § 1.]

§ 9436-2. Road District Tax to be Levied.

There shall be levied annually at the same time the levy for general county taxes is made, and by the officers levying the said county tax, a tax of not more than five mills on the dollar on all taxable property within the territorial limits of every such road district as the same existed at the time of the adoption of such township organization for the payment of and until the full amount of all indebtedness, together with all accrued and accruing interest thereon, existing against any such road district, shall have been paid in full. [L. '11, p. 48, § 2.]

§ 9436-3. Tax Collected as Other Taxes are.

The tax levied, as provided for in section 9436-2, shall be extended upon the tax-rolls of the county, and shall be collected by the county treasurer of said county at the same time and in the same manner as other taxes are collected, and said treasurer shall credit to the proper road tax district all sums collected from any such levy, and all sums so collected shall by the said treasurer be applied to the payment, in the order of their issue, of the outstanding warrants against the road district for the indebtedness of which said levy was made. [L. '11, p. 48, § 3.]

TITLE LXXX.

TRADEMARKS.

§ 9492.

The name of a corporation is not its trademark, as the latter refers to the thing sold, and a trade name embraces both the thing and the individuality of the seller: *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A., N. S., 251, 110 Pac. 23.

As to general principles in the use of trademarks, see note in 85 Am. St. Rep. 84.

A corporation which was first in the use of the name is not entitled to an injunction preventing the further use of the trade name by a copartnership, since protection to a trade name is only coextensive with the market, and there cannot be unfair trade competition unless there is competition: *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A., N. S., 251, 110 Pac. 23.

A corporation organized in this state under the name of "Eastern Outfitting Company," for the purpose of selling cloaks, suits and men's clothing, has no exclusive right to the use of the name throughout the state for that purpose; and where its business had been confined to a retail and mail order business in the vicinity of Seattle, it will be enjoined from opening a branch house under the same name in Spokane, for the purpose of defrauding the public and a copartnership that had for several years been doing the same kind of business under the same name in the city of Spokane, where there had been no confusion theretofore owing to the fact that neither had invaded the territory of the other: *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L. R. A., N. S., 251, 110 Pac. 23.

As to right of corporation organized for purposes other than pecuniary profit to use name similar to that of other corporation, see note in Ann. Cas. 1912A, 825.

Although there may be no exclusive right to use a proprietary trademark, nor any breach of contract as to goodwill, yet an injunction will be granted to restrain unfair competition by the fraudulent use of a trade name, and the complaint states a cause of action, where it appears that a corporation had acquired from a partnership in the restaurant business the right to use the individual name of one of the partners, who had previously built up an enviable reputation and trade at a certain location in the city of S., with the right to conduct the business under such individual name, that such partner after-

ward sold out his stock to his former partner, and soon after organized a new corporation and opened up and began conducting another restaurant and cafe in the same city within a block of the old location, with the same individual name printed in large letters on the front door in such a manner as to make the public believe that the old restaurant had moved to the new location, advertising the same in the daily papers and moving picture shows in the same misleading manner, to the plaintiff's damage: *Wright Restaurant Co. v. Seattle Restaurant Co.*, 67 Wash. 690, 122 Pac. 348.

§ 9494.

Under the law making the secretary of state's attested certificate of the recording of a trademark proof of its adoption, and prescribing no form for the certificate, the secretary of state's certified copy of the application and label is sufficient prima facie proof of all acts necessary for registration, including the filing of two copies of the label required by law: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

An application for registration of trademarks to consist of the words "Typographical Union Label" or "Allied Printing Trades Council," fac-simile of each being attached, is not void as being in the alternative, but is rather an application for the registration of two labels, the law not prohibiting the registration of more than one label on one application: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

The law does not require application for the registration of a trademark to be made by any particular person, and it is sufficient that one application for two labor union labels, having some interests in common, was made by the president of one of the unions in the interest and for the use of the unions: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

§ 9497.

A complaint for the infringement of a trademark label is sufficient when the charging part is in the words of this section, and the label is identified as that of the Allied Printing Trades Council, adopted, used, and filed as required by law: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

The title "An act relating to trademarks" is sufficient to embrace penal provisions for violations of the act: *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

TITLE LXXXI.

WATER AND WATER POWER COMPANIES.

CHAPTER I.

POWERS AND RIGHTS OF APPROPRIATION.

§ 9510.

Under this section, providing that corporations organized for the purpose of erecting and maintaining flumes or aqueducts to convey water for irrigation shall have the same right to appropriate lands for necessary corporate purposes as other corporations and to take any water not otherwise legally appropriated, an irrigation company may condemn land for a reservoir site, that being a "necessary corporate purpose" within the

act, where it is necessary to store water in order to accomplish irrigation: State ex rel. Golden Valley Irr. Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19.

The title, "An act to amend an act approved November 13, 1873, entitled an act to provide for the formation of corporations," is sufficient and broad enough to include a provision conferring the right of eminent domain on corporations organized for certain purposes: State ex rel. Golden Valley Irr. Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19.

CHAPTER II.

WATER AND POWER DISTRICTS.

§ 9510-1. Water Districts Authorized.

Water districts for the acquirement, construction, maintenance, operation, development and regulation of a water supply system within such districts are hereby authorized to be established in the various counties of this state, as in this act provided. [L. '13, p. 533, § 1.]

§ 9510-2. Formation of District.

At any general election or any special election which may be called for that purpose the board of county commissioners of any county in this state shall on petition of at least twenty-five per cent of the qualified electors residing within the district described in said petition, submit to the voters residing within said district, the proposition of creating a water district which shall be coextensive with the territory described in the petition and the board of county commissioners shall submit such proposition at a special election to be called therefor when such petition so requests. [L. '13, p. 533, § 2.]

§ 9510-3. Petition.

The petition presented to the board of county commissioners shall set forth the territorial extent of the proposed district, particularly describing the same and shall be filed with the county auditor who shall within fifteen days examine the signatures thereto and certify to the sufficiency or insufficiency thereof, and for such purpose the county auditor shall have access to all registration books in the possession of officers of any incorporated city or town in such proposed water district. If such petition be found to be insufficient it shall be returned to the person or persons filing the same who may amend or add names thereto for ten days when the same shall be returned to the county auditor who shall have an additional fifteen days to examine the same and attach his certificate thereto. No person having signed such petition

shall be allowed to withdraw his name therefrom after the filing of the same with the county auditor. Whenever such petition shall be certified to as sufficient, the county auditor shall forthwith transmit the same, together with his certificate of sufficiency attached thereto, to the board of county commissioners who shall, at their first meeting thereafter if such petition so requests, by resolution, call a special election to be held not less than thirty nor more than sixty days from the date of such certificate and shall cause to be published a notice of such election at least once a week for four consecutive weeks in a newspaper of general circulation in the county in which said proposed water district is located, which notice shall state the hours during which such polls will be open, the boundaries of the proposed water district and the object of such election, and said notice shall also be posted for ten days in ten public places in such proposed water district. The same notice shall be given in the event of such proposition being submitted at a general election: Provided, In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot in the following terms: “—— Water Supply District. Yes.” (Giving the name to such district as may be decided on by the board of county commissioners.) “—— Water Supply District. No.” (Giving the name to such district as may be decided on by the board of county commissioners.) There shall be not less than one polling-place in each of the various wards of any incorporated city or town in the proposed water districts, and one polling place in each precinct in such proposed water district. [L. '13, p. 533, § 3.]

§ 9510-4. Two or More Petitions.

Whenever two or more petitions for the formation of a water district shall be filed as herein provided the petition describing the greater area shall supersede all others and an election shall first be held thereunder, and no lesser water district shall ever be created within the limits, in whole or in part of any water district. [L. '13, p. 534, § 4.]

§ 9510-5. Elections.

If at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such district the board of county commissioners shall so declare in its canvass of the returns of such elections and such water district shall then be and become a municipal corporation of the state of Washington, and the name of such water district shall be “—— Water District” (inserting the name appearing on the ballot). [L. '13, p. 535, § 5.]

§ 9510-6. Commissioners—Election of.

At the same election, at which the proposition is submitted to the voters as to whether a water district shall be formed, three water commissioners shall be elected to hold office respectively for the terms, one, two, and three years and until their respective successors are elected, the term of each nominee for water commissioner to be expressed on the ballot. And thereafter and at least thirty days prior to the first Tuesday of June in each year such board of water commissioners shall give notice by publication at least once a week for four consecutive weeks in a newspaper of general circulation in said

water district that an election will be held on the first Tuesday in June thereafter for a water commissioner to hold office for three years and until his successor is elected and qualified.

Nominations for water commissioners shall be by petition of at least ten per cent of the qualified electors of such water district to be filed in the office of the county auditor of the county in which such district is located for the first election and with the secretary of such water district for all succeeding elections such nominations to be so filed at least ten days prior to such election: Provided, however, That there shall be no election held on the first Tuesday of June immediately following the creation of such water district: And provided, further, That in the event of a vacancy caused by death, resignation or otherwise, such vacancy shall be filled by appointment by a majority vote of the remaining board of water commissioners until the next regular election for water commissioner. Said board of water commissioners shall designate in their notice of election whether such election be a general or special election, the time of opening and closing of polls, and the place of voting, but in no event shall there be less than one voting place in each of the wards of any city or town in such district, and at least one voting place in any precinct in the water district outside of any town or city. The polls shall be open at every election held by said water district at least from 1 o'clock P. M. to 8 P. M., but said board of water commissioners may keep the polls open for a longer period of time if they shall so order, but the time of opening and closing the polls must be stated in the notice of election and the polls shall be opened and closed in accordance with such notice. Any person residing in said water district who is at the time of holding of any election, a qualified voter under the laws of the state of Washington, shall be entitled to vote at any election held in such water district.

The officers of any city or town, or in any precinct in a water district where registration is required, having charge of the registration, shall deliver the same to the water commissioners for the use of the election officers at any election held in a water district formed under and in accordance with the provisions of this act. And the registration of voters for election to be held in such water district shall be conducted by the city or town clerks and officer of registration of the city, town and territory embraced within said water district; and the notice prescribed to be given by section 4765 of Remington and Ballinger's Annotated Codes and Statutes of Washington, shall constitute sufficient notice to citizens residing in within said water district for registration for any general or special election therein, without the necessity for such notice specially stating that it is for registration for an election to be held in a water district. And any elector who shall have registered in accordance with the laws of this state, entitling him to vote at a general or special election in the city, town or territory comprised within such water district, within time to constitute same a good registration for any general or special election of said water district, shall be entitled to vote thereat without further or other registration. The clerk of such water district shall give notice of the closing of the poll-books for registration for any general or special election of such water district by a notice published at least ten days preceding such closing, such published notice to have at least two insertions in a newspaper of general circulation in such water district. And such poll-

books shall be closed for the purpose of registration of voters for any general or special water district election five days preceding such election and such published notice shall so declare: Provided, however, That such poll-books shall not thereby be deemed closed for a general, county or city municipal elections, but closed only for general or special water district elections. The city or town clerk or registration officer required to perform the duties enumerated under this act shall receive no additional compensation therefor. The general laws of the state of Washington governing the registration of voters for a general or a special city or town municipal elections, when not inconsistent with the foregoing provision, shall govern the registration of voters for elections held under this chapter, and the registration books of the city, town and territory comprising said water district shall be the books used by said water district, and no separate registration books shall be kept or maintained by it. The manner of holding any general or special election for said water district shall be in accordance with the laws of this state and the charter provisions of the cities or towns within said water district if any there be, in so far as the same are not inconsistent with the provisions of this act. All expense of elections for the formation of such water districts shall be paid by the county in which said election is held and such expenditure is hereby declared to be for a county purpose, and the money paid out for such purpose shall be repaid to such county by the water district if formed. [L. '13, p. 535, § 6.]

§ 9510-7. Board of Water Commissioners—Officers.

When the said water district shall be created as hereinbefore provided for, the officers of such district shall be a board of water commissioners consisting of three members elected as provided in section 9510-6 and said board of water commissioners shall annually elect one of their number as president and another of their number as secretary of said board. All water commissioners shall serve without compensation. They shall by resolution adopt rules governing the transaction of its business and shall adopt an official seal. All proceedings shall be by resolution recorded in a book or books kept for such purpose which shall be public records. [L. '13, p. 538, § 7.]

§ 9510-8. Board of Water Commissioners—Powers and Duties.

All water districts organized under the provisions of this act shall be and are hereby authorized to acquire by purchase or condemnation, or both, all lands, property, property rights, water, water rights, leases or easements necessary for the purposes of the water district and to exercise the right of eminent domain in the acquirement or damaging of all land, property, property rights, water or water rights, leases and easements necessary in carrying out the purposes for which said district shall have been created and such right of eminent domain shall be exercised in the same manner and by the same procedure as is or may be provided by law for cities of the third class, except in so far as such law may be inconsistent with the provisions of this act, and except that all assessment or reassessment rolls provided by law to be prepared and filed by eminent domain commissioners or commissioners appointed by the court shall be prepared and filed by the water district, and the duties devolving upon the city treasurer under said law be, and the same are hereby imposed upon the county treasurer for the purposes of this act; to construct,

condemn and purchase, purchase, acquire, add to, maintain and supply water-works for the purpose of furnishing such water district and inhabitants thereof, and any city or town within such district, and any other persons with an ample supply of water for all uses and purposes public and private, except irrigation, with full authority to regulate and control the use, distribution and price thereof. And for the purposes aforesaid, it shall be lawful for any water district so organized in this state to take, condemn and purchase, purchase, acquire and retain water from any public or navigable lake, river or watercourse, percolating or subterranean or any underlying water within the state and, by means of aqueducts or pipe-line to conduct the same throughout such water district, and throughout any city or town within such district and to construct and lay the same along and upon public highways, roads and streets, within such district, and to condemn and purchase, purchase or acquire, lands and rights of way necessary for said aqueducts, and pipe-lines, and such water district is hereby authorized and empowered to erect and build dams or other works across or at the outlet of any lake, river or other watercourse therein up to and above high-water mark; and for all the purpose of constructing or laying such aqueducts or pipe-lines, dams or waterworks or other necessary structures in storing and retaining waters as above provided, or for any of the purposes provided for by this chapter, such water districts shall have the right to occupy the beds and shores up to the high-water mark of any such lake, river, or other watercourse, and to acquire the right by purchase or by condemnation and purchase or otherwise to any water, water rights, easements or privileges named in this chapter or necessary for any of said purpose and any such water district, shall have the right to acquire by purchase or condemnation and purchase any lands, properties or privileges necessary to be had to protect the water supply of such water district from pollution: Provided, That should private property be necessary for any such purposes or for storing water above high-water mark, such water district may condemn and purchase or purchase and acquire such private property. [L. '13, p. 538, § 8.]

§ 9510-9. Local Improvement Districts.

Said water district shall have the power to establish local improvement districts within its territory; to levy special assessments under the mode of annual installments extending over a period not exceeding twenty years on all property specially benefited by any local improvement on the basis of special benefits to pay in whole or in part the damages or costs of any improvements ordered in such water district; to issue local improvement bonds in any such improvement district to be repaid by the collection of local improvement assessments: Provided, That the levying and collection of all public assessments and issuance of bonds hereby authorized shall be in the manner now and hereafter provided by law for the levying and collection of local improvement assessments and the issuance of local improvement bonds by cities of the third class in so far as the same shall not be inconsistent with the provisions of this act: Provided, however, That the duties devolving upon the city treasurer under said laws be and the same hereby are imposed upon the county treasurer for the purposes of this act, the mode of assessment shall be in the manner to be determined by the tax commissioner by resolution. [L. '13, p. 540, § 9.]

§ 9510-10. Adoption of Plan—Submission—Election—Notice.

It shall be the duty of the water district commissioners of every water district before creating any improvements hereunder or submitting to vote any plan for incurring any indebtedness, to consider and determine upon and adopt a comprehensive scheme or plan of water supply for such district for the purposes authorized in this act, and for such purpose, the water district commissioners shall investigate the several portions and sections of such water district for the purpose of determining the present and future needs of such district in regard to a water supply; to examine and investigate, determine and select a water supply or water supplies for such district suitable and adequate for present and future needs thereof; to consider and determine a general system or plan for acquiring such water supply or water supplies, and the lands, waters and water rights and easements necessary therefor, and for retaining and storing any such waters, erecting dams, reservoirs, aqueducts and pipe-lines to convey the same throughout such district; for determining the plan or system for distributing such water throughout such district by means of subsidiary aqueducts and pipe-lines, and the method of distributing the cost and expense thereof against such water district and against local improvement districts within such water district for any purpose authorized in this act, and including any such local improvement district lying wholly or partially within the limits of any city or town in such district.

Such general comprehensive scheme and plan, when finally considered or determined upon by such board of water commissioners, shall be by them adopted by resolution, which resolution shall provide for the submission thereof at a general or special election specified in such resolution to the qualified voters within such district for their ratification or rejection. No expenditure for the carrying on of any part of such plan shall be made by the water district commissioners other than the necessary salaries of engineers, clerical and office expenses of such water district, and the cost of engineering, surveying, preparation and collection of data necessary for the making and adoption of a general scheme of improvements in such water district unless and until such general scheme of improvements has been so officially adopted by the water district commissioners and ratified by the affirmative vote of a majority of the voters of such water district voting thereon at the election which shall be held for such purpose. Twenty days' notice of such election shall be published in one or more weekly newspapers of general circulation in such water district. If at such election a majority of the votes cast upon such question shall be in favor of the adoption thereof, the same shall thereupon be ratified and adopted and proclamation thereof made by such commission within ten days after such election. Such commission may submit at the same election at which the proposition to adopt the comprehensive plan or scheme is submitted, or at any general or special election a proposition that said water district incur a general indebtedness for the construction of any part or all of said comprehensive plan. Provided, however, That such proposition to incur indebtedness shall be so submitted as to enable the voters to vote for or against the same independent of any vote on the proposition of adopting or rejecting such comprehensive plan or scheme. If such general indebtedness is to be incurred, the amount of such indebtedness and the terms thereof shall be included in the proposition submitted to the qualified voters as afore-

said and such proposition shall be adopted and assented to by three-fifths of the qualified voters of the said water district voting at said election.

Whenever a proposition has been adopted as aforesaid, the water district commissioners shall have power to proceed forthwith to carry out said general scheme or plan to the extent specified in the proposition to incur such general indebtedness. [L. '13, p. 540, § 10.]

§ 9510-11. Issuance of Bonds.

Whenever the qualified voters of any such water district shall have heretofore adopted or shall hereafter adopt a proposition for a water supply, as set out in the preceding section, and shall have authorized a general indebtedness for all of said proposition or any part thereof, general water district bonds may be issued as hereinafter provided. Said bonds shall be registered or coupon bonds; shall be issued in denominations of not less than one hundred or more [than] one thousand dollars; shall be numbered from one up consecutively; shall bear the date of their issue; shall be payable not more than forty years from date; and shall bear interest not to exceed six per cent per annum, payable semi-annually, with interest coupons attached; and the principal and interest shall be made payable at such place as may be designated. The bonds and each coupon shall be signed by the presiding officer of the board of water district commissioners and shall be attested by the secretary of the said board under the seal of the water district. There shall be levied each year a tax upon the taxable property within such water district, sufficient to pay the interest on said bonds as the same accrues: Provided, however, That no levy shall be made for such purposes, if the revenues from the sale of water or power is sufficient to pay said interest; before ten years prior to the maturity of said bonds an annual sinking fund sufficient for the payment of said bonds at maturity may be established by the levy of a tax; all taxes shall become due and collectable as other taxes. Said bonds shall be printed and engraved or lithographed on good bond paper and a duly authenticated copy of this act, and a copy of the resolution of the water district commission directing the submission of such plan or system to the qualified voters of such water district for ratification or rejection shall be printed on each bond, together with a printed copy of a signed statement by the presiding officer of the board of water commissioners and the secretary of such board, showing the result of said election. Such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the water district. A register shall be kept of all bonds which register shall show the number, date, amount, interest, to whom delivered—if coupon bonds—and the name of the payee—if registered bonds; and when and where payable and each and every bond executed, issued or sold under the provisions of this subdivision. [L. '13, p. 542, § 11.]

§ 9510-12. Improvements on Local Assessment Plan.

Whenever a petition signed by a majority of the owners of land in the district to be therein described shall be filed with the water district commission, asking that any portion of the general plan adopted be ordered, and defining the boundaries of a local improvement district to be created to pay in whole or in part to pay the cost thereof, it shall be the duty of the water

district commission to fix a date for hearing on such petition after which it may alter the boundaries of such proposed district and prepare and adopt detailed plans of any such local improvement, declare the estimated cost thereof, what proportion of such cost shall be borne by such proposed local improvement district and what proportion of the cost, if any, shall be borne by the entire water district: Provided, however, That engineering and office expenses in all cases shall be borne by the general water district.

The water district commission shall forthwith by resolution order such improvement, provide the general funds of the water district to be applied thereto, acquire all necessary lands therefor, pay all damages caused thereby and commence in the name of the water district such eminent domain proceedings and supplemental assessment or reassessment proceedings to pay all eminent domain awards as may be necessary to entitle said water district to proceed with such work, and said water district commission shall thereafter proceed with such work and shall make and file with the county treasurer, its roll levying special assessments in the amount to be paid by special assessment against the property situated within such local improvement district in proportion to the special benefits to be derived by the property in such local improvement district from such improvement. Before the approval of such roll a notice shall be published once a week for four consecutive weeks in a newspaper of general circulation in such local improvement district, stating that such roll is on file and open to inspection in the office of the clerk of the water district commission, and fixing the time not less than fifteen nor more than thirty days from the date of the first publication of such notice within which protests must be filed with the secretary of said water district commission against any assessments shown thereon and fixing a time when a hearing shall be held by said commission on said protests. After such hearing the water district commission may alter any and all assessments shown on such roll and may then by resolution approve the same, but in the event of any assessment being raised a new notice similar to such first notice shall be given, after which final approval of such roll may be made by the water district commission: Provided, That whenever any property shall have been entered originally upon such roll and the assessment upon any such property shall not be raised, no objection thereto shall be considered by the water district commission or by any court on appeal unless such objection be made in writing at, or prior to the date fixed for the original hearing upon such roll. [L. '13, p. 543, § 12.]

§ 9510-13. Method of Appeal.

The decision of the water district commission upon any objections made within the time and in the manner herein prescribed, may be reviewed by the superior court upon an appeal thereto taken in the following manner. Such appeal shall be made by filing written notice of appeal with the secretary of said water district commission and with the clerk of the superior court in the county in which such water district is situated within ten days after the resolution confirming such assessment-roll shall have become published, and such notice shall describe the property and set forth the objections of such appellant to such assessment; and within ten days from the filing of such notice of appeal with the clerk of the superior court, the appellant shall file

with the clerk of said court, a transcript consisting of the assessment-roll and his objections thereto, together with the resolution confirming such assessment-roll, and the record of the water district commission with reference to said assessment, which transcript, upon payment of the necessary fees therefor, shall be furnished by such secretary of said water district commission and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript. Such fees shall be the same as the fees payable to the county clerk for the preparation and certification of transcripts on appeal to the supreme court in civil actions. At the time of the filing of the notice of appeal with the clerk of the superior court a sufficient bond in the penal sum of two hundred dollars, with at least two sureties, to be approved by the judge of said court, conditioned to prosecute such appeal without delay, and if unsuccessful, to pay all costs to which the water district is put by reason of such appeal. The court may order the appellant upon application therefor, to execute and file such additional bond or bonds as the necessity of the case may require. Within three (3) days after such transcript is filed in the superior court, as aforesaid, the appellant shall give written notice to the head of the legal department of such water district, and to the city clerk, that such transcript is filed. Said notice shall state a time (not less than three (3) days from the service thereof) when the appellant will call up the said cause for hearing; and the superior court shall, at said time or at such further time as may be fixed by order of the court, hear and determine such appeal without a jury; and such cause shall have preference over all civil causes pending in said court, except proceedings under an act relating to eminent domain in such water district and actions of forcible entry and detainer. The judgment of the court shall confirm, correct, modify or annul the assessment in so far as the same affects the property of the appellant. A certified copy of the decision of the court shall be filed with the officer who shall have custody of the assessment-roll, and he shall modify and correct such assessment-roll in accordance with such decision. An appeal shall lie to the supreme court from the judgment of the superior court, as in other cases: Provided, however, That such appeal must be taken within fifteen (15) days after the date of the entry of the judgment of such superior court; and the record and opening brief of the appellant in said cause shall be filed in the supreme court within sixty (60) days after the appeal shall have been taken by notice as provided in this act. The time for filing such record and serving and filing of briefs in this section prescribed may be extended by order of the superior court, or by stipulation of the parties concerned. And the supreme court, on such appeal may correct, change, modify, confirm or annul the assessment in so far as the same affects the property of the appellant. A certified copy of the order of the supreme court upon such appeal shall be filed with the officer having custody of such assessment-roll, who shall thereupon modify and correct such assessment-roll in accordance with such decision. [L. '13, p. 545, § 13.]

§ 9510-14. Proceedings Conclusive.

Whenever any assessment-roll for local improvements shall have been confirmed by the water district commission of such water district as herein provided, the regularity, validity and correctness of the proceedings relating

to such improvement, and to the assessment therefor, including the action of the water district commission upon such assessment-roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the water district commission in confirming such assessment-roll in the manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor: Provided, That this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds (1) that the property about to be sold does not appear upon the assessment-roll, or (2) that said assessment had been paid. [L. '13, p. 547, § 14.]

§ 9510-15. Annexation of Territory—Petition for Election for.

The territory adjoining and in the same county with any water district organized under this chapter may be annexed to and become a part of such water district in the manner following: Any twenty-five (25) legal voters, residents within the territory proposed to be annexed, may petition the said water district commission of such water district to cause the question to be submitted to the legal voters of the territory proposed to be annexed whether they will be annexed and become a part of such adjoining water district: Provided, however, That where such territory to be annexed shall be within the limits of an incorporated city or town other than the first class, such petition shall be signed by at least twenty (20) per cent of the qualified electors residing within such territory. The petition shall define the limits of the territory proposed to be annexed to such water district. Upon the filing of such petition with the board of water commissioners, if said commissioners shall concur in said petition, they shall provide for a hearing to be held for the discussion of such proposed annexation at the office of said board of water commissioners, and shall give due notice of such hearing by publication in a weekly newspaper published in said water district for at least two weeks prior to said hearing. If said water commissioners shall concur in said petition, it shall be their duty to submit the proposal to the electors of such territory proposed to be annexed, at an election to be held in such territory. The said commissioners shall, by order of such board duly adopted, fix a time and place or places within the limits of the territory proposed to be annexed for the holding of such election to determine the question of annexation, and said commissioners shall name the persons to act as judges at such election, and shall give notice thereof by causing notice to be published for two weeks in two consecutive issues of a weekly newspaper published in said water district, and by posting notices in five (5) public places within the territory proposed to be annexed to said district. The ballot to be used at such election shall be in the following form:

“For annexation to water district.”

“Against annexation to water district.”

The judge or judges at such election shall make return thereof to the board of water commissioners, who shall canvass such return and cause a statement of the result of such election to be entered on the record of such commissioners. If the majority of the votes cast upon the question at such election shall be for annexation, then such territory shall immediately be and become annexed to such water district, and the same shall thenceforth be a part of said water district, the same as though originally included in such district. [L. '13, p. 547, § 15.]

§ 9510-16. Election—Officers—Expenses.

All election officers for any election held pursuant to this chapter shall be named by the board of water commissioners and the expense of all such elections shall be paid out of the funds of such water district. [L. '13, p. 549, § 16.]

§ 9510-17. Tax Levy—Limit of—Collection.

The board of water commissioners are hereby authorized to levy, or cause to be levied, to carry out the purposes of this act in addition to that mentioned in section 9510-11, a general tax on all property located in said water district each year not to exceed two mills on the assessed valuation of the property in such water district. Said taxes when so levied shall be certified to the proper county official for the collection of the same as other general taxes. When such money is collected it shall be placed in a separate fund to be known as the — Water District Fund and paid out on warrants issued on the board of water commissioners for the purposes specified in this act. [L. '13, p. 549, § 17.]

§ 9510-18. Limit of Indebtedness.

Each and every water district that may hereafter be organized pursuant to this act is hereby authorized and empowered by and through its board of water commissioners to contract indebtedness for water purposes, and the maintenance thereof not exceeding one per cent of the taxable property in such water district to be ascertained by the last assessment for state and county purposes previous to and the incurring of such indebtedness. [L. '13, p. 549, § 18.]

§ 9510-19. Additional Indebtedness—Election to Authorize.

Each and every water district hereafter to be organized pursuant to this act, may contract indebtedness in excess of the amount named in the preceding section, but not exceeding in amount, together with existing indebtedness, five (5) per centum of the taxable property in said district, to be ascertained as provided in the preceding section, whenever three-fifths ($\frac{3}{5}$) of the voters voting at said election in such water district assent thereto, at an election to be held in said water district in the manner provided by this act, which election may either be a special or a general election, and the board of water commissioners are hereby authorized and empowered to submit the question of incurring such indebtedness, and issuing negotiable bonds of such water district to the qualified voters of such water district at any time they may so order: Provided, That all bonds so to be issued shall be subject to the provisions regarding bonds as set out in section 9510-11. [L. '13, p. 549, § 19.]

§ 9510-20. Contracts.

The board of water commissioners shall have authority to create and fill such positions and fix salaries and bonds thereof as it may by resolution provide. All materials purchased and work ordered, the estimated cost of which is in excess of one thousand dollars shall be let by contract [; but] before awarding any such contract the board of water commissioners shall cause to be published in some newspaper published within the district a notice for at least ten days before the letting of such contract, inviting sealed proposals for such work, plans and specifications which must at the time of publication of such notice be on file in the office of the board of water commissioners subject to public inspection. Such notice shall state generally the work to be done and shall call for proposals for doing the same to be sealed and filed with the board of water commissioners on or before the day and hour named therein. Each bid shall be accompanied by a certified check payable to the order of the board of water commissioners for a sum not less than five per cent of the amount of the bid and no bid shall be considered unless accompanied by such check. At the time and place named such bids shall be publicly opened and read and the board of water commissioners shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications on file or to the best bidder submitting his own plans and specifications: Provided, however, That no contract shall be let in excess of the cost of said materials or work, or if in the opinion of the board of water commissioners all bids are unsatisfactory they may reject all of them and readvertise and in such case all checks shall be returned to the bidders; but if such contract be let, then and in such case all checks shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract shall be entered into for the purchase of such materials or doing such work, and a bond to perform such work furnished with sureties satisfactory to the board of water commissioners in the full amount of the contract price between the bidder and the commission in accordance with the bid. If said bidder fails to enter into said contract in accordance with said bid and furnish such bond within ten days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the water district. [L. '13, p. 550, § 20.]

§ 9510-21. Interest Coupon—Payment of.

The coupons hereinbefore mentioned for the payment of interest on said bonds shall be considered in all purposes as warrants drawn upon the general fund of the said water district issuing such bonds, and when presented to the treasurer of the county having custody of the funds of such water district at maturity, or thereafter, and when so presented, if there are not funds in the treasury to pay the said coupons, it shall be the duty of the county treasurer to indorse said coupons as presented for payment, in the same manner as county warrants are indorsed, and thereafter said coupons shall bear interest at the same rate as the bond to which it was attached. [L. '13, p. 551, § 21.]

§ 9510-22. County Treasurer—Funds.

The county treasurer shall create a fund to be known as the “—— Water District Fund,” into which shall be paid all money received by him from the

collection of taxes in behalf of such water district, and no money shall be disbursed therefrom except upon warrants of the county auditor as in this act provided. The county treasurer shall also maintain such other special funds as may be prescribed by the water district, into which shall be placed such moneys as the board of water commissioners may by its resolution direct, and from which disbursements shall be made upon proper warrants of the county auditor issued against the same by authority of the board of water commissioners. [L. '13, p. 551, § 22.]

§ 9510-23. Cumulative.

This act shall not be construed to repeal, amend, or modify any law heretofore enacted providing a method for water supply for any city or town in this state, but shall be held to be an additional and concurrent method providing for such purpose. [L. '13, p. 552, § 23.]

TITLE LXXXII.

WEIGHTS AND MEASURES.

§§ 9511-9523.

Repealed. See L. '13, p. 155, § 11.

§ 9511-1. National and State Standards.

The weights and measures, received from the United States under a resolution of Congress approved June 14, 1836, and such new weights and measures as shall be received from the United States as standard weights and measures in addition thereto or renewal thereof, and such as shall be supplied by the state in conformity therewith and certified by the National Bureau of Standards, shall be the state standards, by which all county and municipal standards of weights and measures shall be tried, approved and sealed.

All weights, measures, scales, scale beams, patent balances, steelyards, automatic or computing scales, or other instruments for weighing or measuring, by which any merchandise, commodity, or thing is bought or sold by weight or measure, or offered or exposed for sale, shall conform to the state standards herein prescribed.

Any weight, measure, scale, scale-beam, patent balance, steelyard, automatic or computing scale or other instrument or device for weighing or measuring which does not conform to such state standards is hereby declared to be a false weight or measure. [L. '13, p. 144, § 1.]

§ 9511-2. Department of Weights and Measures—Officers and Duties.

There is hereby created a department of weights and measures in and for the state of Washington. The secretary of state shall be ex-officio superintendent of weights and measures and the head of the department herein created. He shall appoint a deputy superintendent of weights and measures and one inspector whose terms of office shall expire with that of the superintendent. The deputy shall receive a salary of twenty-four hundred dollars per annum, and the inspector shall receive a salary of fifteen hundred dollars per annum. There shall be allowed for maintenance of the department of weights and measures such sums as shall be appropriated by the legislature.

The superintendent shall take charge of the state standards, cause them to be kept in a safe and suitable place in the office of the superintendent, from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safekeeping. He shall maintain the state standards in good order and shall submit them at least once in ten years to the National Bureau of Standards for certification. He shall at least once in five years try and prove by the state standards all weights, measures and other apparatus which may belong to any county or city, and shall seal such when found to be accurate, by stamping on them with seals which he shall have and keep for that purpose, the letter "W" and the last two figures of the year in which the same are sealed. He shall have and keep a general supervision of the weights, measures and weighing and measuring devices offered for sale, sold or in use in the state. He shall, upon the written request of any citizen, firm, corporation or educational institution

in the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in this state. He, or his deputy, or his inspectors, by his direction, shall, at least once annually, test all scales, weights and measures used in checking the receipts or disbursements of supplies in every institution for the maintenance of which moneys are appropriated by the legislature, and he shall report in writing his findings to the supervising board and to the executive officer of the institution concerned, and at the request of such board or executive officer, the superintendent of weights and measures shall appoint in writing one or more employees, then in the actual service of each institution, who shall act as special deputies for the purpose of checking the receipts or disbursements of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for same from his successor in office. He shall annually, on the first day of October make to the governor a report of the work done by his office. The state superintendent, or his deputy, or inspectors, at his direction, shall inspect all standards and apparatus used by the counties and cities at least once in two years, and shall keep a record of the same. He or his deputy or inspectors, at his direction, shall at least once in two years visit the various cities and counties in the state, in order to inspect the work of the local sealers, and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any citizen, firm or corporation, and shall have the same powers as the local sealer of weights and measures. The superintendent shall issue from time to time, regulations for the guidance of county and city sealers, and the said regulations shall govern the procedure to be followed by the aforesaid officers in the discharge of their duties. The state superintendent of weights and measures shall forthwith, on his appointment, give a bond in the penal sum of five thousand dollars with sureties to be approved by the governor for the faithful performance of the duties of his office, and for the safety of the standards intrusted to his care, and for the surrender thereof immediately to his successor in office or to the person appointed by the governor to receive them. [L. '13, p. 145, § 2.]

§ 9511-3. County and City Standards.

The board of county commissioners of each county and the common council of each city required to appoint a sealer under this act, shall procure at the expense of the county or city, and shall keep at all times a complete set of weights and measures and other apparatus of such materials and construction as the said superintendent of weights and measures may direct. All such weights, measures and other apparatus having been tried and accurately proven by him, shall be sealed and certified to by the state superintendent as hereinbefore provided; and shall be then deposited with and preserved by the county or city sealer as public standards for such county or city.

Whenever the board of county commissioners of a county or the common council of such city shall neglect for six months so to do, the county auditor of the county, or the city clerk or comptroller of said city, on notification and request by the superintendent of weights and measures, shall provide such standards and cause the same to be tried, proved, sealed and deposited at the expense of the county or city. [L. '13, p. 147, § 3.]

§ 9511-4. Auditor Ex-officio Sealer—Duties—Powers.

The county auditor of each county shall be ex-officio sealer of weights and measures in such county and shall, for the purpose of carrying out the provisions of this act, appoint a deputy sealer of weights and measures who shall possess the same powers and perform the same duties as to the county auditor in respect to this act. Such deputy shall be paid a reasonable salary, and no fee shall be charged by the inspector or by the county for the inspection or testing of weights, measures, or weighing or measuring device. Where not otherwise provided by law, the county sealer shall have the power, within his county, to inspect, test, try and ascertain if they are correct all weights, scales, beams, measures of every kind, instruments or mechanical device for measurements and tools, appliances or accessories connected with any or all such instruments or measures kept for the purpose of sale, sold or used or employed within the county by any proprietor, agent, lessee or employee in proving the size, quantity or extent, area or measurement of quantities, things, produce, articles for distribution or consumption offered or submitted by such person or persons for sale, for hire or award; and he shall have the power to and shall from time to time weigh or measure packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered for sale or sold, or in the process of delivery, in order to determine whether the same contains the amount represented, and whether they are being offered for sale or sold in a manner in accordance with law. He shall at least twice in each year, and as much oftener as he may deem necessary, see that the weights, measures and all apparatus used in the county are correct. He may for the purpose above mentioned, and in the general performance of his official duties, enter and go into or upon, and without formal warrant, any stand, place, building or premises, or stop any vender, peddler, junk-dealer, coal-wagon, wood-wagon, ice-wagon, delivery-wagon or any dealer whatsoever, and require him, if necessary to proceed to some place which the sealer may specify, for the purpose of making the proper tests. Whenever the county sealer finds a violation of the statutes relating to weights and measures, he shall cause the violator to be prosecuted. Whenever the sealer compares weights, measures or weighing or measuring instruments, and finds that they correspond or causes them to correspond with the standards in his possession, he shall seal or mark such weights, measures or weighing or measuring instruments with appropriate devices to be approved by the state superintendent of weights and measures. He shall condemn and seize and may destroy incorrect weights, measures or weighing or measuring instruments which cannot be repaired; and such as are incorrect and yet may be repaired he shall mark or tag as "Condemned for repairs"—in a manner prescribed by the state superintendent of weights and measures. The owner or users of any weights, measures or weighing or measuring instruments of which such disposition is made, shall have the same repaired or corrected within ten days and they may neither use nor dispose of the same in any way, but shall hold the same at the disposal of the sealer. The county sealer shall keep a complete record of the work done by him, and shall make an annual report to the board of county commissioners and an annual report duly sworn to not later than the first of October to the state superintendent of weights and measures on blanks to be furnished by the superintendent. The deputy county sealer of weights

and measures shall forthwith, on his appointment give a bond in the penal sum of one thousand dollars (\$1,000) with sureties to be approved by the appointive power for the faithful performance of the duties of his office, and for the safety of the local standards, and such appliances for verification as are committed to his charge, and for the surrender thereof immediately to his successor in office, or to the person appointed by the proper authority to receive them.

Provided, however, That nothing in the above shall be construed to prevent two or more counties from combining the whole or any part of their districts as may be agreed upon by the auditors thereof with one set of standards and one sealer, upon the written consent of the state superintendent of weights and measures. [L. '13, p. 147, § 4.]

§ 9511-5. County and City Sealer—Powers.

There shall be a city sealer of weights and measures in cities of the first class to be appointed by the mayor from a list to be furnished by the civil service board, and under the rules of said board, where such board exists, otherwise he shall be appointed by the mayor by and with the advice and consent of the common council or city commission. He shall perform in said city the duties and have like powers as a county sealer in a county. In those cities in which no sealer is required by the above, the county sealer of the county shall perform in said cities the duties and have like powers as in the county.

Provided, however, That nothing in the above shall be construed to prevent any county and a city situated therein from combining the whole or any part of their districts, as may be agreed upon, with one sealer, subject to the written approval of the state superintendent of weights and measures.

Provided, however, That in every case where any city of the first class has heretofore made, or may hereafter make provision by charter or ordinance for the enforcement of proper legal weights and measures vesting general supervision and direction in any official at the head of any department of such city, such official for the purpose of this act, shall be the ex-officio sealer of weights and measures in such city, and he and his subordinate or subordinates, shall have the duties and powers of city sealers of weights and measures, and the powers of such cities relative to weights and measures shall be additional to the powers granted such city by law or charter: And provided further, That the county sealer shall exercise no powers and discharge no duties in any city of the first class having its own sealer of weights and measures. [L. '13, p. 150, § 5.]

§ 9511-6. Penalties.

Any person, who, by himself or his servant or agent or as the servant or agent of another, shall use or retain in his possession a false weight or measure or weighing or measuring device, or any weight or measure or weighing or measuring device which has not been sealed by a sealer of weights and measures within one year, in the buying or selling of any commodity, or thing; or who shall dispose of any condemned weight, measure or weighing or measuring device contrary to law, or remove any tag placed thereon by the sealer; or any person who, by himself or by his servant or agent, or as the servant or agent of another, shall sell or offer or expose for

sale less than the quantity he represents; or sell or offer or expose for sale any such commodities in a manner contrary to law; or any person who by himself or by his servant or agent or as the servant or agent of another shall sell or offer for sale, or have in his possession for the purpose of selling any device or instrument to be used to or calculated to falsify any weight or measure, shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty (20) dollars nor more than two hundred (200) dollars, or by imprisonment in the county jail not more than three months, or both such fine and imprisonment upon a first conviction, but upon a second conviction he shall be punished by a fine of not less than fifty (50) dollars, nor more than five hundred (500) dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment. [L. '13, p. 150, § 6.]

§ 9511-7. Special Policemen.

The superintendent of weights and measures, his deputy and inspectors, and the county and city sealer of weights and measures, are hereby made special policemen, and are authorized and empowered to arrest, without formal warrant, any violator of the statutes in relation to weights and measures, and to seize, for use as evidence, and without formal warrant, any false weight, measure or weighing or measuring device or packages or amounts of commodities found to be used, retained or offered or exposed for sale or sold in violation of law. [L. '13, p. 151, § 7.]

§ 9511-8. Obstructing Officers—Penalty.

Any person who shall hinder or obstruct, in any way, the superintendent of weights and measures, his deputy or inspectors, or any county or city sealer, in the performance of his official duties, shall be guilty of a misdemeanor, and shall be punished upon conviction thereof, in any court of competent jurisdiction by a fine of not less than twenty (20) nor more than two hundred (\$200) dollars or by imprisonment in the county jail for not more than ninety days or by both such fine and imprisonment. [L. '13, p. 151, § 8.]

§ 9511-9. Specified Standards.

A standard package or container of butter in the state of Washington shall contain sixteen (16) ounces net weight or thirty-two (32) ounces net weight, and a standard package or container need have no statement of the net weight of its contents.

Whenever butter is sold or offered for sale in a package or container the net weight of which is more or less than the standards herein prescribed, such package or container shall be labeled in plain English words or figures with the correct net weight of its contents expressed in pounds and ounces together with the name of the manufacturer or jobber.

A standard loaf of bread in the state of Washington shall contain sixteen (16) ounces net weight or thirty-two (32) ounces net weight, and no bread shall be sold within the state except it be a whole, half or quarter loaf, containing thirty-two (32) ounces, sixteen (16) ounces, or eight (8) ounces net weight, unless the same be labeled in plain English words or figures with its correct net weight expressed in pounds and ounces together with the name and address of the manufacturer.

This section shall not apply to rolls or to fancy bread weighing less than four (4) ounces nor to stale bread sold in quantity.

A standard sack of potatoes in the state of Washington shall contain one hundred (100) pounds net weight, and a standard sack of potatoes need have no statement of the weight of its contents.

Whenever potatoes are sold by the sack, in sacks containing more or less than the standard, such sack shall be labeled in plain English words or figures with its true net weight.

All sales of blackberries, currants, strawberries, raspberries, cranberries, blueberries, gooseberries, cherries and similar berries in packages containing less than one bushel, shall be sold by the dry quart containing 67.2 cubic inches or the dry pint containing 33.6 cubic inches, and all berry boxes sold, used or offered for sale within the state shall be of the interior capacity of 67.2 or 33.6 cubic inches, unless the same be labeled in plain English words or figures with its correct interior capacity expressed thereon in cubic inches.

Nothing in the above section shall be so construed as to prevent the sale of any of the articles therein mentioned by weight.

A standard sack of coal in the state of Washington shall contain one hundred (100) pounds net weight and a standard sack of coal need have no statement of the net weight of its contents.

Whenever coal is sold or offered for sale by the sack, in sacks containing more or less than one hundred (100) pounds net weight, such sack shall be labeled in plain English words or figures with the true net weight of its contents expressed in pounds.

It shall be unlawful for any person, firm or corporation or their agents, servants or other employees to misrepresent any coal offered for sale or to sell coal of any particular name or designation, or from any particular mine under the name or designation of another coal or mine.

All milk, cream or buttermilk sold in the state of Washington, in bottles shall be sold only in bottles containing one-half pint, one pint, one quart, one-half gallon or one gallon standard liquid measure.

All vinegar sold, exposed or offered for sale in the state of Washington, in bottles, shall be sold in bottles containing one-half pint, one pint, one quart, one-half gallon or one gallon standard liquid measure and when so sold need have no statement of the net measure of its contents.

Whenever vinegar is sold in the state of Washington in bottles containing more or less than mentioned in the foregoing section, such bottles shall be labeled in plain English words and figures with its true net measure.

It shall be unlawful for any person, firm or corporation in the state of Washington to buy any commodity upon the basis of weight or measure except the same be bought upon the basis of the true net weight or measure, and unless the scales or measures so used shall bear the seal of a sealer of weights and measures and conform to the standards adopted by the state of Washington.

Every vender of ice in the state of Washington shall at the time of actual delivery of any ice sold, weigh the quantity of ice delivered, and for that purpose shall use a steelyard balance or other apparatus for weighing such ice, which shall have been duly adjusted and sealed by a duly appointed sealer of weights and measures in accordance with the provisions of the laws of the state of Washington, and all ice delivered to consumers within this state shall

be sold by avoirdupois weight unless it is otherwise specially agreed upon between the buyer and the seller.

Each and every pair of ice tongs used in the delivery of ice within said state shall have prominently and conspicuously stamped thereon the exact and true avoirdupois weight of said tongs.

It shall be unlawful for any vender, or his servant, agent or other employee in the state of Washington, to offer to sell, or sell, or sell and deliver any commodity ordinarily and usually sold in bulk or quantity by weight or measure, unless the same be weighed or measured as the case may be upon or by officially tested and approved weights, measures, scales, scale beams, patent balances, steelyards, automatic or computing scales or other instruments for weighing or measuring, and unless that portion of such commodity so offered for sale or sold by weight or measure shall be the true net weight or measure.

It shall be unlawful for any vender of firewood in the state of Washington, or his servant, agent or other employees to sell or offer for sale the same in the state in any quantity or by any measure except by the cord or fractional part thereof. The standard measurement of a cord of firewood in this state is hereby fixed and established at one hundred twenty-eight (128) cubic feet.

It is hereby expressly provided that mill wood in twenty-four (24) inch lengths or shorter shall not be subject to the provisions of this act.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [L. '13, p. 152, § 9.]

§ 9511-10. Effect on Powers of Public Service Commission.

Nothing contained in this act shall be construed as withdrawing or superseding the powers and duties of the Public Service Commission of Washington with respect to track scales and other weighing devices used by common carriers, but the standards herein established shall be used in testing the track scales and weighing devices of such carrier. [L. '13, p. 155, § 10.]

§ 9511-11. Berry Boxes Until January 1, 1914.

No law passed during the session of 1913 of the legislature of the state of Washington relating to the size and capacity of berry boxes shall go into effect until January 1, 1914. [L. '13, p. 201, § 1.]

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